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Article III Judicial Power, the Adverse-Party Requirement, and Non-Contentious Jurisdiction

ABSTRACT. Students of Article III have so far failed to resolve a fundamental tension in the theory of federal adjudication. On the one hand, Article III has been said to limit the federal courts to the resolution of concrete disputes between adverse parties, one of whom seeks redress for an injury caused by the other's conduct. On the other hand, Congress has repeatedly conferred power on the federal courts to hear *ex parte* proceedings in which the petitioner sets up a claim of right without naming an opponent. Such proceedings, dating from the nation's formative years and still extant today, call upon the federal courts to play an inquisitorial role that seems hard to square with the nation's commitment to an adversary system.

In this Article, we catalog these *ex parte* proceedings and offer the first general theory of how they fit within our largely adversarial federal judicial system. We argue that Article III embraces two kinds of judicial power: power over disputes between adverse parties, which was known in Roman and civil law as "contentious" jurisdiction, and power over *ex parte* and other uncontested proceedings, which was described in Roman and civil law as voluntary or "non-contentious" jurisdiction. Non-contentious jurisdiction allows a party to seek a binding determination of a claim of right without identifying an injury in fact or naming an adverse opponent; it was taken up by courts of equity and admiralty and promptly introduced into the federal judicial practice of the early Republic. In working to situate non-contentious jurisdiction within America's broader legal inheritance, we offer a theoretical account of continuing practices that many view as aberrational. Our new account calls for a thorough reconsideration of the nature of the judicial power of the United States, and a reexamination of the Supreme Court's gloss on Article III's case-or-controversy requirement.

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INTRODUCTION

For students of federal jurisdiction, the Supreme Court's encounter with the adverse-party requirement in the Defense of Marriage Act (DOMA) case, *United States v. Windsor*, was both overdue and disappointing.¹ The Court has long held that federal courts can hear only "definite and concrete" controversies that touch upon "the legal relations of parties having adverse legal interests."² But the Court has failed to provide a coherent account of this "adverse-party requirement" or of how such a requirement can coexist with a variety of non-adverse or ex parte proceedings that have worked their way onto the docket of the federal courts. Since the 1790s, Congress has assigned pension claims, naturalization proceedings, and a surprisingly broad range of other matters lacking an adverse party to the federal courts. For example, the Foreign Intelligence Surveillance Act of 1978 (FISA), a subject of recent controversy, requires the government to obtain an ex parte federal-court order to conduct certain kinds of electronic surveillance but makes no provision for an adverse party ever to contest the government's application.³ Aside from a decision some ninety years ago addressing the power of the federal courts to naturalize aliens,⁴ the Court has failed to wrestle with the constitutionality of non-adverse and ex parte proceedings.

Windsor, unfortunately, did little to clarify matters. Doubts as to the presence of adverseness had arisen early on, when the government insisted on enforcing DOMA but agreed with its nominal opponent, Edith Windsor, that the law violated her constitutional rights by denying her the beneficial federal tax treatment she would have received had she been the surviving spouse of a man instead of a woman.⁵ Yet the opinion by Justice Kennedy for a five-Justice ma-

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1. *United States v. Windsor*, 133 S. Ct. 2675, 2695-96 (2013) (invalidating section 3 of the Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996)).
 2. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937) (citations omitted).
 3. On the operation of ex parte proceedings before the FISA courts, see *In re Sealed Case*, 310 F.3d 717, 737-41 (FISA Ct. Rev. 2002); Note, *Shifting the FISA Paradigm: Protecting Civil Liberties by Eliminating Ex Ante Judicial Approval*, 121 HARV. L. REV. 2200, 2206-07 (2008); Spencer Ackerman, *FISA Chief Judge Defends Integrity of Court over Verizon Records Collection*, GUARDIAN (London), June 6, 2013, <http://www.theguardian.com/world/2013/jun/06/fisa-court-judge-verizon-records-surveillance> [<http://perma.cc/6F4-B5X6>]; and Glenn Greenwald, *FISA Court Oversight: A Look Inside a Secret and Empty Process*, GUARDIAN (London), June 18, 2013, <http://www.theguardian.com/commentisfree/2013/jun/19/fisa-court-oversight-process-secrecy> [<http://perma.cc/A5RV-UV8E>].
 4. *Tutun v. United States*, 270 U.S. 568 (1926).
 5. Recognizing that party agreement posed a jurisdictional hurdle, the Court appointed an amicus curiae to argue the matter. See Brief for Court-Appointed Amica Curiae Addressing Jurisdiction, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307), 2013 WL 315234.

majority announced that the federal government's agreement with Windsor did not deprive the Court of power to reach the merits.⁶ For the majority, the requirement of "concrete adverseness" was a prudential element of standing doctrine, one that appropriately informed the Court's discretion but did not inflexibly compel party opposition as a jurisdictional prerequisite at every stage of every case.⁷ The Court did not offer much by way of support for its conclusion that such a requirement existed or, if it did, why it might merely be a matter of prudence; the Court took no notice of the many instances in which the federal judiciary, without first consulting constitutional limitations or prudential considerations, proceeds in the absence of party adverseness.⁸

Justice Scalia's sharply worded dissent also added little to our understanding of the adverse-party requirement. To be sure, Justice Scalia viewed the rule not as a "prudential" requirement that we have invented," but as "an essential element of an Article III case or controversy."⁹ Moreover, Justice Scalia attempted to connect the adverse-party restriction to the text of Article III, placing some emphasis on the fact that the term "controversy" connotes a live dispute between opposing parties.¹⁰ But Justice Scalia did not address the meaning of Article III's grant of "judicial power" or of its reference to "cases"; both terms have suggested to others, including possibly Chief Justice John Marshall and Justice Joseph Story, that federal courts may do more than simply resolve disputes between adversaries.¹¹

As for history, Justice Scalia depicted Article III's case-or-controversy limits as reflecting the traditional notions of adjudication inherited from early Americans and our "English ancestors,"¹² an echo of Justice Felix Frankfurter's earlier contention that the federal judicial power extends only to the forms and actions of the English courts at Westminster.¹³ This emphasis on England and the

(arguing that the United States had no standing to appeal from the decision below once it concluded, in agreement with Windsor, that DOMA was unconstitutional).

6. *Windsor*, 133 S. Ct. at 2684-89 (evaluating the adverse-party requirement).

7. *Id.* at 2685-88.

8. For a catalog of many such proceedings, see *infra* Part I.

9. *Windsor*, 133 S. Ct. at 2702 (Scalia, J., dissenting).

10. *Id.* at 2701 ("The question here is not whether, as the majority puts it, 'the United States retains a stake sufficient to support Article III jurisdiction,' the question is whether there is any controversy (which requires *contradiction*) between the United States and Ms. Windsor." (citation omitted)).

11. See, e.g., Robert J. Pushaw, Jr., *Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447, 460-65 (1994).

12. *Windsor*, 133 S. Ct. at 2699 (Scalia, J., dissenting).

13. See *Coleman v. Miller*, 307 U.S. 433, 460 (1939) (opinion of Frankfurter, J.) ("Judicial power could come into play only in matters that were the traditional concern of the courts at

practice of the (mostly common-law) courts at Westminster, however, not only overlooks the fact that the English Court of Chancery, a non-common law court sitting at Westminster, exercised jurisdiction over certain *ex parte* and non-adverse matters; it also tends, in its focus on the common law, to obscure the range of alternative sources on which the Framers drew in crafting Article III.¹⁴ It was mainly in the equity, admiralty, and probate courts of the eighteenth century, where judges rather than juries bore primary responsibility for fact-finding, that the Framers were to encounter the range of *ex parte* proceedings that made their way onto federal court dockets in the early Republic.¹⁵ Justice Scalia's common-law traditionalism thus brought us little closer than did Justice Kennedy's prudentialism toward resolving the tension between the theory of the adverse-party requirement and the reality of federal court practice.

Few scholars have attempted to address the tension by exploring the textual and historical underpinnings of the adverse-party requirement.¹⁶ Fewer still

Westminster . . ."); *see also* *Willing v. Chi. Auditorium Ass'n*, 277 U.S. 274, 290 (1928) (noting in Justice Brandeis's majority opinion that a resort to equity when no case or controversy existed was "a proceeding which was unknown to . . . English . . . courts").

14. *See* James E. Pfander & Daniel D. Birk, *Article III and the Scottish Judiciary*, 124 HARV. L. REV. 1613 (2011) (arguing that the focus of American legal scholars on Blackstone and the horizontal structure of the English judiciary may have obscured the extent to which the hierarchical structure of the Scottish judicial system influenced the structure of the Article III judicial system).
15. *See infra* Part III.A.3. Although the High Court of Chancery, which exercised the equitable jurisdiction of the Crown, and the Court of Exchequer, which heard cases at law and equity, *see* JOHN H. LANGBEIN ET AL., *HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS 120-22* (2009), sat in Westminster Hall, along with the courts of King's Bench and Common Pleas, most civil-law courts sat outside Westminster. Thus, the High Court of Admiralty, which followed civil-law forms of action, sat at Doctors' Commons in London, at least during the eighteenth century, and heard claims by civil lawyers admitted to the College of Advocates. *See* G.J. FOSTER, *DOCTORS' COMMONS: ITS COURTS AND REGISTRIES, WITH A TREATISE ON PROBATE COURT BUSINESS* 6, 11 (London, Reeves, Son & Co. 1869); 1 WILLIAM HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 547 (7th ed. 1956); *see also* STEVEN L. SNELL, *COURTS OF ADMIRALTY AND THE COMMON LAW: ORIGINS OF THE AMERICAN EXPERIMENT IN CONCURRENT JURISDICTION* 112-13 (2007) (reporting that the civilians occupied quarters from 1671 to 1858 that were popularly known as Doctors' Commons). The ecclesiastical courts, which handled probate and family-law matters in the first instance, sat in dioceses throughout the realm. *See* 1 R.H. HELMHOLZ, *THE OXFORD HISTORY OF THE LAWS OF ENGLAND: THE CANON LAW AND ECCLESIASTICAL JURISDICTION FROM 597 TO THE 1640S*, at 396-97 (2004) (describing the "widely dispersed" jurisdiction over probate matters, with records held by "rural deans, archdeacons, and cathedral prebendaries").
16. *See* Martin H. Redish & Andrianna D. Kastanek, *Settlement Class Actions, the Case-or-Controversy Requirement, and the Nature of the Adjudicatory Process*, 73 U. CHI. L. REV. 545, 548, 552 (2006) (noting that neither courts nor scholars have devoted sustained attention to the theoretical underpinnings of the adverse-party requirement and arguing that an analysis of the foundations of the requirement had not been previously "undertaken by jurist or scholar").

have considered the requirement in light of the non-adverse practices of the federal courts. To be sure, some students of constitutional history have called attention to certain early *ex parte* or non-adverse proceedings that appear very much at odds with an adverse-party requirement.¹⁷ Others have identified more modern examples of departures from our adversary ideal, such as certain actions in bankruptcy administration, consent decrees, and settlement class actions.¹⁸ Still others have attempted to justify particular *ex parte* practices, such as search and arrest warrants, by highlighting the possibility that related adverse-party litigation might ensue.¹⁹ Yet, to our knowledge, no one has conducted a comprehensive assessment of the non-adverse proceedings of the federal courts or attempted to situate them within a coherent theoretical framework. Instead of attempting to develop a theory that can account for the federal courts' willingness to hear both adverse-party disputes and non-adverse proceedings, most scholars who have confronted the issue tend to treat the non-adverse practices they discover as aberrational vestiges of an earlier day,²⁰ or as anomalies that have become too entrenched to question.²¹

ar"). Some important works on federal judicial power do not address the adverse-party requirement as such. *See, e.g.*, LARRY W. YACKLE, *FEDERAL COURTS* 306-10 (3d ed. 2009) (treating adverse-party issues as encompassed by the prohibition against the issuance of advisory opinions).

17. *See, e.g.*, David P. Currie, *The Constitution in Congress: Substantive Issues in the First Congress, 1789-1791*, 61 U. CHI. L. REV. 775, 824-25 (1994) (noting the "difficult" jurisdictional question presented by the assignment of *ex parte* naturalization claims to federal courts); *id.* at 827 & n.311 (contending that the assignment of remission and mitigation duties to the district courts put them in the position of exercising administrative functions and issuing advisory opinions); Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1373-74 (1973) (remarking upon the lack of an adverse party in various federal court proceedings, including petitions for naturalization); Russell Wheeler, *Extrajudicial Activities of the Early Supreme Court*, 1973 SUP. CT. REV. 123, 132-36 & n.61 (describing such early non-contentious forms as naturalization and pension petitions, application for mitigation of forfeitures, and shipwreck, salvage, and safety issues, but treating these as instances of extrajudicial activity that do not present a "case or controversy"). We consider these proceedings *infra* Part I.
18. *See* Ralph E. Avery, *Article III and Title 11: A Constitutional Collision*, 12 BANKR. DEV. J. 397, 449-50 (1996) (bankruptcy administration); Michael T. Morley, *Consent of the Governed or Consent of the Government? The Problems with Consent Decrees in Government-Defendant Cases*, 16 U. PA. J. CONST. L. 637 (2014) (consent decrees); Redish & Kastanek, *supra* note 16 (settlement class actions).
19. *See* Redish & Kastanek, *supra* note 16, at 587 n.157; *cf.* Avery, *supra* note 18, at 417-18 n.137 (rejecting *Tutun* as a precedent that justifies non-adverse bankruptcy proceedings).
20. *See, e.g.*, Morley, *supra* note 18, at 668-69 (arguing that the role of federal courts in naturalizing citizens "is a largely historical appurtenance").
21. *See, e.g.*, RICHARD H. FALLON, JR. ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 84-85 (6th ed. 2009) [hereinafter HART & WECHSLER 6th].

Beneath the surface of this judicial and scholarly neglect lies a deeply ingrained set of assumptions about the adversarial character of the judicial system of the United States. In an adversary system, the parties maintain substantial control over the development of the legal issues and evidence bearing on the resolution of their dispute. Judges play a more passive role as neutral arbiters of disputes presented to them by the parties.²² This passivity contrasts with the more active role of judges in European and other civil-law inquisitorial systems. There, judges develop the factual record of the case and enjoy some control over the legal issues to which they will most closely attend. The attorneys stay on the sidelines to some degree, particularly during the fact-finding process.

Although the contrast between the Anglo-American adversary system and the inquisitorial systems of continental Europe may be slightly overdrawn,²³ American lawyers and judges are steeped in the adversarial ideal,²⁴ and courts in the United States mainly continue to profess adherence to the adversarial model.²⁵ Indeed, one can sense that the adversary ideal has come to be per-

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22. Lon Fuller, the scholar perhaps most closely associated with the adversary conception of the judicial role, explained that the system works best when the judge bases her decision “wholly on the proofs and argument actually presented to [her] by the parties.” Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 388 (1978). See generally STEPHAN LANDSMAN, READINGS ON ADVERSARIAL JUSTICE: THE AMERICAN APPROACH TO ADJUDICATION (1988) (outlining the traditional, adversary conception of the judicial role); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 380-86 (1982) (same).
23. See 16 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW ch. 1, § 28, at 31 (Mauro Cappelletti ed. 1987) (discussing the “clear” error committed by “many *common law* jurists” who view the “inquisitorial” traditions of the civil law and the “adversary” traditions of the common law as if they were “mutually exclusive”) (emphasis in original); Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181 (2005) (reclaiming a forgotten inquisitorial practice).
24. For example, in a paper cautiously celebrating the inquisitorial features of developments in the management of mass tort litigation, Howard Erichson recognized that the culture of American adjudication remains decidedly adversarial and may not easily support a shift to a more inquisitorial model. See Howard M. Erichson, *Mass Tort Litigation and Inquisitorial Justice*, 87 GEO. L.J. 1983, 2010-15 (1999).
25. One important exception – and one which is in some tension with the Court’s celebration of the adversary ideal in criminal procedure – is plea bargaining, in which the prosecutor serves as the *de facto* judge of guilt or innocence. Indeed, the Court’s tendency to celebrate the adversarial ideal in the criminal context may appear slightly ironic to those who have observed the inquisitorial process of plea bargaining become the cornerstone of the American criminal justice system. Judge Gerard Lynch puts it this way:

To me, the essence of this practice, and what radically distinguishes it from the adversarial litigation model embodied in textbooks, criminal procedure rules, and the popular imagination, is that the *prosecutor*, rather than a judge or jury, is the

ceived as yet another feature of American exceptionalism – that is, as a deliberate departure from and improvement upon the practice of European countries of which Americans should be justly proud.²⁶ As Amanda Frost has noted, inquisitorial judging has become something of an “epithet among American judges,” most of whom seek to avoid even a “whiff of its judge-dominated procedures.”²⁷

This devotion to the adversary tradition tends to encourage strong statements of the adverse-party requirement and to cast doubt on the power of federal courts to entertain *ex parte* and non-adverse proceedings. After all, in many of these proceedings, the courts determine petitions for recognition of a right or benefit – such as naturalized citizenship – in almost the same way as administrative agencies oversee applications for Social Security benefits or immigration status. To rule on such a petition, the judge must investigate the factual and legal justification for the relief sought, often without the appearance of an adverse party. Such uncontested proceedings present a challenge, especially

central adjudicator of facts (as well as replacing the judge as arbiter of most legal issues and of the appropriate sentence to be imposed). Potential defenses are presented by the defendant and his counsel not in a court, but to a prosecutor, who assesses their factual accuracy and likely persuasiveness to a hypothetical judge or jury, and then decides the charge of which the defendant should be adjudged guilty. Mitigating information, similarly, is argued not to the judge, but to the prosecutor, who decides what sentence the defendant should be given in exchange for his plea.

Gerard E. Lynch, *Screening Versus Plea Bargaining: Exactly What Are We Trading Off?*, 55 STAN. L. REV. 1399, 1403-04 (2003). Somewhat ironically, the Supreme Court most frequently celebrates the adversary ideal in the context of criminal procedure. See *Greenlaw v. United States*, 554 U.S. 237, 243 (2008) (declaring the norm of the adversary system in civil and criminal cases to be one of reliance on the parties “to frame the issues for decision” and on courts to play “the role of neutral arbiter”); *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 357 (2006) (distinguishing adversary from inquisitorial systems of procedure in respect of the rules governing procedural default); *United States v. Burke*, 504 U.S. 229, 246 (1992) (Scalia, J., concurring) (implying that the rule imposing a procedural default may have a constitutional underpinning in that it distinguishes “our adversary system of justice from the inquisitorial one”); cf. *Sims v. Apfel*, 530 U.S. 103, 111 (2000) (distinguishing the adversary proceedings of courts from the inquisitorial approach of benefit agencies, such as the Social Security Administration, at which no party opposes the claim for benefits).

26. Two exceptional features, American devotion to the jury trial and punitive damages, remain a sore spot for European countries confronting suits to recognize and enforce sizable American judgments. See Richard L. Marcus, *Putting American Procedural Exceptionalism into a Globalized Context*, 53 AM. J. COMP. L. 709, 710 (2005) (listing “pleading, broad discovery, jury trial, limited cost shifting, potentially remarkable awards for pain and suffering or punitive damages” as some features of American procedural exceptionalism). A third, the exercise of “doing business” jurisdiction over firms with their corporate seat elsewhere, was recently curtailed. See *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014).
27. Amanda Frost, *The Limits of Advocacy*, 59 DUKE L.J. 447, 460 (2009).

for federal judges who lack the training, administrative support, and inclination to conduct their own investigations. Modern observers justifiably view such inquisitorial *ex parte* practices as inconsistent with the adversary ideal. Consider, for example, the thorough critique of settlement class actions offered by Martin Redish and Andrianna Kastanek.²⁸ The two authors argue that settlement class actions violate Article III's adverse-party requirement, which they view as a "logical outgrowth of the nation's commitment to an adversary system."²⁹ Yet, non-adverse proceedings account for a significant part of the dockets of federal courts.

In this Article, we offer a solution to the puzzle of why federal courts, limited by Article III and guided by the adversary ideal that animates so much of American procedural exceptionalism, may properly entertain *ex parte* and certain other non-adverse proceedings. We suggest that the answer lies in recognizing that federal courts may constitutionally exercise not *one* but *two* kinds of judicial power: power to resolve disputes between adverse parties and power to entertain applications from parties seeking to assert, register, or claim a legal interest under federal law. The first power, familiar to those practicing within an adversary system, was known in ancient Rome and to civil-law lawyers of the eighteenth century as "contentious" jurisdiction and extended to the resolution of disputes between parties. The second, less familiar power, was known in Roman and civil law as "voluntary" or "non-contentious" jurisdiction and extended to the registration of contracts, the application for legal benefits, and the recordation of a legal status or interest. Much like federal courts hearing *ex parte* proceedings today, Roman tribunals and the civil-law European courts that succeeded them often exercised non-contentious jurisdiction in the course of performing administrative functions on an *ex parte* or consensual basis. The existence of a genuine dispute between adversaries was not essential to the exercise of non-contentious jurisdiction; indeed, parties appeared before the court either alone or in openly feigned contests, seeking a decree that would legalize a transaction or help them structure their affairs.

On our view, the evidence supports an inference that the Roman-law tradition of non-contentious jurisdiction was taken up by the civilian lawyers in

28. Redish & Kastanek, *supra* note 16. They support their findings with evidence from the social-political practice of litigation as it has developed in the courts of the United States.

29. *Id.* at 572-73. For Redish and Kastanek, party adverseness ensures a "well-developed record" on which to base a decision and conforms to a liberal democratic model of litigation that presupposes private control of the litigation process. *Id.* at 571-72. While we do not address the settlement class actions that animated the Redish and Kastanek study, and we disagree with their bottom-line view of the constitutional force of the adverse-party requirement, we have found their work, as well as their willingness to grapple with the complexities of the adverse-party requirement, extremely illuminating.

continental Europe and Britain, made its way to the American colonies, and came to characterize a variety of proceedings familiar to the Founding generation. Proceedings in probate and admiralty jurisdiction in England and the colonies were governed by civil law, and both proceedings featured elements of non-contentious jurisdiction. Bankruptcy proceedings, an outgrowth of estate administration by the ecclesiastical courts and courts of equity, included administrative chores that did not invariably feature adverse parties. English and Scottish law books in the eighteenth century described the difference between contentious and non-contentious jurisdiction.³⁰ Even Blackstone's *Commentaries* described non-contentious forms of practice, distinguishing "voluntary" from "contentious" jurisdiction in the probate of wills and granting of administration.³¹ Justices of the peace, the workhorses of eighteenth- and nineteenth-century American adjudication, resolved disputes and handled a range of legislative and administrative chores at the county level.³² All these forms of non-contentious jurisdiction were part of the complex and cosmopolitan legal world in which the lawyers of the Framers' generation practiced law, and many of these forms found their way onto the dockets of the first federal courts.

Evidence from the early Republic also suggests that the Framers viewed the judicial power with which Article III courts were invested as encompassing the exercise of non-contentious jurisdiction. Article III extends the judicial power to "cases" arising under federal law and to "controversies" between specified parties.³³ Whereas the latter term connotes a dispute between opposed parties (and does much of the textual work in arguments for an adverse-party requirement), the former term has proved more elusive. Some scholars have argued, despite the tendency of the Supreme Court to conflate the two terms,

30. See, e.g., 1 JOHN ERSKINE, AN INSTITUTE OF THE LAW OF SCOTLAND 27-28 (photo. reprint 2010) (James Badenach Nicolson ed., Bell & Bradfute 1871) (1773); 4 THOMAS WOOD, AN INSTITUTE OF THE LAWS OF ENGLAND 499 (photo. reprint 1979) (3d ed. 1724) ("The Jurisdiction of these [Ecclesiastical] Courts is either Voluntary or Contentious. 1. Voluntary, or where there is no Opposition; which consists in visiting Churches, the Clergy and Churchwardens of several Parishes or Districts; in Granting Sequestrations, Institution and Induction to Benefices, Licenses and Dispensations, Ordering Real Compositions, Granting Probates of Wills, Letters of Administration, Letters ad Colligendum etc. 2. Contentious, or where there is a Plaintiff and Defendant; which consists in Hearing and Determining the following Causes: Apostacy, Blasphemy, Idolatry . . .").

31. See 3 WILLIAM BLACKSTONE, COMMENTARIES *98.

32. See SAMUEL BAYARD, AN ABSTRACT OF THOSE LAWS OF THE UNITED STATES WHICH RELATE CHIEFLY TO THE DUTIES AND AUTHORITY OF THE JUDGES OF THE INFERIOR STATE COURTS, AND JUSTICES OF THE PEACE, THROUGHOUT THE UNION 17-18 (New York, printed for the author 1804) (describing both ministerial and judicial functions of justices of the peace); see also *infra* text accompanying notes 284-287 (describing the administrative functions served by local colonial and state courts).

33. U.S. CONST. art. III, § 2.

that the term “case” confers a broader power than simply that of dispute resolution.³⁴ Non-contentious jurisdiction may partly explain why the Framers chose to distinguish between cases and controversies in Article III. As we argue below, the term “case” includes not just disputed adverse claims, but also certain petitions brought on an *ex parte* basis by a party seeking to assert claims within the bounds of the law. Indeed, such early exponents of federal jurisdiction as Chief Justice Marshall and Justice Story defined the term “case” capaciously enough to include *ex parte* submissions, thereby giving voice to a principled distinction between such “cases,” on the one hand, and “controversies” arising between adverse parties and subject to federal diversity jurisdiction, on the other.³⁵

The insight that the federal court system can consciously exercise both contentious and non-contentious jurisdiction without violating constitutional strictures or historical norms strikes us as surprisingly useful but profoundly unsettling. On the useful side of the ledger, the recognition of non-contentious judicial power provides a novel solution to a serious problem of coherence in the workaday world of the Article III judiciary by explaining how federal courts can hear both adversary disputes and certain *ex parte* and non-adverse proceedings. The proposed dual-power solution also fits well with the text, structure, and history of Article III, and it nicely explains admiralty and equity practices at the time of the Framing. In addition, by formulating a theory for the *ex parte* matters already entertained by federal courts, we hope to provide a framework for evaluating those proceedings’ compliance with necessary jurisdictional predicates.

On the other hand, few notions seem more central to our conception of Article III courts than that they serve as tribunals for the resolution of concrete disputes between adverse parties and perform their law-exposition functions best in that setting. Recognition of non-contentious jurisdiction challenges this familiar conception of the Article III judiciary and forces courts and scholars to confront the inadequacy of current doctrines, such as the adverse-party requirement and the injury-in-fact test for standing. In addition, the recognition of non-contentious jurisdiction poses a potential risk to the rights of third parties. Finally, one might worry that the formal recognition of the propriety of non-contentious jurisdiction will encourage Congress to assign new administrative chores to the federal courts, burdening them with matters that they are not institutionally equipped to adjudicate or that could be better handled by administrative agencies and other non-Article III actors.

34. See *infra* notes 364-365.

35. See *infra* Part III.B.1.

In putting forward a theory of non-contentious jurisdiction, we propose to achieve greater coherence without calling for a dramatic transformation of the work of the Article III judiciary. We therefore suggest that the federal courts maintain a distinction between their contentious and non-contentious jurisdiction. On the contentious side, federal courts should continue to insist, in the main, on concrete disputes between genuine adversaries.³⁶

On the non-contentious side, we develop a set of guidelines to which federal courts should adhere as they entertain the administrative or ex parte matters that Congress has assigned to them. They should, for example, continue to apply elements, some familiar, some adapted, of the case-or-controversy rule and of standing doctrine. Thus, while no adverse party need appear in non-contentious proceedings, federal courts should exercise jurisdiction only if the party invoking federal power has a concrete interest in the recognition of a legal claim. In a revision of the traditional standing test, courts should decide a question of law only if the party's entitlement to recognition of the right sought necessarily turns on resolution of that question. The courts also should exercise non-contentious jurisdiction only where they have been called upon to employ judicial judgment in the application of law to the facts and only where their decisions will enjoy the finality long viewed as essential to the federal judicial role. The courts must be especially mindful of the potential for cases heard on the non-contentious side of their dockets to affect the rights of absent parties, and due process will continue to require that third parties receive notice of, and an opportunity to participate in, matters that concern them. We derive these guidelines from practice and use them to review, critique, and refine the exercise of non-contentious jurisdiction in the courts of the United States.

We begin in Part I with a catalog of the ex parte and other non-contentious matters that have been assigned to federal dockets. Part II shows that scholars have not sufficiently accounted for the appearance of these proceedings, even as the Supreme Court has quietly validated them as proper objects of judicial power. Part III proposes to reconcile theory and practice, offering a historical account of contentious and non-contentious judicial power and suggesting that both modes of proceeding were proper subjects of federal judicial cognizance. In particular, Part III shows that non-contentious jurisdiction made an early

36. As *Windsor* demonstrates, there may be some instances in which courts will exercise jurisdiction despite the disappearance of adverseness from an originally contentious suit. The Supreme Court has yet to consider how its reliance on prudential considerations in *Windsor* comports with its later suggestion that prudential doctrines have a reduced role to play in justiciability law. See *Lexmark Int'l Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014) (recharacterizing both the zone-of-interests test and the generalized grievance rule in light of a distrust of prudential standing doctrines holding that judges may refrain from hearing matters concededly within federal jurisdiction).

appearance in federal practice in the United States in the form of naturalization, pension, warrant, and other applications and helps to explain the distinction between “cases” and “controversies” as used in Article III.³⁷ Part IV develops our theory of non-contentious jurisdiction, proposing a further distinction between what we call “original” and “ancillary” non-contentious proceedings and setting forth guidelines for their adjudication. Part IV also examines the broad range of puzzles that our theory can help to solve. We show that the concept of non-contentious jurisdiction assists in the evaluation of current *ex parte* practices; provides a new understanding of the injury-in-fact requirement; better defines and limits the “probate exception” to federal jurisdiction; and helps to clarify the contested boundaries between judicial, administrative, and ministerial work.

I. NON-CONTENTIOUS PROCEEDINGS IN THE FEDERAL COURTS

Scholars and jurists widely accept the proposition that the federal judicial power can be exercised only when a court is presented with a concrete dispute between parties possessed of adverse legal interests.³⁸ This “adverse-party re-

37. A word on methodology: although we spend a good deal of time with arguments based on the text and history of Article III and believe that non-contentious jurisdiction was embraced in the Framers’ conception of federal judicial power, we do not follow a self-consciously originalist line of argument. Instead, as we have done in earlier work, *see* Pfander & Birk, *supra* note 14, we set out to recover a feature of America’s legal inheritance that has been obscured from view by a post-New Deal emphasis on the adversarial system as it evolved in the English common-law courts at Westminster Hall. The common-law model for resolving disputes over mine and thine (*meum* and *teum*) continues to shape modern conceptions of the federal judicial function, but the nation’s legal inheritance also includes (as Article III confirms) cases in law *and equity* as well as cases of *admiralty and maritime jurisdiction*. It was in these contexts (as well as in the practice of the church courts) that England drew on non-contentious modes of procedure, and it was these contexts that introduced non-contentious work to the courts of America. While history explains the arrival of non-contentious jurisdiction in America, continuing practice explains the need for a theory of judicial power that can account for non-adversarial proceedings today. For us, then, the lessons of history provide a framework for a contemporary understanding of the *ex parte* cases currently heard by federal courts, but those lessons are the beginning, not the end, of our investigation.

38. *See, e.g.*, *Bond v. United States*, 131 S. Ct. 2355, 2361 (2011); *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937); *see also, e.g.*, HART & WECHSLER 6th, *supra* note 21, at 84-85; Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 469 (2008) (stating that a “dispute that satisfies Article III thus has at least two sides, each of which has a stake in winning”); Redish & Kastanek, *supra* note 16, at 567 & n.80 (“The Court has widely held that the case-or-controversy language of Article III mandates litigant adverseness.”); Jonathan R. Siegel, *A Theory of Justiciability*, 86 TEX. L. REV. 73, 77 (2007) (describing as part of fundamental justiciability doctrine the principle that “courts will act only on a matter involving adverse parties”).

quirement” complements other justiciability doctrines that limit the constitutional or prudential jurisdiction of federal courts, such as finality, standing, mootness, and the prohibitions on issuing advisory opinions and addressing political questions.³⁹ Many believe that the adverse-party requirement serves to circumscribe the role of federal courts by preventing them from interfering with the prerogatives of the states and of the political branches of the federal government unless required to do so by the presence of a live dispute.⁴⁰ Adverseness is also said to protect the interests of absent third parties and to enable courts to make decisions with the benefit of a full record and a comprehensive understanding of the arguments bearing upon questions implicated by the case.⁴¹ Indeed, the Supreme Court has treated decisions rendered without full adversarial briefing as entitled to less precedential weight than decisions rendered on fully developed records.⁴²

But the adverse-party requirement sits uneasily with the reality of federal judicial practice. In fact, since their establishment, federal courts have entertained a wide variety of *ex parte* and other proceedings lacking an adverse party and have consistently upheld the judicial role in such proceedings against challenges to their propriety under Article III of the Constitution. Moreover, non-contentious proceedings often call upon the courts to exercise core judicial functions, such as fact-finding, the determination of questions of law, and the application of the law to the facts of the case.⁴³ To provide a sense of the sheer

39. Just how solid a place the adverse-party requirement occupies was cast into some doubt by *United States v. Windsor*, 133 S. Ct. 2675 (2013). The Court stated in that case that “concrete adverseness” is merely a prudential requirement rather than a limitation contained in Article III and also suggested that the lack of an adverse party could be mitigated by the presence of an amicus curiae advancing an adverse argument. *Id.* at 2687 (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). Justice Scalia strenuously objected to the Court’s characterization. *See id.* at 2701-02 (Scalia, J., dissenting).

40. *See, e.g., Morley, supra* note 18, at 665; Redish & Kastanek, *supra* note 16, at 582-83.

41. *See Baker*, 369 U.S. at 204 (stating that, to have standing to sue, a litigant must possess “such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions”).

42. *See Dist. of Columbia v. Heller*, 554 U.S. 570, 623-24 (2008) (dismissing the reasoning of *United States v. Miller*, 307 U.S. 174 (1939), because the defendants in that case did not appear or present argument and so did not offer a “counterdiscussion” of the government’s position on the history of the right to bear arms—“reason enough, one would think, not to make [*Miller*] the beginning and the end of this Court’s consideration of the Second Amendment”); *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 91 (1998) (characterizing “drive-by jurisdictional rulings” as entitled to no precedential weight).

43. *See Printz v. United States*, 521 U.S. 898, 905-09 & n.2 (1997) (characterizing the role of the courts under the 1790 Naturalization Act as “quintessentially adjudicative”). *But see id.* at

scope of the gap between the adverse-party requirement in theory and the diverse reality of federal court practice, the sections that follow catalog many of the non-contentious proceedings overseen by the Article III judiciary.⁴⁴ As we will see, some non-contentious matters begin with an original application for relief, while others unfold in proceedings ancillary to a dispute between parties with opposing interests.

A. Government Benefits

We begin with *ex parte* court proceedings as a method for the determination of government benefit claims in the early Republic.⁴⁵ Congress apparently chose to rely on the federal courts to hear such claims in part because of the absence of the sort of federal administrative apparatus available today. Aside from the postal service, customs collectors, district attorneys, marshals, and lighthouse keepers, early Congresses had little administrative capacity at their disposal⁴⁶ and understandably turned to the federal courts to evaluate benefit claims.

1. Naturalization Proceedings

Applications for citizenship appeared on federal dockets shortly after the adoption of the nation's first naturalization statute in 1790. The 1790 Act provided for an applicant to submit a petition for naturalization to "any common law court of record."⁴⁷ This formulation was broad enough to encompass both state and federal courts, and federal judges issued naturalization judgments

949-51, 952 n.11 (Stevens, J., dissenting) (questioning the judicial character of naturalization proceedings).

44. Although the catalog provided here is lengthy, there likely are many other instances of federal non-contentious proceedings that we have overlooked. This catalog also focuses on the non-contentious dockets of federal courts and thus omits practices unique to state courts.
45. In a later Part, we will evaluate the scholarly treatment of these early examples of *ex parte* practice. *See infra* Part II.
46. *See* LEONARD D. WHITE, *THE FEDERALISTS: A STUDY IN ADMINISTRATIVE HISTORY* 199-200 (1948). For a comprehensive account of the executive and administrative organs of the federal government in the early Republic, *see* JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW* 29-78 (2012).
47. *See* Act of March 26, 1790, ch. 3, 1 Stat. 103 (repealed 1795). On the framing of the Constitution's Naturalization Clause and the drafting of the 1790 Act generally, *see* James E. Pfander & Theresa R. Wardon, *Reclaiming the Immigration Constitution of the Early Republic: Prospectivity, Uniformity, and Transparency*, 96 VA. L. REV. 359 (2010).

under its authority;⁴⁸ later, the 1795 Act expressly conferred concurrent authority on the state, lower federal, and territorial courts to entertain naturalization petitions.⁴⁹ Along with the petition, the applicant was required to submit evidence sufficient to satisfy the court of the applicant's good character and residence in the United States.⁵⁰ Assuming the applicant made these showings, the Act called upon the "court," not the judge, to administer an oath in which the applicant pledged to support the Constitution.⁵¹ Finally, the Act provided for the clerk to record the application and the proceedings, memorializing the court's conclusion.⁵² The Act made no provision for the prospective citizen to name the government (or its officers) as an opposing party. Nor did it specifically allow for the government to intervene or seek the cancellation of a naturalization judgment.⁵³

The failure to require or even provide for the appearance of an adverse party does not appear to have raised doubts in the minds of legislators or judges as to the judicial nature of the naturalization proceeding. Indeed, the Act's referral of these matters to "courts of record" tends to underscore their judicial quality. Courts of record enjoyed a special status in Anglo-American law: they conducted open proceedings on "court" days,⁵⁴ and their judgments, part of the court's

48. See Pfander & Wardon, *supra* note 47, at 394 n.155.

49. See An Act To Establish a Uniform Rule of Naturalization; and To Repeal the Act Heretofore Passed on that Subject, ch. 20, § 1, 1 Stat. 414, 414 (1795) (repealed 1802) (authorizing naturalization proceedings before any "supreme, superior, district, or circuit court" of the states, any such court of the territories, and any circuit or district court of the United States).

50. *Id.*

51. *Id.*

52. *Id.*

53. These features were added in 1906, apparently after Congress grew concerned that federal courts were applying an insufficiently searching standard of review to naturalization petitions. See Naturalization Act of 1906, Pub. L. No. 59-338, § 11, 34 Stat. 596 (repealed by the Nationality Act of 1940, Pub. L. 76-853, 54 Stat. 1137).

54. During the eighteenth century, court sessions occupied a few days each month, often corresponded to market days, and attracted a good deal of public participation. Not only would the local press (if any) attend and report on the proceedings, but members of the public would also attend—both as spectators and as potential jurors. On the public quality of court days in colonial and early statehood America, see A.G. Roeber, *Authority, Law, and Custom: The Rituals of Court Day in Tidewater Virginia, 1720 to 1750*, 37 WM. & MARY Q. 29 (1980). See also RHYS ISAAC, *THE TRANSFORMATION OF VIRGINIA, 1740-1790*, at 90 (2d ed. 1999) ("In the monthly concourse at the courthouse the male part of Virginia county society became visible to its members in a manner similar to that observed at the parish church."). For press accounts of the early federal circuit courts, see DWIGHT F. HENDERSON, *COURTS FOR A NEW NATION* 35 (1971) (quoting a newspaper account of the parade that accompanied the opening of the circuit court in Boston).

formal record, were considered conclusive unless modified through some special proceeding.⁵⁵ The Supreme Court has long treated the *ex parte* consideration of naturalization petitions as an appropriate exercise of judicial power. In *Ex parte Fitzbonne*, an unreported decision from 1800, the district court resolved an issue of law that had arisen in a naturalization proceeding, namely, whether a statutory prohibition on the naturalization of citizens of a country at war with the United States applied to French citizens during the quasi-war with France.⁵⁶ The district court decided that the countries were at war, and Alexander Dallas, the Court's reporter and the attorney for the petitioners, sought review by petitioning the Supreme Court for a writ of mandamus.⁵⁷ The Court agreed to hear the matter and ordered the district court to proceed with the naturalization proceeding, apparently concluding that French citizens were eligible for naturalization in the federal courts.⁵⁸

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55. See Arthur M. Alger, *What Is a Court of Record?*, 34 AM. L. REV. 70, 71 (1900) (observing that, while a variety of factors have been associated with a court's of-record status, including the power to fine and imprison for contempt, the "important consequence . . . was the conclusiveness of its judgments"); see also 3 BLACKSTONE, *supra* note 31, at *24-25 (discussing the features of courts of record); cf. S.E. Thorne, *Courts of Record and Sir Edward Coke*, 2 U. TORONTO L.J. 24, 48-49 (1937) (concluding that Coke developed the construct of the court of record as a way to bolster claims of judicature by the Houses of Commons and Lords and placing these developments in the context of the constitutional struggles of the seventeenth century). Writs of *coram nobis* operated to reopen and correct factual errors in the judgment of a court of record. See *United States v. Mayer*, 235 U.S. 55, 67-68 (1914). Writs of *scire facias* were used in England to contest letters patent. See JOSEPH CHITTY, JR., A TREATISE ON THE LAW OF THE PREROGATIVES OF THE CROWN 330-31 (London, Joseph Butterworth & Son 1820); THOMAS CAMPBELL FOSTER, A TREATISE ON THE WRIT OF SCIRE FACIAS 244-77 (London, V.R. Stevens & G. S. Norton 1851). In the United States, courts tended to rely instead on equitable proceedings, rather than the writ of *scire facias*, to cancel letters patent. See, e.g., *United States v. Stone*, 69 U.S. 525, 535 (1864) (describing the suit in equity as a more convenient remedy to cancel a wrongly issued patent in a land case than the writ of *scire facias*). The Court eventually approved the congressionally authorized use of equitable proceedings to cancel a naturalization obtained by fraud or mistake. See *Johannessen v. United States*, 225 U.S. 227 (1912).
56. For an account of *Ex parte Fitzbonne*, see 8 THE DOCUMENTARY HISTORY OF THE SUPREME COURT: 1789-1800, at 389-90 (Maeva Marcus ed., 2007) [hereinafter DHSC], which describes the litigation and the import of the Court's decision to issue the writ directing the naturalization to proceed.
57. On Dallas's defense of the rights of those seeking naturalized citizenship, see James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. REV. 1862 (2010). For an overview of the Court's supervisory powers, see James E. Pfander, *Jurisdiction-Stripping and the Supreme Court's Power To Supervise Inferior Tribunals*, 78 TEX. L. REV. 1433 (2000).
58. The Court upheld the naturalization of French citizens, having concluded, in effect, that the quasi-war between the United States and France did not make the French citizens enemies of the United States within the meaning of the naturalization laws. On the quasi-war, see Pfander & Hunt, *supra* note 57, at 1877-80. On the war's impact on naturalization legislation,

2. *Revolutionary War Pension Claims and Hayburn's Case*⁵⁹

The oft-told story of *Hayburn's Case* begins in 1792, when Congress assigned the federal circuit courts responsibility for reviewing the pension applications of disabled war veterans.⁶⁰ The statute called for the claimant to file a petition with the court, along with supporting evidence of military service, rank, and related information.⁶¹ The statute did not, however, require the veterans to join the government as an opposing party. In passing on these petitions, the circuit courts were to conduct a physical examination of the veteran, assess the extent of the injury, and prepare an opinion as to the degree of disability and the proper compensation.⁶² The court's decision, together with the veteran's supporting evidence, were to be forwarded to the Secretary of War for review.⁶³ Assuming there was no "imposition or mistake" – as adjudged by the Secretary and reviewed by Congress – the petitioner would be added to the pension list for submission to Congress.⁶⁴ *Hayburn's Case* reports that three circuit courts rejected the pension scheme, in part because the Secretary's revi-

see Pfander & Wardon, *supra* note 47. Although one might consider them "drive-by" jurisdictional rulings today, in view of the absence of any discussion of jurisdictional issues, see *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 512-13 (2006) (refusing to treat a prior ruling as decisive on a jurisdictional issue over which the parties had failed to "cross swords"), these episodes nonetheless suggest that ex parte proceedings were consistent with notions of the judicial power held in the early Republic. In *Tutum v. United States*, 270 U.S. 568 (1926), the Supreme Court specifically considered and rejected an argument that ex parte naturalization petitions do not present a cognizable judicial "case" under federal law. See *infra* Part II.B.

59. 2 U.S. (2 Dall.) 409 (1792).

60. Disabled veterans began filing legislative petitions as soon as Congress convened in 1789, seeking benefits they had been promised by the old Congress under the Articles of Confederation. See William C. diGiacomantonio, *Petitioners and Their Grievances: A View from the First Federal Congress*, in *THE HOUSE AND SENATE IN THE 1790S*, at 29, 47-56 (Kenneth R. Bowling & Donald R. Kennon eds., 2002) (describing the petitions of invalid veterans). For an account of the legislation, see James E. Pfander, *Judicial Compensation and the Definition of Judicial Power in the Early Republic*, 107 MICH. L. REV. 1, 34-40 (2008), which sketches the 1792 controversy over the assignment of pension claims to the federal circuit courts.

61. An Act To Provide for the Settlement of the Claims of Widows and Orphans Barred by the Limitations Heretofore Established, and To Regulate the Claims to Invalid Pensions, ch. 11, §§ 2-3, 1 Stat. 243, 244 (1792).

62. *Id.*

63. *Id.* § 4.

64. See *Hayburn's Case*, 2 U.S. (2 Dall.) at 411-14 (quoting letters from the judges of circuit courts).

sion power rendered the courts' decisions non-final, and in part for reasons that have been the cause of frequent speculation.⁶⁵

3. *Remission and Mitigation of Forfeitures*

Tucked away in the history of revenue collection in the early Republic, a curious provision for the mitigation or remission of penalties and forfeitures appears to blur the lines of separation between the departments of government. The revenue laws of 1789 imposed duties on imported goods as well as a fee on the “tonnage” of the vessels engaged in the carrying trade.⁶⁶ Congress assigned collection of these taxes to a group of federal collectors, surveyors, and naval officers, all appointed by the President to work one of many revenue districts along the coast.⁶⁷ The revenue laws imposed strict rules of transparency: mer-

65. We consider the mystery of *Hayburn's Case* in more detail *infra* Part III.B.2. Two other grants of non-contentious jurisdiction appeared in the 1790s. See An Act for the Relief of the Refugees from the British Provinces of Canada and Nova Scotia, ch. 26, § 3, 1 Stat. 547, 548 (1798) (providing for the judges of the district and supreme courts of the United States to take “proof of the several circumstances” entitling refugees from Canada to pursue land claims under the Act); An Act for the Government and Regulation of Seamen in the Merchants Service ch. 29, § 3, 1 Stat. 131, 132 (authorizing a crew to contest a vessel's seaworthiness by petition to the district judge of the district and directing the district judge to commission a report by knowledgeable citizens and, after receiving the report, to “adjudge and determine . . . whether the said ship or vessel is fit to proceed on the intended voyage”); *cf.* MASHAW, *supra* note 46, at 74 (opining that the seaworthiness procedure “effectively made courts (both state and federal) into administrators”). The latter grant of authority appears to have derived from the practice by which the colonial vice-admiralty courts, following the “custom of all trading nations,” ordered surveys to ascertain the condition of vessels. See CHARLES ANDREWS, 4 THE COLONIAL PERIOD OF AMERICAN HISTORY 253 & n.1 (1938) (describing a colonial practice in which a captain whose ship had grown unseaworthy would submit a “public instrument of protest” against the ship in the vice-admiralty courts, asking for a warrant of survey that could result in the sale of the ship and its cargo by court order). One might argue that the Fugitive Slave Act of 1793, ch. 7, § 3, 1 Stat. 302, 302-05, provided for judges of the district or circuit courts of the United States to exercise non-contentious jurisdiction in authorizing the return of fugitive slaves on the basis of oral testimony or affidavits submitted on an *ex parte* basis by the captor. *But see* *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 616 (1842) (characterizing the practice under the Act as giving rise to a controversy between adverse parties and a case under the laws of the United States).

66. An Act To Regulate the Collection of the Duties Imposed by Law on the Tonnage of Ships or Vessels, and on Goods, Wares and Merchandise Imported into the United States, ch. 5, § 1, 1 Stat. 29 (1789).

67. *Id.* §§1-2. On the history of the customs service, see WHITE, *supra* note 46, at 199-200, describing the duties of “the collector, naval officer, and surveyor,” who were employed to “assess[] customs and tonnage dues.” See also LAURENCE F. SCHMECKEBIER, INSTITUTE FOR GOVERNMENT RESEARCH, SERVICE MONOGRAPH NO. 33, THE CUSTOMS SERVICE: ITS HISTORY, ACTIVITIES AND ORGANIZATION 6 (1924) (reporting that the President in 1789 appointed

chants involved in the import business were obliged to declare the goods they proposed to import and to pay the specified duties.⁶⁸ If they failed to do so, or if they attempted to smuggle goods into port, they were subject to fines and penalties enforced by the admiralty courts.⁶⁹ Most dramatically, informers were encouraged to bring suit for violations of the revenue laws against the offending vessels, seeking a forfeiture of ship and cargo for the use of the United States.⁷⁰ Informers were entitled to keep a portion of the value of any forfeited property.⁷¹

Concerned with the relative harshness of these punishments, Congress adopted legislation in 1790 that conferred power on the Secretary of the Treasury to mitigate or remit penalties and forfeitures.⁷² These powers came into play when, in the Secretary's opinion, the violation had occurred without "wilful negligence or any intention of fraud."⁷³ The decision was to be made on the basis of a record assembled by the federal judge in the district where the forfeiture occurred.⁷⁴ To apply for relief from the forfeiture, the petitioning party was required to submit a petition for remission to the district court, along with a statement of the pertinent "circumstances."⁷⁵ Upon submission, the district judge was directed to notify interested parties, conduct a summary (that is, non-jury) inquiry into the matter, and attach a statement of the facts to the petition for transmission to the Secretary.⁷⁶ Although interested parties (usually, the customs officers who had a financial interest in the proceeds) could appear, their presence was not required; the district judge could proceed to assemble a

some "fifty-nine collectors, thirty-three surveyors, and ten naval officers" to staff fifty-nine customs districts).

68. An Act To Regulate the Collection of the Duties Imposed by Law, ch. 5, §§ 13, 19-20, 1 Stat. at 39-42.

69. On the role of federal admiralty courts in revenue collection cases, see William R. Casto, *The Origins of Federal Admiralty Jurisdiction in an Age of Privateers, Smugglers, and Pirates*, 37 AM. J. LEGAL HIST. 117, 149-51 (1993).

70. See An Act To Regulate the Collection of the Duties Imposed by Law, ch. 5, § 38, 1 Stat. at 48.

71. *Id.*

72. Act of May 26, 1790, ch. 12, § 1, 1 Stat. 122.

73. *Id.* § 1, 1 Stat. at 122-23. For an account of practice under the remission statute, see ANDREW DUNLAP, A TREATISE ON THE PRACTICE OF THE COURTS OF ADMIRALTY IN CIVIL CAUSES OF MARITIME JURISDICTION; WITH AN APPENDIX CONTAINING RULES IN THE ADMIRALTY COURTS OF THE UNITED STATES, AND A FULL COLLECTION OF PRACTICAL FORMS 281-88 (New York, Jacob R. Halsted, 2d ed. 1850).

74. Act of May 26, 1790, ch. 12, § 1, 1 Stat. at 122.

75. *Id.* (directing the judge, on petition for remission or mitigation of a forfeiture, to "inquire in a summary manner into the circumstances of [the] case").

76. *Id.*

factual record even where no adverse party came forward to contest the petition for remission.⁷⁷ As with naturalization petitions, federal courts have treated petitions for remission or mitigation as falling within the judicial power of the United States.⁷⁸

B. Transfers of Property

The federal courts also exercised jurisdiction over *ex parte* and non-contentious transfers of property. In the eighteenth and nineteenth centuries, before the advent of contemporary due process protections,⁷⁹ in rem proceedings in probate and admiralty were commonly brought in English and American courts to secure a transfer of title to property that was regarded, in the colorful parlance of the day, as binding on “all the world.”⁸⁰ Often, these in rem proceedings began and even continued on an *ex parte* basis. Probate in the “common form” began with an application for the admission of a will to probate by the party named as the will’s administrator.⁸¹ Similarly, the captors of a vessel claimed as prize would initiate proceedings by filing a petition (or “libel”) with the admiralty court.⁸² While the probate and admiralty courts welcomed the appearance of adverse parties, the court’s power to transfer title in the property did not depend on their presence.⁸³ It was possible, therefore, that

77. *Id.*

78. See *The Margareta*, 16 F. Cas. 719, 721 (Story, Circuit Justice, C.C.D. Mass. 1815). For a more detailed discussion, see *infra* Part III.B.1.

79. The Due Process Clause of the Fourteenth Amendment has been interpreted to impose an obligation on fiduciaries to give notice “reasonably calculated” to inform the beneficiaries of events pertaining to the administration of a trust. See, e.g., *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 318 (1950). In addition to imposing this notice requirement, modern due process forbids a state from adjudicating claims involving non-residents unless they have the requisite “minimum contacts” with the forum state. See *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). Courts can no longer bind non-residents simply by asserting power over property located in the state; they instead must show that those with an interest in the property have such minimum contacts. See *Shaffer v. Heitner*, 433 U.S. 186 (1977).

80. *Grignon’s Lessee v. Astor*, 43 U.S. (2 How.) 319, 342 (1844).

81. On the English history of probate in the common (or non-contentious) form and in the solemn (contentious) form, see LEWIS M. SIMES & PAUL E. BASYE, *PROBLEMS IN PROBATE LAW, INCLUDING A MODEL PROBATE CODE* 388-91 (1946).

82. See *infra* notes 90-96 and accompanying text.

83. Issuance of letters testamentary empowered the executor to collect the decedent’s assets, pay off the debts, and distribute the legacies, often on the basis of little by way of judicial proceeding and often without contestation. SIMES & BASYE, *supra* note 81, at 390. On the power of the admiralty courts to decree good prize without a judicial contest, see also *infra* note 248, discussing remarks of Justice Story and archival research of Kevin Arlyck.

an ex parte disposition could foreclose the claims of interested parties who had not received any personal notice of the pendency of the proceeding.⁸⁴ Yet the courts nonetheless took the position that such dispositions were conclusive judgments, binding in the absence of fraud.⁸⁵

1. *Prize and Salvage Cases*

Although the “probate exception” kept—and keeps—most personal estate proceedings out of the federal courts,⁸⁶ federal courts sitting in admiralty possessed a considerable docket of often non-contentious property transfer actions in the form of prize and salvage cases. Prize claims were a commonplace of eighteenth- and nineteenth-century seagoing warfare; governments authorized both the officers of their navies and certain duly licensed privateers to intercept and claim as prize the merchant ships and naval vessels of opposing nations.⁸⁷ The administration of prize claims occupied the lion’s share of the dockets of

84. As recently as 1945, Lewis Simes, a law professor and the reporter of the Uniform Probate Code, published a spirited defense of the traditional conception of probate as an in rem proceeding. See Lewis M. Simes, *The Administration of a Decedent’s Estate as a Proceeding in Rem*, 43 MICH. L. REV. 675 (1945).

85. Two cases from the nineteenth century illustrate the conclusive quality of proceedings in the probate courts. In one case, arising in the Wisconsin Territory, the administrator of the decedent’s estate filed an ex parte petition with the local court, requesting the court to approve the proposed sale of the decedent’s land to satisfy the estate’s debts. See *Grignon’s Lessee*, 43 U.S. (2 How.) 319. The court duly granted its approval in an ex parte proceeding and issued what the Supreme Court described as a “license to sell.” *Id.* at 340. Heirs of the decedent later moved to unwind the sale and to reclaim the land. But the Court concluded that the license to sell qualified as the judgment of a court of record that immunized the sale from subsequent challenge. *Id.* at 343-44. A similar result obtained in a case arising in Pennsylvania. An ex parte decree of the orphan’s court, authorizing the sale of a decedent’s land to support his children, was viewed as conclusive. See *McPherson v. Cunliff*, 11 Serg. & Rawle 422 (Pa. 1824). Conclusive quality also was ascribed to proceedings in admiralty over title to vessels captured or salvaged at sea and claimed as lawful prize. See *id.* at 430; *Grignon’s Lessee*, 43 U.S. at 338 (noting that, as in rem proceedings, probate sales “are analogous to proceedings in admiralty”).

86. See generally James E. Pfander & Michael J.T. Downey, *In Search of the Probate Exception*, 67 VAND. L. REV. 1533 (2014) (describing and analyzing the probate exception to federal jurisdiction).

87. See Casto, *supra* note 69, at 123-24. For an overview of English practice in prize cases, describing the use of privateers and government naval vessels to intercept enemy commerce and the reliance on colonial vice-admiralty courts in British North America, see SNELL, *supra* note 15, at 171-77. See also Pfander & Hunt, *supra* note 57, at 1916 (noting that naval captains were compensated for taking prizes during the quasi-war with France in 1798-1800); Kevin Arlyck, *Forged by War: The Federal Courts and Foreign Affairs in the Age of Revolution* 234 (Sept. 2014) (unpublished Ph.D. dissertation, New York University) (on file with authors) (noting the reliance of the United States on privateers during the War of 1812).

the colonial vice-admiralty courts and, later, of the state admiralty courts and the federal Court of Appeals in Cases of Capture under the Articles of Confederation and the federal admiralty courts of the early Republic.⁸⁸ Salvage was awarded to a crew that helped to save a stranded or damaged vessel or re-took a friendly ship that the enemy had claimed as prize.⁸⁹

Much like probate proceedings, prize and salvage claims began with the ex parte submission of a petition (again, here called a “libel”) to the proper court, seeking an order that would institute the condemnation process, an inquisitorial process—characteristic of admiralty proceedings—in which the court would demand all of the ship’s records and issue commissions to take deposition testimony from those involved in the vessel’s capture.⁹⁰ If, on the basis of the evidence collected, the court found that the vessel qualified as one subject to capture or salvage, the court would enter a decree authorizing the sale of the vessel and its cargo.⁹¹ The legal effect of prize decrees did not depend on the appearance of any opposing party, and indeed section 30 of the Judiciary Act of 1789 recognized that no adverse party might even be named;⁹² on many occasions, presumably, the captured vessel was so obviously a good prize that no one bothered to contest the fact. But the court would nonetheless proceed to decree in such a case.⁹³

While the task of administering probate estates fell to the state courts, federal courts were assigned jurisdiction over claims of prize and capture.⁹⁴ Rules

88. See Casto, *supra* note 69, at 123-29, 149-53; see also Frederick Bernays Wiener, *Notes on the Rhode Island Admiralty, 1727-1790*, 46 HARV. L. REV. 44, 47 (1932) (describing the heavy prize business in the Rhode Island colonial court of admiralty during King George’s War with France). On the role played by the Court of Appeals in Cases of Capture, see HENRY J. BOURGUIGNON, *THE FIRST FEDERAL COURT: THE FEDERAL APPELLATE PRIZE COURT OF THE AMERICAN REVOLUTION, 1775-1787* (1977).

89. ANDREWS, *supra* note 65, at 253; SNELL, *supra* note 15, at 160 n.128, 160-61 (2007).

90. See DUNLAP, *supra* note 73, at 368-76.

91. See *id.*

92. An Act To Establish the Judicial Courts of the United States, ch. 20, § 30, 1 Stat. 73, 89 (1789).

93. See Arlyck, *supra* note 87, at 264 (“[P]rize proceedings were largely nonadversarial; that is, in most cases the only parties to the proceedings were the captors seeking condemnation of the vessel and cargo as good prize.”). Arlyck attributes the lack of adverse-party presentations to the simple notion that the owners had nothing to litigate. *Id.* For descriptions of prize condemnation proceedings in England and the American colonies, see Matthew P. Harrington, *The Legacy of the Colonial Vice-Admiralty Courts (Part II)*, 27 J. MAR. L. & COM. 323, 329 (1996); and L. Kinvin Wroth, *The Massachusetts Vice Admiralty Court and the Federal Admiralty Jurisdiction*, 6 AM. J. LEGAL HIST. 250, 256 (1962).

94. Casto, *supra* note 69, at 140. The frustrating experience of the Court of Appeals in Cases of Capture, which heard appeals from state courts adjudicating prize cases under the Articles of

of procedure promulgated by the First Congress declared that “civil law” process was to govern proceedings in federal courts of admiralty (as well as in suits brought in equity).⁹⁵ Federal courts sitting in admiralty accordingly followed the inquisitorial model customary of admiralty proceedings in English and continental civil-law courts, decreeing good prize and ordering the sale of captured vessels.⁹⁶ Given the widespread view that such matters of prize and capture were proper subjects of federal adjudication, no one appears to have raised doubts about the power of the federal courts to adopt an inquisitorial model or to entertain the proceedings on an *ex parte* basis.⁹⁷ Indeed, providing dispositive legal decrees regarding naval captures played a crucial role in national defense and international relations in the early Republic,⁹⁸ and the fact that this task was assigned to federal district courts sitting in admiralty (as it was assigned to the admiralty courts in England) suggests that the Framers expected the federal courts to play a role in the administration of law beyond mere dispute resolution.

2. Trademark Seizure Orders

Although prize cases have fallen by the wayside, Congress has relied on federal courts to exercise similar functions in contemporary forfeiture proceedings. In 1984, for example, Congress amended the Lanham Act to authorize federal courts to issue *ex parte* seizure warrants aimed at the sellers of goods infringing on a valid trademark.⁹⁹ Exercising this power, federal courts have

Confederation, may have motivated Congress’s decision to assign such cases to the exclusive jurisdiction of the federal courts. See BOURGUIGNON, *supra* note 88, at 39-100.

95. An Act To Regulate Processes in the Courts of the United States, ch. 21, § 2, 1 Stat. 93, 94 (1789).
96. For example, in his treatise on admiralty, Dunlap observes that the admiralty court in Boston promptly adopted the civil law practice on letters rogatory in the course of seeking to procure relevant evidence in other countries. See DUNLAP, *supra* note 73, at 200-02.
97. Early admiralty courts adopted rules of procedure designed to facilitate an inquisition into prize and capture claims. See *id.* at 368-82 (setting forth rules of the Federal District Court for the Southern District of New York that required early notice to the court in cases of prize and capture, judicial collection of relevant papers, and an inspection of the vessel, all before any libel had been filed).
98. See Casto, *supra* note 69, at 133-34.
99. See Trademark Counterfeiting Act of 1984, Pub. L. No. 98-473, § 1503, 98 Stat. 2178, 2179; 15 U.S.C. § 1116(d) (2012). See generally Daniel Grobman, Note, *Preemptive Ex Parte Seizure Orders and Substantive Relief: A Far Cry from Congressional Intent*, 33 CARDOZO L. REV. 1185 (2012) (describing the background and operation of trademark seizure orders). The statute specifies that “the court may, upon *ex parte* application, grant an order under subsection (a) of this section pursuant to this subsection providing for the seizure of goods and counterfeit marks.” 15 U.S.C. § 1116(d)(1)(a) (2012).

issued broad ex parte seizure orders authorizing the owners of a trademark to take counterfeit goods off the market in the days surrounding major events.¹⁰⁰

The statute contemplates post-seizure proceedings during which the target of the seizure order may contest the order¹⁰¹ and provides for the award of compensatory and punitive damages and attorneys' fees in cases of wrongful seizure.¹⁰² But many such seizures are never contested. A close student of the practice reports that many successful trademark owners use the seizure order simply to get the counterfeit goods off the street and never pursue claims for damages against the sellers of the offending goods (who also never show up to claim them).¹⁰³

C. Bankruptcy

The administration of an estate by courts exercising equitable powers has long featured a combination of both adverse and non-adverse proceedings.¹⁰⁴ One can see this combination reflected in the wide range of familiar forms of estate administration, including the probate matters discussed above, equity receiverships, equitable trust supervision, and federal bankruptcy.¹⁰⁵ Although

100. See Grobman, *supra* note 99, at 1191-93.

101. See 15 U.S.C. § 1116(d)(8) (2012).

102. See 15 U.S.C. § 1116(d)(11) (2012).

103. See Grobman, *supra* note 99, at 1194-95. On the availability of appellate review of ex parte seizure orders, see *Vuitton v. White*, 945 F.2d 569, 570 (3d Cir. 1991), which holds that an order denying an application for a 15 U.S.C. § 1116(d) seizure order constitutes a denial of a form of injunction and is immediately appealable. The Ninth Circuit arrived at the opposite conclusion in *In re Lorillard Tobacco Co.*, 370 F.3d 982, 989 (9th Cir. 2004), dismissing the plaintiff's appeal of the denial of its ex parte seizure application for lack of subject-matter jurisdiction. *But see* *NBA Props. v. Does*, No. 97-40609, 1997 WL 271311 (10th Cir. May 21, 1997) (reversing the district court's denial of an ex parte trademark seizure application).

104. In probate, for example, courts commonly distinguish between their power to administer the estate on an ex parte basis and their power to resolve disputed or "inter partes" matters. See, e.g., John F. Winkler, *The Probate Jurisdiction of the Federal Courts*, 14 PROB. L.J. 77, 84-85 (1997). The so-called probate "exception" to the jurisdiction of federal courts has been interpreted to apply to administrative matters but leaves the federal courts free to hear disputes between parties. See *Marshall v. Marshall*, 547 U.S. 293, 310 (2006) (declaring that federal courts lack jurisdiction to "probate a will or administer an estate" but ultimately upholding their power to adjudicate controversies arising out of probate proceedings (quoting *Markham v. Allen*, 326 U.S. 490, 494 (1946))).

105. On the mixed quality of bankruptcy cases, see Ralph Brubaker, *On the Nature of Federal Bankruptcy Jurisdiction: A General Statutory and Constitutional Theory*, 41 WM. & MARY L. REV. 743, 837 n.352 (2000), which recognizes that a "case commenced under the Bankruptcy Code differs substantially from a typical civil action commenced in state or federal court to resolve a two-party dispute" (quoting Lawrence P. King, *Jurisdiction and Procedure Under the Bankruptcy Amendments of 1984*, 38 VAND. L. REV. 675, 676-77 (1985)). As Brubaker reports,

these forms have evolved in different directions, they apparently spring from common roots in the civil or canon law, and all feature administrative and ex parte elements in addition to formal adverse-party disputes.¹⁰⁶

1. *Initial Appointment*

Most estate proceedings begin with a petition that commences the administrative process through the appointment of an individual who will bear a fiduciary obligation to manage the affairs of the estate.¹⁰⁷ The names of these fiduciaries vary: trustees oversee estates, including those in bankruptcy; administrators conduct intestate successions; guardians serve on behalf of minors; receivers manage an equitable receivership; and executors handle the probate of wills and the distribution of the testators' property.¹⁰⁸

the Advisory Committee on Bankruptcy Rules described "the bankruptcy case" as something different from "litigation involving a legal dispute in the traditional sense." *Id.* (quoting COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, REQUEST FOR COMMENT ON PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE, JUDICIAL CONFERENCE OF THE U.S. 5 (1998)); see also Avery, *supra* note 18, at 450 (noting that, in bankruptcy, courts often act as "administrators of a congressionally mandated system rather than arbiters of disputes between litigating parties").

106. On the ecclesiastical, estate-administration origins of English bankruptcy, see R.H. HELMHOLZ, *CANON LAW AND THE LAW OF ENGLAND* 292 (1987), which reports that records of the English church courts "show conclusively that English bankruptcy practice has antecedents and perhaps even roots in the canon law administered by the Church courts." On the English precursors to early American bankruptcy statutes, see Ralph Brubaker, *A "Summary" Statutory and Constitutional Theory of Bankruptcy Judges' Core Jurisdiction After Stern v. Marshall*, 86 AM. BANKR. L.J. 121, 123-25 (2012).
107. See JAMES L. HIGH, *A TREATISE ON THE LAW OF RECEIVERS* § 1, at 2 (Chicago, Callaghan & Co. 3d ed. 1894) (describing the receiver as a person "appointed by the court to preserve the property or fund in litigation *pendente lite* when it does not seem reasonable that either party should hold it"); WILLIAM M. MCGOVERN ET AL., *WILLS, TRUSTS AND ESTATES: INCLUDING TAXATION AND FUTURE INTERESTS* 571-72 (4th ed. 2010) (explaining that the powers of personal representatives, such as trustees and executors, are acquired by court appointment); SIMES & BASYE, *supra* note 81, at 388-91 (describing the appointment of executors and administrators to handle the administration of decedents' estates). On the binding quality of the discharge in bankruptcy, even where the creditor fails to contest, see FRANCIS HILLIARD, *A TREATISE ON THE LAW OF BANKRUPTCY AND INSOLVENCY* ch. 9, § 13, at 241 (2d ed., Philadelphia, J. B. Lippincott & Co. 1867), which notes that creditors may be concluded by an insolvent's discharge where they have notice but fail to appear and contest and further observing that notice will be presumed). For a discussion of the fiduciary duties imposed on trustees, see MCGOVERN ET AL., *supra*, at 530-624, which describes fiduciary duties such as the duties to remain loyal, to adopt a prudent investment strategy, and to account for the assets of the trust.
108. Despite the difference in titles, the responsibilities of these fiduciaries overlap to a degree. They typically owe a duty of loyalty to the estate; they all must manage its affairs for the benefit of its participants, heirs, legatees, or beneficiaries; and they must all avoid conflicts

Petitions for judicial involvement may be contested, but they need not be contested in order for the court to begin the proceeding and appoint a fiduciary. In bankruptcy, for example, the submission of an uncontested or voluntary petition may be filed in the absence of any dispute and will initiate the proceeding and occasion the creation of a bankruptcy estate.¹⁰⁹ In such an uncontested proceeding, the court has the power to distribute the non-exempt assets (if any) among the creditors.¹¹⁰ If there are no assets, and no creditors appear, the court nonetheless has power to provide the debtor with a discharge (and fresh start).¹¹¹

of interest that might cast doubt on their loyalty to their fiduciary obligations. See GEORGE T. BOGERT, TRUSTS 1 (6th ed. 1987) (defining a trust as a fiduciary relationship in which the trustee holds title of property subject to an equitable obligation to administer it for the benefit of another). In a departure from this model, the bankruptcy trustee represents the interests of the creditors, whereas the equity receiver acts on behalf of the court in administering an equitable remedy. On the duties of the bankruptcy trustee, see DAVID G. EPSTEIN & STEVEN H. NICKLES, PRINCIPLES OF BANKRUPTCY LAW § 1.5, at 24-26 (2007), which distinguishes the bankruptcy trustee, as “the representative of the estate,” from the United States trustee, a federal official who shares in the work of overseeing bankruptcy administration. On the duties of the equity receiver, see JOHN W. SMITH, THE LAW OF RECEIVERSHIPS 3 (2d ed. 1900), which notes that the receiver “is not the agent . . . of either party to the action, but is uniformly regarded as an officer of the court.” On the power of courts of equity to appoint guardians for minors, see JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 1338, at 926-27 (photo. reprint 2006) (London, Stevens & Hayes 1884), which states, “The Court of Chancery [in England] will appoint a suitable guardian to an infant, where there is none other, or none other who will, or can act . . . Guardians appointed by the court are treated as officers of the court, and are held responsible accordingly to it.” On the appointment of equity receivers, see HIGH, *supra* note 107, § 1, at 2.

109. Avery, *supra* note 18, at 419.

110. See 11 U.S.C. § 726 (2013).

111. See EPSTEIN & NICKLES, *supra* note 108, § 16.9, at 219-20 (explaining that in the “typical” case of an individual bankruptcy under chapter 7, no one objects and the discharge is granted); *id.* § 16.10, at 223 (describing an illustrative “no-asset” case in which the court proceeds to enter a “pro forma” discharge); see also CHARLES JORDAN TABB, THE LAW OF BANKRUPTCY § 10.28, at 995 (3d ed. 2014) (observing that the bankruptcy court issues an automatic discharge of the individual’s debts in the absence of objection); *id.* § 10.1, at 937 (linking the fresh start and discharge as the goals of voluntary bankruptcy petitions). A similar procedure obtained in probate proceedings. On the difference between contested and uncontested proceedings in probate, see Winkler, *supra* note 104, at 84-85, which distinguishes between *ex parte* “common form” proceedings and disputed, or *inter partes*, “solemn form” proceedings.

2. *Administrative Fees*

The judicial administration of bankruptcy cases often entails the issuance of orders approving the payment of administrative fees.¹¹² Fees may be due to the trustee or to professional advisors (lawyers, investment managers, and accountants) hired to assist with the estate's management and may generally be paid from the estate if "reasonable."¹¹³ In many situations, no party to the estate's administration has an incentive to contest these fees.¹¹⁴ Perhaps as a result, bankruptcy law holds that the court has an independent duty to examine the fees, even in the absence of a specific challenge.¹¹⁵ In some respects, the dynamic surrounding the approval of such fees resembles the dynamic triggered by a proposed settlement of a class action and raises similar concerns.¹¹⁶

3. *Contract and Plan Approval*

During the course of bankruptcy proceedings, courts grant formal approval to a variety of business decisions by debtors-in-possession that are agreed to in advance by interested parties.¹¹⁷ For example, the parties may wish to adopt a pre-petition contract that has been profitable for the debtor and the bankruptcy estate.¹¹⁸ In such a situation, the federal bankruptcy code requires the court to approve the contract before it can be given legal effect.¹¹⁹ In addition, court approval of the debtor's reorganization plan requires satisfaction of a laundry list of conditions.¹²⁰ The court must hold a hearing on the plan's confirmation and take evidence and make findings on each item, regardless of whether the item has "been placed in issue by the parties."¹²¹

112. In bankruptcy, administrative fees are accorded a relatively high priority for payment by the estate. See 11 U.S.C. § 507 (2012) (conferring priority on payment of administrative fees, which include the actual necessary costs and expenses of preserving the estate); DAVID G. EPSTEIN ET AL., *BANKRUPTCY* § 7-11, at 463 (1993) (noting that administrative fees include attorneys', accountants', and investment bankers' fees).

113. See 11 U.S.C. § 503(b) (2013).

114. See Avery, *supra* note 18, at 434 (explaining that "each creditor individually has little reason to object" based on a consideration of the costs of objection and the likely recovery).

115. See *id.* at 433.

116. See *infra* notes 198-206 and accompanying text.

117. Avery, *supra* note 18, at 422, 437.

118. See *id.* at 422-23.

119. See *id.*

120. See *id.* at 437.

121. *Id.*

D. Government Investigations

In a variety of situations, the government must secure the approval of the federal judiciary before completing one or more phases of its investigatory process, such as conducting a search or seizure or issuing a subpoena. We summarize these proceedings in this section, recognizing that the rule of prior judicial approval does not apply to warrants and subpoenas issued under the aegis of grand jury proceedings (which have themselves been described as operating on an inquisitorial, rather than an adversarial, model).¹²²

1. Warrant Applications

The Fourth Amendment assumes that courts and magistrates will conduct *ex parte* proceedings in the course of evaluating arrest and search warrants. The well-thumbed terms of the Amendment prohibit “unreasonable searches and seizures” and further declare that “no Warrants shall issue, but upon probable cause, supported by Oath or affirmation.”¹²³ Although scholars debate the meaning of the Warrant Clause and its connection to the ban on unreasonable searches,¹²⁴ and although the Court has tugged and pulled at the Clause over time,¹²⁵ key features seem relatively clear for our purposes. First, jurisprudence regarding the Warrant Clause contemplates the submission of an application to a “neutral and detached magistrate,” typically in an *ex parte* proceeding in which a government officer offers sworn testimony in support of the proposed warrant.¹²⁶ Second, the issuance of a warrant had genuine legal consequences

122. *See, e.g.*, *United States v. Morton Salt Co.*, 338 U.S. 632, 642 (1950) (distinguishing the “judicial power” to obtain evidence in the context of an adversary proceeding from the grand jury’s “power of inquisition”); 1 WAYNE R. LAFAVE ET AL., *CRIMINAL PROCEDURE* § 1.4(c) n.94 (2d ed. 1999) (arguing that the characterization of the investigatory stage as “inquisitorial” reflects the government’s ability to gather evidence without making a showing before a magistrate). On the grand jury, see Niki Kuckes, *The Democratic Prosecutor: Explaining the Constitutional Function of the Federal Grand Jury*, 94 *GEO. L.J.* 1265 (2006), which describes the tension between the judicial and prosecutorial models of the grand jury.

123. U.S. CONST. amend. IV.

124. Much has been written about the warrant requirement and the scope of Fourth Amendment protections from unreasonable searches and seizures. *See, e.g.*, WILLIAM J. CUDDIHY, *THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING* 602-1791 (2009); Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 *MICH. L. REV.* 547 (1999).

125. *See, e.g.*, *United States v. Leon*, 468 U.S. 897, 920-21 (1984) (recognizing a good faith exception to the exclusionary rule).

126. *See Gerstein v. Pugh*, 420 U.S. 103, 117 (1975) (emphasizing the importance of transferring the judgment from the prosecutor to “a neutral and detached magistrate”); *Johnson v. United States*, 333 U.S. 10, 14 (1948) (holding that probable cause must be determined by a “neu-

at common law, in that a lawful warrant immunized an officer who stayed within its bounds and the bounds of the law from subsequent civil liability.¹²⁷

In the early Republic, representatives of all three branches of government appear to have presumed that warrant applications were proper in Article III courts, as when Congress authorized “any court of the United States” to hear warrant proceedings to enforce Alexander Hamilton’s 1791 federal excise tax on distilled spirits, which for obvious reasons did not provide for advance notice to the warrant’s target.¹²⁸ Consider also the affair of Captain Barré, a French

tral and detached magistrate”). *See generally* NELSON B. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* 120 (1937) (distinguishing between the “sober” judgment of a judicial official in issuing a warrant and the perhaps ill-informed judgment of the “ministerial” officer who executes the warrant, subject to the possibility of “civil and criminal liability” if he exceeds the authority conferred). On the impact of English history on the rise of a judicial role in the issuance of warrants, see PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* 178 (2014) (concluding, on the basis of England’s rejection of prerogative warrants, that the judicial power conferred on Article III courts includes the power to issue binding orders and warrants; these “were judicial and had to come from the judges”). It is not entirely clear whether the Framers understood the Fourth Amendment to require a judicial, rather than executive, official to issue warrants. Practice before and after adoption of the Fourth Amendment sometimes involved police and other executive officials claiming authority to issue warrants. *See* Akhil Reed Amar, *Fourth Amendment First Principles*, 107 *HARV. L. REV.* 757, 772-73 (1994).

127. In general, earlier judges understood that warrants in the eighteenth century, when valid, conferred immunity from civil liability. *See* Amar, *supra* note 126, at 778. When overbroad or general, however, such warrants conferred no immunity on the officers that executed them. For recognition of such official liability in English cases, see *Entick v. Carrington*, (1765) 95 *Eng. Rep.* 807 (K.B.); 2 *Wils. K.B.* 275, which imposed liability in connection with a search undertaken pursuant to a general warrant. For an account of the claims brought in England by John Wilkes and his supporters, see Davies, *supra* note 124, at 562-63 & 563 n.21, which describes a successful attack on a general warrant, resulting in a substantial award of damages from the Secretary of State. Professor Davies shows that Americans likely learned of these developments through newspaper accounts and pamphlets, rather than through formal case reports. *Id.* at 563-65.
128. An Act Repealing, After the Last Day of June Next, the Duties Heretofore Laid Upon Distilled Spirits Imported from Abroad, and Laying Others in Their Stead; and also upon Spirits Distilled Within the United States, and for Appropriating the Same, ch. 15, §32, 1 *Stat.* 199-207 (1791). On Hamilton’s role in formulating the excise tax, see RON CHERNOW, *ALEXANDER HAMILTON* 342-43 (2004). Enforcement of the excise tax in Western Pennsylvania led to the so-called Whiskey Rebellion. *See* WILLIAM HOGELAND, *THE WHISKEY REBELLION: GEORGE WASHINGTON, ALEXANDER HAMILTON, AND THE FRONTIER REBELS WHO CHALLENGED AMERICA’S NEWFOUND SOVEREIGNTY* 7-8 (2006); THOMAS P. SLAUGHTER, *THE WHISKEY REBELLION: FRONTIER EPILOGUE TO THE AMERICAN REVOLUTION* (1986). Congress’s first customs tax, adopted in 1789, did not rely on the federal courts to issue search warrants, but provided instead for applications to “any justice of the peace.” An Act To Regulate the Collection of the Duties Imposed by Law on the Tonnage of Ships or Vessels, and on Goods, Wares and Merchandise Imported into the United States, 1 *Stat.* 29, ch. 5, § 24 (1789). By choosing to assign the warrant-issuing authority to state officials, the customs

sailor who apparently found life in the United States preferable to the vagaries of the French Revolution.¹²⁹ Under a treaty with France, the United States had agreed to arrest deserters from French vessels and deliver them to the French consul for return to their country.¹³⁰ The French consul filed papers before Judge John Laurance in the United States District Court for the District of New York, seeking a warrant for Barré's arrest following his desertion from a French ship.¹³¹ Although the evidence tended to establish that Barré had in fact deserted, Judge Laurance refused to issue an arrest warrant until the consul produced evidence of Barré's enlistment on the ship's register or roll (as apparently contemplated in the language of the treaty).¹³² The consul, lacking the specific proof demanded, sought help from the executive branch, which filed a petition for a writ of mandamus to compel Judge Laurance to issue the warrant.¹³³

In a unanimous decision, the Supreme Court refused to issue the requested writ.¹³⁴ Reasoning that Judge Laurance had acted in a "judicial capacity," the Court said that it lacked power by way of mandamus to compel the judge to decide "according to the dictates of any judgment, but his own."¹³⁵ No one in-

legislation does not imply that Article III courts lacked power to conduct such proceedings. Rather, it may simply reflect the lack of an existing federal option. Congress did not adopt its system of lower federal courts and judges until September 1789, and President Washington made his first appointments to those courts in early 1790, several months after the customs law took effect. For an account of the Judiciary Act of 1789, see 4 DHSC, *supra* note 56, at 22-35.

129. For accounts, see 6 DHSC, *supra* note 56, at 522-53; and Susan Low Bloch, *The Early Role of the Attorney General in Our Constitutional Scheme: In the Beginning There Was Pragmatism*, 1989 DUKE L.J. 561, 613-16.

130. See Convention Between His Most Christian Majesty and the United States of America, for the Purpose of Defining and Establishing the Functions and Privileges of Their Respective Consuls and Vice-Consuls, U.S.-Fr., art. IX, Nov. 14, 1788, 8 Stat. 106, 112; see also 6 DHSC, *supra* note 56, at 522, 524-25 (specifying that proof was to be by "an exhibition of the register of the vessel or ship's roll").

131. See *United States v. Lawrence*, 3 U.S. (3 Dall.) 42, 42-43 (1795). (The judge's name is styled Lawrence in the opinion but is typically spelled Laurance.) The desertion likely had something to do with the changing politics of the French Revolution. When the famed Citizen Genet fell from grace in February 1794, he left his position as minister and retired to a farm in New York rather than return to France to face the guillotine. See William Casto, *America's First Independent Counsel: The Planned Criminal Prosecution of Chief Justice John Jay*, 1 GREEN BAG (n.s.) 353, 357 (1998).

132. See 6 DHSC, *supra* note 56, at 523.

133. See *Lawrence*, 3 U.S. (3 Dall.) 42. For an account of the French consul's efforts to secure the support of the executive, see Bloch, *supra* note 129, at 613-15.

134. *Lawrence*, 3 U.S. (3 Dall.) at 53.

135. *Id.*

volved in the affair questioned the power of either the district court or the Supreme Court to proceed on an ex parte basis.¹³⁶

2. FISA Warrants

Warrant proceedings remain a commonplace feature of federal judicial practice today. To be sure, much of the workaday review of applications for search and arrest warrants now falls to federal magistrates rather than to Article III judges.¹³⁷ But Article III courts continue to assess ex parte warrant applications in other areas. In the much-discussed context of national security, Article III foreign intelligence surveillance courts consider ex parte applications for warrants authorizing the government to conduct certain kinds of foreign surveillance.¹³⁸ Created by FISA, the Foreign Intelligence Surveillance Court (often called the FISC) and the Foreign Intelligence Surveillance Court of Review employ judges from the Article III judiciary who have been designated by the Chief Justice of the United States to serve for specified terms.¹³⁹ As in the case of warrant proceedings associated with the 1791 excise tax, FISA makes no provision for notice to the targets of the application and provides them with no opportunity to contest the showing made in support of the warrant. The government presents its case for surveillance in a closed-door, ex parte proceeding.¹⁴⁰ In the event the FISC rejects the warrant application, FISA permits the government to appeal on an ex parte basis without joining an adverse party.¹⁴¹

136. Notably, Justice Wilson participated in the case, posing a question about the state of the factual record below. *Id.* at 49 n.*. His failure to raise doubts about the ex parte character of the proceeding may lend a measure of support to the conclusion that such doubts did not underlie his concern with the “judicial nature” of invalid pension claims in *Hayburn’s Case*. See *infra* Part III.B.2. Nor did the Court question the Attorney General’s authority to seek a writ on behalf of the French consul’s application for the warrant. See Bloch, *supra* note 129, at 613-17 (contrasting the Court’s willingness to entertain the *Lawrence* mandamus petition with its refusal to hear Randolph’s ex officio application in *Hayburn’s Case*).

137. See Note, *A Survey of the Qualifications of Magistrates Authorized To Issue Warrants*, 9 VAL. U. L. REV. 443 (1975); see also FED. R. CRIM. P. 41(b) (assigning the power to issue search warrants to magistrate judges, if they are available).

138. See Note, *supra* note 3, at 2201-03.

139. On the Chief Justice’s role in designating members of the FISA courts, see Judith Resnik & Lane Dilg, *Responding to a Democratic Deficit: Limiting the Powers and the Term of the Chief Justice of the United States*, 154 U. PA. L. REV. 1575 (2006), which explores the Chief Justice’s various powers and questions whether they should vest in a single Justice or be shared; and Theodore W. Ruger, *The Judicial Appointment Power of the Chief Justice*, 7 U. PA. J. CONST. L. 341 (2004).

140. See Note, *supra* note 3, at 2206.

141. See 50 U.S.C. § 1803(b) (2012).

Both the *ex parte* proceedings before FISA courts and the *ex parte* trademark seizure proceedings before federal district courts described in Part I.B.2 have been criticized for failing to satisfy the adverse-party requirement of Article III. One prominent early critic of the FISC, Laurence Silberman, later a judge on the D.C. Circuit, argued to Congress that the secret, non-adversarial character of its proceedings is inconsistent with Article III's case-or-controversy requirement.¹⁴² And a district court, ruling before the practice was codified in 1984, held that *ex parte* trademark seizure applications suffered from the same defect.¹⁴³ As we shall see in Part II, some jurists have relied on the possibility of post-warrant litigation in arguing that *ex parte* warrant proceedings satisfy the adverse-party requirement; depending on the circumstances, the party seeking the warrant might institute criminal proceedings against the target or the target might seek civil damages in tort.

3. *Administrative Subpoenas*

On occasion, federal courts serve as adjuncts to enforce discovery occurring in non-Article III tribunals or initiated in the course of administrative investigations. The organic statutes of many administrative agencies include provisions authorizing the agencies to invoke the subpoena power of the federal courts in connection with their efforts to compel the production of evidence and testimony by regulated parties.¹⁴⁴ In 1887, Supreme Court Justice Field, riding circuit, held in *In re Pacific Railway Commission* that federal courts have no power to play this adjunct role.¹⁴⁵ For Justice Field, the business of issuing a subpoena was a distinctly judicial function to be undertaken by the federal

142. See *Foreign Intelligence Electronic Surveillance: Hearing on H.R. 5794, 9745, 7308, and 5632 Before the Subcomm. on Legis. of the Permanent Select Comm. on Intelligence*, 95th Cong. 224 (1978) (statement of Laurence Silberman), http://www.cnss.org/data/files/Surveillance/FISA/1970s_Cong_Hearings/C_fisao11078_part_1c.pdf [<http://perma.cc/UFG4-5G87>].

143. See *Rock Tours, Ltd. v. Does*, 507 F. Supp. 63, 65-67 (N.D. Ala. 1981) (refusing to grant an *ex parte* seizure order in advance of a Styx concert on the basis that there were no adversaries before the court). The *Rock Tours* court noted that in seeking the order for the purposes of impounding the counterfeit materials, the plaintiffs described the prospects for an eventual trial on the merits as small or non-existent. *Id.* at 66.

144. According to Robert A. Mikos, "Congress has passed more than 300 administrative subpoena statutes grant[ing] some form of administrative subpoena authority to most federal agencies." Robert A. Mikos, *Can the States Keep Secrets from the Federal Government?*, 161 U. PA. L. REV. 103, 117 (2012) (alteration in original) (internal quotation marks omitted). For an example of such laws, see 29 U.S.C. §§ 161(1)-(2) (2012), which confers subpoena power on the NLRB to compel testimony and the production of documentary evidence and authorizes the NLRB to seek judicial enforcement in case of a refusal to comply with the subpoena.

145. 32 F. 241, 268 (C.C.N.D. Cal. 1887).

courts only in service of proceedings before the courts themselves.¹⁴⁶ Administrative and legislative investigations were to be conducted without the aid of federal courts,¹⁴⁷ in keeping with Justice Field's belief that the federal courts were barred from acting as administrative assistants to coordinate departments.¹⁴⁸ Ultimately, however, the Supreme Court rejected Justice Field's view and upheld the federal courts' role in issuing and enforcing subpoenas to further an agency's investigation.¹⁴⁹

4. *Immunized Testimony*

When a witness claims her Fifth Amendment privilege against self-incrimination, she triggers a mechanism that allows the government to grant her immunity and compel her to testify.¹⁵⁰ Building on an approach first adopted in 1954 to regulate immunized testimony in the national security arena,¹⁵¹ Congress in 1970 created a three-step mechanism in which the witness claims the privilege, the prosecutor or other government attorney procures from higher-ups in Washington, D.C., a statement as to the importance of the

146. Justice Field thus distinguished the supervision of grand jury proceedings, which often lead to the issuance of investigative subpoenas, on the basis that those proceedings were an inherent part of the process of adjudicating criminal charges against a certain class of offenders and required judicial support and oversight. *Id.* at 257 n.2.

147. *Id.* at 257-59. For years, Congress enforced its own subpoenas by arresting those who refused to appear as witnesses. See, e.g., *Kilbourn v. Thompson*, 103 U.S. 168, 205 (1880) (recognizing that while the legislative body enjoys immunity for the wrongful arrest of a prospective witness, the executive officer of the body or sergeant at arms would face personal liability for wrongful imprisonment).

148. Writing in *Pacific Railway*, Justice Field collected cases that he regarded as foreclosing judicial administration. See *In re Pac. Ry. Comm'n*, 32 F. at 258-59 (citing the circuit courts' handling of veterans' disability claims in *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792), and Chief Justice Taney's conclusion in *United States v. Ferreira*, 54 U.S. (13 How.) 40, 52-53 (1851), that earlier decisions foreclosed the circuit judges from considering such disability claims in their capacity as commissioners).

149. See *Interstate Commerce Comm'n v. Brimson*, 154 U.S. 447, 489 (1894) (upholding the power of an Article III court to issue a subpoena to enforce the obligation of a regulated railroad to comply with an agency's request for information).

150. For an overview of the law governing immunized witness testimony, see Leonard N. Sosnov, *Separation of Powers Shell Game: The Federal Witness Immunity Act*, 73 TEMP. L. REV. 171 (2000).

151. See Immunity Act of 1954, Pub. L. No. 600, 68 Stat. 745. For accounts of the Act, see Robert G. Dixon, Jr., *The Doctrine of Separation of Powers and Federal Immunity Statutes*, 23 GEO. WASH. L. REV. 501 (1955); O. John Rogge, *The New Federal Immunity Act and the Judicial Function*, 45 CALIF. L. REV. 109, 127 (1957); and Comment, *Immunitization of Congressional Witnesses Under the Compulsory Testimony Act: Constitutionality of the Function of the District Courts*, 22 U. CHI. L. REV. 657 (1955).

testimony, and the federal district court then enters an order granting the requested immunity.¹⁵² In many instances, the parties do not disagree: the witness and the government both prefer that the grant of immunity be extended, and no one opposes the result.¹⁵³ Therefore, a number of commentators once questioned the constitutionality of the judicial role in such proceedings, arguing that the absence of any case or controversy deprived courts of the power to issue the immunity orders.¹⁵⁴ In *Ullmann v. United States*, the Supreme Court rejected the claim that no case or controversy existed.¹⁵⁵ Although the decision triggered a spirited dissent, no Justices questioned the majority's conclusion as to the power of the federal courts to pass on an uncontested application for the grant of immunity.¹⁵⁶

E. Prisoner Litigation

Prisoners often contest the fact or duration of their imprisonment, the conditions in which they have been confined, or, in death penalty cases, the manner in which their execution will be conducted. Both the nature of these challenges and procedural hurdles enacted by Congress to regulate them frequently give rise to *ex parte* proceedings in the federal courts. The familiar petition for a writ of habeas corpus, for example, displays some non-contentious features.¹⁵⁷ Although the prisoner obviously has an interest adverse to the interest of the custodian detaining him, petitions for habeas corpus begin in an *ex parte* manner, and a court hearing the petition may reject it even before demanding that the custodian file a return to the writ specifying the cause of confine-

152. See Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (codified as amended at 18 U.S.C. § 6003 (2012)). For an overview and criticism of the 1970 law, see Sosnov, *supra* note 150, at 182-205.

153. Dixon emphasizes the fact of party agreement in the immunity cases, noting that the parties often both agree about the need for the testimony and the wisdom of immunity. Dixon, *supra* note 151, at 529-30 (describing the court's role as reduced to "ratifying the government's request for an immunity order").

154. See, e.g., *id.* at 531-32 (arguing that a judicial immunity order cannot be a "case" under the Constitution); Rogge, *supra* note 151, at 127, 132-33 (characterizing the act as imposing a "nonjudicial function" on the courts in violation of Article III); Comment, *supra* note 151, at 671 (criticizing the judicial role on separation-of-powers grounds).

155. 350 U.S. 422, 434 (1956).

156. *Id.* at 440 (Douglas, J., dissenting).

157. Habeas corpus, a judicial mode of securing a test of the legality of current detention, is implied in the Constitution's Suspension Clause, see U.S. CONST. art. I, § 9, cl. 2, and was incorporated into the practice of the state and federal courts. See Pfander, *supra* note 57, at 1443-44 & 1444 n.42. On habeas corpus in Britain, see PAUL D. HALLIDAY, *HABEAS CORPUS: FROM ENGLAND TO EMPIRE* (2010).

ment.¹⁵⁸ Similarly, the Prison Litigation Reform Act of 1995¹⁵⁹ requires the federal district court to screen a complaint in a civil action in which a prisoner plaintiff is proceeding in forma pauperis and to dismiss any claim that is frivolous, malicious, fails to state a claim on which relief may be granted, or seeks monetary relief against a defendant who is immune from such relief.¹⁶⁰ Still another example is the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA),¹⁶¹ which provides that a habeas petitioner seeking to appeal from the district court's denial of habeas relief must first obtain a certificate of appealability (COA) from a "circuit justice or judge" but does not require the return of an adverse party.¹⁶²

Despite the initial absence of an adverse party in all such proceedings, federal courts are entitled to hear *ex parte* habeas applications as a prelude to the determination of the merits.¹⁶³ On appeal, however, matters grow more complex.¹⁶⁴ In *Hohn v. United States*, the petitioner sought a COA as a prelude to

158. HALLIDAY, *supra* note 157, at 39-41.

159. Pub. L. No. 104-134, §§ 801-810, 110 Stat. 1321, 1321-66 to 1321-77 (1996).

160. See 28 U.S.C. § 1915(e)(2)(B) (2012). The screening provision provides, in pertinent part: "Screening.—The court shall review, before docketing, if feasible or, in any event, as soon as practicable after docketing, a complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity." 28 U.S.C. § 1915A(a) (2012). Wright and Miller report that the district courts have complied with their screening obligation, dismissing frivolous petitions without demanding adverse presentations. See 13 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3530, at 676-82 (3d ed. 2008) [hereinafter WRIGHT & MILLER].

161. Pub. L. No. 104-132, 110 Stat. 1214. For accounts of the legislation and its impact on federal post-conviction review, see HART & WECHSLER 6th, *supra* note 21, at 1157-58.

162. 28 U.S.C. § 2253(c)(1) (2012).

163. Federal law authorizes prisoners to challenge their detention by filing applications for writs of habeas corpus. See 28 U.S.C. § 2241 (2012); see also 28 U.S.C. § 2254 (2012) (limiting relief to state prisoners held in violation of the constitution, laws, or treaties of the United States).

164. The complexity first arose in the Civil War-era case *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), a challenge to the military trial of an Indiana politician in the waning days of the Civil War. Milligan had petitioned for habeas review of his military conviction and death sentence, but the two-judge federal circuit court divided as to whether the claim had any merit and refused to issue the writ. The circuit court invoked the statute authorizing certification of such divided questions to the Supreme Court for decision. *Id.* at 5-9. Government counsel opposed the Court's power to hear such a certified question on the ground that the *ex parte* proceeding did not become a "cause" to which the certification power applied until after the writ issued and a return had been made. *Id.* at 10. The Court rejected that argument, upholding its jurisdiction and relying on its conclusion in an earlier opinion that a (similarly *ex parte*) application for a writ of prohibition, albeit in a state court, was nonetheless a "suit" within the meaning of its appellate jurisdiction. *Id.* at 110-14. In that earlier opinion, by Chief Justice Marshall, the Court explained that the term "suit" encompasses "any proceeding in a court of justice, by which an individual pursues that remedy . . . which

pursuing review of his conviction for use of a firearm in violation of federal law.¹⁶⁵ When the application was denied, he sought review in the Supreme Court.¹⁶⁶ Invoking the habeas cases and other examples, the Court ruled that his *ex parte* application for a COA was a “case” in the court of appeals within the meaning of its statutory grant of certiorari jurisdiction.¹⁶⁷

Justice Scalia wrote a vigorous dissent, anticipating in certain respects his dissent in *Windsor*. Justice Scalia viewed the application for a COA as a threshold proceeding, separate from the dispute on the merits as to the propriety of habeas relief, and he evaluated its justiciability by seeking elements of adverse-party litigation:

An application for a COA, standing alone, does not have the requisite qualities of a legal “case” under any known definition. It does not assert a grievance against anyone, does not seek remedy or redress for any legal injury, and does not even require a “party” on the other side. It is nothing more than a request for permission to seek review.¹⁶⁸

For Justice Scalia, the COA did not seek to “remedy” any harm; instead, it operated only as a “threshold procedural requirement that a petitioner must meet in order to carry his § 2255 suit to the appellate stage.”¹⁶⁹ As a result, the application for a COA did not constitute a “case” in the court of appeals within the meaning of the provision for certiorari review.¹⁷⁰

The Court’s intriguing response to Justice Scalia distinguished administrative work from judicial work. Citing *United States v. Ferreira* and *Gordon v. United States*, the Court acknowledged that it had previously refused to exercise appellate jurisdiction over decisions of lower courts that it viewed as adminis-

the law affords him.” *Weston v. City Council of Charleston*, 27 U.S. 449, 464 (1829). Subsequent cases continue to confirm that parties may appeal from the judicial denial of *ex parte* petitions for relief from detention. See *Ex parte Quirin*, 317 U.S. 1, 24 (1942).

165. 524 U.S. 236 (1998).

166. *Id.* at 240.

167. See *id.* at 241, 253. The relevant statute declares that “[c]ases in the courts of appeals” may be reviewed via certiorari. 28 U.S.C. § 1254 (2012).

168. *Hohn*, 524 U.S. at 256 (Scalia, J., dissenting). Justice Scalia’s adoption of this framework is in some tension with his conclusion in *Printz v. United States*, 521 U.S. 898, 908 n.2 (1997), that non-adverse naturalization proceedings were “purely adjudicative” in character and that the dissent was wrong to contend that such work was non-judicial. See *infra* Part IV.C.

169. *Hohn*, 524 U.S. at 258 (Scalia, J., dissenting).

170. *Id.* at 256–57.

trative or legislative, rather than judicial, in character.¹⁷¹ But petitions for COAs were different:

Decisions regarding applications for certificates of appealability, in contrast, are judicial in nature. It is typical for both parties to enter appearances and to submit briefs at appropriate times and for the court of appeals to enter a judgment and to issue a mandate at the end of the proceedings, as happened here.¹⁷²

The Court evaluated the judicial quality of COA applications in part by identifying characteristics that they share with adverse-party proceedings, such as the appearance of opposing parties and the submission of adversarial briefing. Importantly, the Court also focused in part on the extent to which COA applications call upon the court of appeals to act within the usual forms of judicial proceedings, such as by entering a judgment and issuing a mandate.¹⁷³

F. *Public and Private Dispute Resolution*

1. *Default Judgments*

Ex parte proceedings also occur in the context of the judicial resolution of disputes between adverse parties. In perhaps the most familiar example, federal courts have the power, based on longstanding practice before courts of law and

171. *Id.* at 245 (majority opinion) (citing *Gordon v. United States*, 117 U.S. 697, 702, 704 (1864); *United States v. Ferreira*, 54 U.S. (13 How.) 40, 51-52 (1851)). In both cases, the Court declined to review the determinations of legislative courts on the ground that the Supreme Court cannot review decisions of special tribunals created by the legislature and dependent on the legislature for the execution of their determinations.

172. *Id.*

173. As it did in *Hohn*, the Court recently found that an ex parte application for review of a district court order remanding a class action to state court qualified as a “case” in the Tenth Circuit for purposes of triggering the availability of its certiorari jurisdiction. See *Dart Cherokee Basin Operating Co. v. Owens*, 135 S. Ct. 547, 554-55 (2014) (application to appellate court for discretionary review was a case within the Court’s certiorari jurisdiction). Justice Thomas dissented, arguing that such an ex parte application was inconsistent with the adverse-party rule: “It does not assert a grievance against anyone, does not seek remedy or redress for any legal injury, and does not even require a ‘party’ on the other side.” *Id.* at 562 (Thomas, J., dissenting) (internal quotation marks omitted). Although the majority did not respond to Justice Thomas’s assertion, we regard the construct of non-contentious jurisdiction offered in this article as affording a complete answer: Federal question “cases” do not require adverse parties so long as the application for relief under federal law calls for the exercise of judicial judgment. See *infra* Part II.B (discussing the conclusion in *Tutun v. United States*, 270 U.S. 568 (1926), that ex parte naturalization petitions were cases within the judicial power).

equity, to enter default judgments on an ex parte basis if satisfied that the defendant has been duly served with process and that the plaintiff has a prima facie right to recover.¹⁷⁴ This practice has been codified in Rule 55 of the Federal Rules of Civil Procedure.¹⁷⁵ Rule 55 imposes some procedural safeguards, requires the district court to exercise broad inquisitorial powers to investigate the facts that bear on the proposed judgment,¹⁷⁶ and prohibits the court from entering the judgment unless the claim has been established through the submission of “evidence that satisfies the court.”¹⁷⁷ But the rule does not condition the court’s power to issue a judgment on party opposition.

174. Rule 55 was first adopted as a blend of default procedures then available in actions in law and equity. See FED. R. CIV. P. 55 advisory committee’s note (1937). In proceedings at common law, failure to respond resulted in the entry of a default judgment; courts of equity entered what were called decrees *pro confesso*. See Thomson v. Wooster, 114 U.S. 104 (1885) (describing the origin and evolution of the decree *pro confesso* and likening it to the common law practice of default); 10A WRIGHT & MILLER, *supra* note 160, § 2681, at 7. In both instances, traditional practice called for the court to investigate the amount of damages if the figure was not liquidated. *Id.* at 400. Today, as the text of the Rule confirms, a court may conduct a hearing to determine whether to enter a default judgment. See FED. R. CIV. P. 55(c). As a leading treatise explains, “The hearing is not considered a trial, but is in the nature of an inquiry before the judge.” 10A WRIGHT & MILLER, *supra* note 160 § 2688, at 58.

175. FED. R. CIV. P. 55.

176. Rule 55(b)(2) provides as follows:

- The court may conduct hearings or make referrals—preserving any federal statutory right to a jury trial—when, to enter or effectuate judgment, it needs to:
- (A) conduct an accounting;
 - (B) determine the amount of damages;
 - (C) establish the truth of any allegation by evidence; or
 - (D) investigate any other matter.

FED. R. CIV. P. 55(b)(2). In cases of default at common law, the court would issue a writ of inquiry to convene a special jury to fix the amount of damages. See JAMES OLDHAM, TRIAL BY JURY: THE SEVENTH AMENDMENT AND ANGLO-AMERICAN SPECIAL JURIES 45-79 (2006); cf. Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 452-53 (1793) (noting the availability in cases of default of a “writ of enquiry” into damages).

177. FED. R. CIV. P. 55(d); see also 10A WRIGHT & MILLER, *supra* note 160, § 2702, at 184 (reading Rule 55 to preclude procedural defaults and to require “in all cases” that the claims must be proven on a prima facie basis). Courts sometimes refer to the assessment of damages in a default case as an “inquisition of damages” to capture this investigative role. See Proceedings of the Thirty-Fifth Annual Judicial Conference of the District of Columbia Circuit, 66 F.R.D. 233, 306 (1974) (recounting the magistrate’s role in conducting “damage inquisition hearings” in cases of default); Paul H. Aloe, *Civil Practice*, 60 SYRACUSE L. REV. 717, 730-31 (2010) (noting the use of an “inquest to determine damages” following entry of default); see also Thomson, 114 U.S. at 113 (explaining that “a decree *pro confesso* is not a decree as of course according to the prayer of the bill, nor merely such as the complainant chooses to take it; but that it is made (or should be made) by the court, according to what is proper to be decreed upon the statements of the bill, assumed to be true”).

2. *Uncontested Equity Receiverships*

In the latter part of the nineteenth century, with no federal bankruptcy law in place until 1898, railroads and their creditors often turned to the equity receivership to restructure their affairs.¹⁷⁸ In theory, the receivership was designed to protect the interests of creditors who could not otherwise enforce and collect their debts.¹⁷⁹ In practice, the railroads themselves often welcomed the initiation of a receivership to secure the stay of litigation triggered by such a proceeding and to secure an orderly administration and restructuring of their debts.¹⁸⁰

In one such proceeding, intervening parties contested the power of the federal court to entertain “friendly” receiverships.¹⁸¹ The Supreme Court found no violation of the adverse-party requirement and upheld the friendly receivership, because the party initiating the receivership had an unsatisfied demand against the railroad that was neither denied nor paid.¹⁸² That failure to pay, the Court held, was sufficient to ground the federal trial court’s jurisdiction.¹⁸³

178. See Julie A. Veach, *On Considering the Public Interest in Bankruptcy: Looking to the Railroads for Answers*, 72 IND. L.J. 1211, 1215 (1997). On the connection between bankruptcy and the stay of proceedings in connection with the initiation of an equitable receivership, see Ralph Brubaker, *An Administrative Expense Odyssey*, 29 BANKR. L. LETTER, June 2009, at 6, which explains that “[a] federal bankruptcy court’s exclusive jurisdiction and its injunctive powers go hand-in-hand” and that, “as a historical matter, the very concept of an automatic stay of ancillary proceedings was founded upon general principles of exclusive in rem jurisdiction.” See also *In re Tyler*, 149 U.S. 164, 181 (1893) (recognizing the role of the federal receivership court in controlling the degree to which other courts may entertain claims upon property in the custody of the court); *People’s Bank v. Calhoun*, 102 U.S. 256, 261-62 (1880) (same). For an argument that such stays complied with the requirements of the federal Anti-Injunction Act, see James E. Pfander & Nassim Nazemi, *The Anti-Injunction Act and the Problem of Federal-State Jurisdictional Overlap*, 92 TEX. L. REV. 1 (2013), which argues that federal law blocked only original applications to stay state court proceedings and left federal courts free to grant ancillary injunctive relief in receivership and other equitable proceedings where they first obtained jurisdiction over the dispute and the property at stake.

179. See, e.g., Douglas G. Baird & Robert K. Rasmussen, *Control Rights, Priority Rights, and the Conceptual Foundations of Corporate Reorganizations*, 87 VA. L. REV. 921, 930 (2001).

180. See Veach, *supra* note 178, at 1215-16.

181. As the Court explained, “[I]t is insisted now that there was no dispute or controversy in that case within the meaning of the [diversity] statute, because the defendant admitted the indebtedness and the other allegations of the bill of complaint, and consented to and united in the application for the appointment of receivers.” *In re Metro. Ry. Receivership*, 208 U.S. 90, 107 (1908).

182. *Id.*

183. *Id.* at 108; see also *Pope v. United States*, 323 U.S. 1, 11 (1944) (“When a plaintiff brings suit to enforce a legal obligation it is not any the less a case or controversy upon which a court possessing the federal judicial power may rightly give judgment, because the plaintiff’s

3. *Consent Decrees*

The Supreme Court also has found that the lower federal courts have the power to enter consent decrees.¹⁸⁴ Typically, consent decrees represent the negotiated resolution of a dispute between adverse parties. Unlike purely private settlements, however, the parties to a consent decree condition their agreement on the willingness of the district court to enter the decree as part of their settlement. The decree operates like an injunction. It specifies what the defendant can and cannot do, and it often provides the district court with continuing authority to oversee compliance with its terms, punishing or threatening with contempt those who fail to comply with the decree.¹⁸⁵ Although scholars have questioned the propriety of consent decrees under Article III, reasoning that the parties' agreement as to the scope of relief lacks necessary adverseness,¹⁸⁶ the Court's sanctioning of consent decrees remains undisturbed.¹⁸⁷

4. *Guilty Pleas*

Government enforcement proceedings often involve federal courts in the approval of a pre-negotiated settlement between the government and the enforcement target. Consent decrees are one example of such involvement. Plea agreements, which arose some 150 years ago as a capitulation to the demands placed on criminal dockets by mass society, are another.¹⁸⁸ Critics identify

claim is uncontested or incontestable.”); *Pac. R.R. v. Ketchum*, 101 U.S. 289 (1879) (approving the defendant's confession of judgment and the entry of judgment on the basis of stipulated facts).

184. See *Swift & Co. v. United States*, 276 U.S. 311 (1928).

185. See *Morley*, *supra* note 18, at 647-52.

186. See *id.* (expressing doubt as to the justiciability of all consent decrees, whether negotiated in advance of the filing of the lawsuit or after the litigation begins); Redish & Kastanek, *supra* note 16, at 569-70 & n.100 (accepting consent decrees that terminate litigation that was properly adversarial when initiated, but treating the Court's approval of pre-negotiated decrees in *Swift & Co.* as “aberration[al]”).

187. See *Morley*, *supra* note 18, at 666-67 (describing Supreme Court precedent upholding consent decrees but questioning the scope of these holdings).

188. On the history of plea bargaining, see GEORGE FISHER, *PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA* (2003), which describes instances of plea bargaining in nineteenth-century Massachusetts; Albert W. Alschuler, *Plea Bargaining and Its History*, 13 L. & SOC'Y REV. 211 (1979), which argues that pleas became the primary method of disposing of criminal cases after the Civil War; and George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857, 859-61 (2000).

flaws with the plea-bargaining system,¹⁸⁹ but most doubt that the criminal justice system can function in its absence.¹⁹⁰ Plea bargaining represents, in the words of federal judge Gerard Lynch, an “informal, administrative, inquisitorial process of adjudication.”¹⁹¹ In the typical case, the prosecutor and the defendant have agreed in advance on the sentence or its parameters in exchange for the defendant’s agreement to plead guilty to a particular offense.¹⁹² Needless to say, most guilty pleas do not occasion any adversary presentation to the court; both the prosecutor and the defense seek substantially the same disposition. But the agreement alone does not suffice to ensure the effectiveness of the plea bargain; the court must go along.¹⁹³ Thus, the agreement will not be effective unless the district court first conducts a colloquy with the defendant to ensure that the plea and associated waiver of constitutional rights were knowing and voluntary, enters a judgment of conviction on the basis of the plea, and agrees to impose a sentence consistent with the plea agreement and the sentencing guidelines.¹⁹⁴

5. *Crime Victims’ Rights*

Under the Crime Victims’ Rights Act, victims of federal crimes are afforded certain rights during criminal proceedings and may assert or enforce those rights through non-contentious proceedings.¹⁹⁵ The statute declares that a crime victim or his representative may assert his rights by motion to the district court and further provides that, upon the denial of such motion, the victim

189. Indeed, the Court has expressed a growing willingness to police the fairness of plea bargaining by insisting on effective assistance of counsel at that stage of the process. *See, e.g.,* *Misouri v. Frye*, 132 S. Ct. 1399 (2012); *Lafler v. Cooper*, 132 S. Ct. 1376 (2012).

190. *See Padilla v. Kentucky*, 559 U.S. 356, 372-73 (2010) (noting that plea bargaining accounts for some ninety-five percent of the criminal matters closed in the courts of the United States).

191. Lynch, *supra* note 25, at 1404; *see also* Gerald E. Lynch, *Our Administrative System of Criminal Justice*, 66 *FORDHAM L. REV.* 2117, 2118 (1998) (arguing that, because of plea bargaining, “the American system as it actually operates in most cases looks much more like what common lawyers would describe as a non-adversarial, administrative system of justice than like the adversarial model they idealize”).

192. For a summary of the process of accepting a guilty plea and imposing sentence, *see* 5 *LAFAYETTE ET AL.*, *supra* note 122, §§ 21.3(e)-21.4, at 145-92.

193. *See id.* § 21.3(e), at 145 (emphasizing that the judge must evaluate the plea bargain but does not have to accept its terms).

194. *See id.* §§ 21.4(a)-(e), 21.4(g).

195. *See* 18 U.S.C. § 3771(a) (2012) (conferring such rights as those to be notified of court proceedings, to be heard at public proceedings, to be treated with dignity and respect, and to confer with the government’s attorney).

may petition for a writ of mandamus in the court of appeals.¹⁹⁶ The statute does not call for the person claiming to be a victim to name an opposing party in the motion, and although the victim's status or the extent of the rights to which he is entitled might be contested by a target of the criminal proceedings or even the government,¹⁹⁷ the statute does not predicate the judicial role on the existence of a controversy.

6. *Class-Action Settlements*

Under Rule 23(e) of the Federal Rules of Civil Procedure, the district court must oversee and approve the terms of the settlement of any certified class action.¹⁹⁸ Settlement approval protocols have grown increasingly elaborate, as courts have come to recognize the threat that an inadequate settlement can pose to the interests of absentees.¹⁹⁹ In addition to the judicial role in approving the settlement of certified class actions, courts sometimes agree to entertain what have come to be known as "settlement class actions," disputes that were resolved by party agreement before any litigation had been instigated.²⁰⁰ When

196. See 18 U.S.C. § 3771(d) (2012).

197. See Erin C. Blondel, Note, *Victims' Rights in an Adversary System*, 58 DUKE L.J. 237, 260-62 (2008).

198. See FED. R. CIV. P. 23(e).

199. Following certification and the associated finding that members of the class will be adequately represented by the named plaintiff and class counsel, counsel has presumptive authority to settle the case for the class as a whole. Scholars have raised important doubts as to just how adequate in fact this representation often proves to be. See, e.g., Susan P. Koniak, *Feasting While the Widow Weeps: Georgine v. AmChem Products, Inc.*, 80 CORNELL L. REV. 1045 (1995). These doubts have spawned a variety of proposals, including proposals for an invigorated protection of the due process rights of individual litigants, see Martin H. Redish, *Class Actions, Litigant Autonomy, and the Foundations of Procedural Due Process*, 95 CALIF. L. REV. 1573 (2007); for the encouragement of opt-out guarantees, see Alan Morrison & Brian Wolfman, *What the Shutts Opt-Out Right Is and What It Ought To Be*, 74 U.M.K.C. L. REV. 729 (2006); and for the imposition of limits on the preclusive effect of class settlements on absentees, see Henry P. Monaghan, *Antisuit Injunctions and Preclusion Against Absent Nonresident Class Members*, 98 COLUM. L. REV. 1148 (1998). In 2003, the Rules were amended to require the district court to hold a hearing and approve the settlement only if the court is satisfied that the settlement is "fair, reasonable, and adequate." See FED. R. CIV. P. 23(e)(1)(C). For an overview of the 2003 amendments to the Rules, see 7A WRIGHT & MILLER, *supra* note 160, § 1753.1, at 52-54. Some additional protections were added, at least in connection with inter-state class actions based on state law, in the Class Action Fairness Act of 2005. See 28 U.S.C. § 1718 (2012). See generally Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439 (2008) (providing an overview of the Class Action Fairness Act).

200. See 7B WRIGHT & MILLER, *supra* note 160, § 1797.2, at 149-59 (describing settlement class action practice).

the parties agree, they may simultaneously file a complaint and a proposed settlement, inviting the court to approve a resolution of the claims on terms upon which they have previously agreed.²⁰¹ Such settlement class actions pose well-known threats of collusion and self-dealing, frequently advancing “only the interests of plaintiffs’ attorneys, not those of the class members.”²⁰²

Apart from the threat to the due process rights of individual litigants, such settlement class actions have been described as violating Article III’s adverse-party requirement.²⁰³ Redish and Kastanek draw a sharp line between pre-certification agreements in such settlement class actions and more “traditional” post-certification settlements.²⁰⁴ They defend the judicial role in post-certification settlements on the ground that the federal courts enjoy ancillary power to dispose of a whole case following a settlement that renders the claims in the case non-justiciable.²⁰⁵ However, they condemn settlement class actions because the parties commence proceedings only to seek judicial approval of a pre-arranged agreement and therefore have no adverse interests giving rise to a justiciable controversy.²⁰⁶

7. *Letters Rogatory*

Federal courts often play an *ex parte* role when parties to a foreign proceeding seek discovery of facts in the United States. Under longstanding international practice, parties to litigation in one country can apply through diplomatic channels for “letters rogatory” ordering the collection of evidence in another country.²⁰⁷ Today, many such evidentiary requests are handled through the

201. Although the Court refused to approve the pre-packaged settlement of asbestos claims in the well-known case of *AmChem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), it also refrained from articulating a *per se* prohibition of settlement classes in that case.

202. John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1348 (1995).

203. See Redish & Kastanek, *supra* note 16, at 547, 563, 588-89, 614-15.

204. *Id.* at 590.

205. *Id.* (citing *U.S. Bancorp Mortgage Co. v. Bonner Mall P’ship*, 513 U.S. 18 (1994)). We employ an adaptation of this conception of ancillary power in explaining certain forms of non-contentious jurisdiction in Part IV.

206. *Id.* at 590.

207. Letters rogatory, or letters of request, have deep roots in civil-law practice. For an overview of historic practice with respect to letters rogatory, see ANDREAS F. LOWENFELD, *INTERNATIONAL LITIGATION AND ARBITRATION* 1016-18 (3d ed. 2006), which describes the process by which a request was forwarded through diplomatic channels to the ministry of justice for ultimate execution in the courts of the country where the evidence was located. See also Harry Leroy Jones, *International Judicial Assistance: Procedural Chaos and a Program for Reform*, 62 YALE L.J. 515 (1953) (offering a critical overview of the procedure that governed in the Unit-

Hague Evidence Convention, which the United States joined as an original signatory.²⁰⁸ The Convention directs such requests to a country's designated "Central Authority" for submission to the proper court.²⁰⁹ The application to a court of the United States for letters rogatory typically proceeds on an ex parte basis and may or may not lead to litigation, depending on the target's response to the discovery request.²¹⁰ If the district court agrees with the evidentiary request, it will typically appoint a commissioner to take the deposition or collect the evidence.²¹¹ While the target's opposition to the discovery in any particular case can certainly create a measure of adverseness, many ex parte applications for letters rogatory proceed without any contest.²¹²

II. SCHOLARLY REACTIONS TO EX PARTE AND NON-CONTENTIOUS PROCEEDINGS

Existing scholarship on the adverse-party requirement has yet to confront the widespread appearance of ex parte and non-contentious proceedings on the dockets of the federal courts. Nor has it come to grips with the consistent line

ed States before 28 U.S.C. § 1782, the statutory provision that governs federal practice, was updated in 1964); Hans Smit, *International Litigation Under the United States Code*, 65 COLUM. L. REV. 1015, 1026-35 (1965) (describing the updated 28 U.S.C. § 1782). For an account of current practice, see Walter B. Stahr, *Discovery Under 28 U.S.C. § 1782 for Foreign and International Proceedings*, 30 VA. J. INT'L L. 597 (1990).

208. See Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Mar. 1-July 27, 1970, 23 U.S.T. 2555, 847 U.N.T.S. 231; cf. *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court*, 482 U.S. 522, 530 (1987) (holding that the Hague Evidence Convention does not provide an exclusive means of discovery, thereby leaving open the possibility that courts in the United States can compel discovery by a foreign party over which they have obtained personal jurisdiction). See generally LOWENFELD, *supra* note 207, at 1018 (describing practice under the Hague Convention); Harold G. Maier, *Extraterritorial Discovery: Cooperation, Coercion and the Hague Evidence Convention*, 19 VAND. J. TRANSNAT'L L. 239 (1986) (same).

209. Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *supra* note 208, at art. II.

210. Consider the description of the process in one apparently representative case. A criminal investigation in London of corporate misconduct had targeted an individual living in the United States. Scotland Yard initiated a request for letters rogatory, which worked its way through diplomatic channels to the Department of Justice. There, an attorney applied to the United States District Court for the District of Columbia on an ex parte basis for an order authorizing discovery from a witness. The district court's order, in turn, named a Justice Department attorney as commissioner to take the evidence. The target objected, moving to quash the application on various statutory grounds. See *In re Letter of Request from the Crown Prosecution Serv.*, 870 F.2d 686 (D.C. Cir. 1989).

211. See 28 U.S.C. § 1782(a) (2012); Stahr, *supra* note 207, at 627.

212. See Stahr, *supra* note 207, at 627-30.

of Supreme Court decisions upholding such assignments. Of those few commentators who have encountered an instance of non-contentious practice and have identified a potential justiciability problem with the practice, some simply have denied the legitimacy of the exception, viewing it as a violation of the adverse-party or case-or-controversy requirements;²¹³ others have dismissed the practice as an isolated departure or one that lies beyond the scope of their specific project.²¹⁴ We consider arguments against the legitimacy of non-contentious proceedings in later sections of this Article. In this Part, we critically evaluate prior attempts to fit these proceedings within the judicial power as it currently is understood.

A. *Isolated Departures and Historical Aberrations*

Scholarly treatment of *ex parte* proceedings often tends to occur in the context of an encounter with a single non-contentious practice—for example, bankruptcy or naturalization proceedings.²¹⁵ Perhaps as a result, a common response has been to treat the encounter as an isolated and insignificant departure from the courts' otherwise broad-based commitment to adverse-party proceedings.²¹⁶ Apart from the fact that such an approach is unsatisfying from a doctrinal perspective, the rather lengthy catalog of *ex parte* matters in Part I makes the argument from isolated aberration difficult to sustain. These matters are neither isolated nor considered aberrations in the unbroken line of cases upholding them. The denial practiced by scholars does little to explain the existence of non-contentious proceedings.

Another common response to encounters with non-contentious proceedings has been to treat the specific practice as a vestige of an earlier day—a vestige obviously inconsistent with the adverse-party rule but perhaps too well established to overthrow.²¹⁷ One could argue, for instance, that the federal courts' role in naturalization proceedings dates from early in the nation's history and depends for its constitutionality on its pedigree rather than on its compliance

213. See, e.g., Currie, *supra* note 17, at 212-13 (characterizing mitigation as putting judges in the position of issuing advisory opinions).

214. See, e.g., Joseph W. Mead, *Interagency Litigation and Article III*, 47 GA. L. REV. 1217, 1225 (2013) (listing matters that seem inconsistent with the adversary ideal but ultimately concluding that the task of deciding if those matters can be squared with the adverse-party requirement was “beyond the scope of the article”).

215. See, e.g., Avery, *supra* note 18 (bankruptcy); Morley, *supra* note 18, at 668-69 (naturalization).

216. See, e.g., Redish & Kastanek, *supra* note 16, at 587 n.157 (arguing that “the bankruptcy scheme is a narrow exception to the adverseness requirement”).

217. See, e.g., HART & WECHSLER 6th, *supra* note 21, at 84-85.

with the demands of Article III.²¹⁸ The instinct that underlies this strategy may be sound: an early practice, consistently followed, can claim respect as liquidating or fixing the meaning of Article III. For example, the Court cited historical pedigree in upholding *qui tam* relator actions, despite the fact that a relator prosecuting the claim on the government's behalf was said to lack standing in his own right.²¹⁹

With respect to non-contentious proceedings, however, the practices “grandfathered” occupy such a broad swath of judicial business that they raise a fundamental question about the soundness of the adverse-party requirement. If the Constitution really does embody such a requirement, then why were the Framers and others in the early Republic apparently so untroubled by the widespread exercise of jurisdiction in non-contentious matters in their federal courts, and why did the First Congress assign, apparently without concern, such matters to the courts’ dockets? Also, how can grandfathering explain the consistent appearance of non-contentious business on federal court dockets in new manifestations today, such as the relatively recent creation of the FISA court and the provision for trademark seizure proceedings? Resolving these questions requires more than indulgence; it requires a coherent, possibly separate, classification for non-contentious proceedings and perhaps a fundamental rethinking of prevailing views of federal judicial power.

B. *Tutun v. United States and the Possible Adversary Theory*

Some scholars attempt to explain non-contentious proceedings by drawing on what has come to be known as the “possible adversary” theory supposedly outlined in *Tutun v. United States*.²²⁰ Under the possible adversary theory, the prospect of eventual adverse-party litigation in the future can justify the exercise of jurisdiction without an adverse party in the present.²²¹ In *Tutun*, two cir-

218. See Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 458 n.309 (1996) (describing *Tutun v. United States*, 270 U.S. 568 (1926), as a case in which Justice “Brandeis deferred to longstanding precedent that conflicted with the modern idea that Article III courts can act only if presented with an adversarial dispute”).

219. *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765 (2000).

220. 270 U.S. 568 (1926).

221. For example, Russell Wheeler has suggested that while naturalization proceedings were not proper cases or controversies in the early Republic, the addition of the United States as a possible “adverse party” in 1906 (something that “did not exist in the earlier acts”) gave proceedings the adversarial quality necessary to bring them within the ambit of Article III. Wheeler, *supra* note 17, at 134 & n.61. See also *Johannessen v. United States*, 225 U.S. 227, 236-37 (1912) (describing the Naturalization Act of 1906 and explaining that no provision

cuit courts certified to the Supreme Court the question of whether they could exercise jurisdiction over appeals of district court denials of naturalization petitions.²²² Justice Brandeis, writing for the Court, held that naturalization proceedings are proper exercises of the judicial power despite the lack of concrete adverseness until (and unless) naturalization is denied and the question goes up on appeal. In a stray statement from the decision, Justice Brandeis hypothesized that one ground for upholding such proceedings was that the federal government remained a potentially adverse party that might intervene to contest the petition if it so chose.²²³

One finds the idea of a possible adversary expressed in a variety of contexts, as scholars have deployed this theory to address a surprisingly wide range of justiciability problems.²²⁴ Some scholars have invoked the possible adversary theory to explain the many uncontested matters that find their way onto the dockets of the bankruptcy courts.²²⁵ Others have invoked it to explain the willingness of federal courts to entertain *ex parte* warrant applications, arguing that the warrant issues in the shadow of a criminal investigation that may lead to criminal charges in which the target of the warrant can presumably test its legality.²²⁶ Running with this notion, some scholars have explored the relevance of the possible adversary theory to *ex parte* FISA warrant practice.²²⁷ (FISA warrants rarely lead to criminal proceedings, however, making “razor

for government participation in the proceeding had been part of the law “as it formerly stood”).

222. 270 U.S. at 580.

223. *Id.* at 577.

224. For scholars who treat the possible adversary theory as central to *Tutun*, see David P. Currie, *The Constitution in the Supreme Court, 1921-1930*, 1986 DUKE L.J. 65, 122 (treating the possible adversary theory as central to *Tutun* and criticizing the conclusion that it was sufficient for Article III purposes to show that the government “might” oppose the petition); and Maeva Marcus & Robert Teir, *Hayburn’s Case: A Misinterpretation of Precedent*, 1988 WIS. L. REV. 527, 542 (suggesting that *Tutun* upheld naturalization proceedings as cases or controversies after finding that the government was available as a possible adverse party).

225. See Thomas Galligan, Jr., *Article III and the “Related to” Bankruptcy Jurisdiction: A Case Study in Protective Jurisdiction*, 11 U. PUGET SOUND L. REV. 1, 39-40 n.145 (1987) (analogizing bankruptcy to the possible adversary theory of *Tutun*). For a critique of Galligan’s approach, see Avery, *supra* note 18, at 417-18 n.137.

226. See Redish & Kastanek, *supra* note 16, at 587 n.157.

227. For a standard dismissal of Article III concerns with the *ex parte* proceedings in FISA courts, see David J. Barron & Martin S. Lederman, *The Commander-in-Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941, 1106 n.663 (2008) (reasoning that the FISC “is adjudicating a proceeding in which the target of the surveillance is the party adverse to the government” and collecting authorities upholding the power of Article III FISA courts to entertain *ex parte* applications for warrants to conduct foreign intelligence surveillance).

thin” the fiction that their issuance may result in an adversary proceeding.)²²⁸ Others suggest that Congress should address the absence of any possible adversary by authorizing an after-the-fact suit for damages in which targets of certain FISA warrants could contest their legality.²²⁹ Indeed, a similar justification for the exercise of jurisdiction could be offered in prize cases heard in admiralty; the seized ship’s owner, captain, or crew could potentially (and sometimes did) appear to contest condemnation of the prize.²³⁰ One might also use the possible adversary theory to explain federal court jurisdiction over remission petitions, trademark seizure orders, and the issuance of administrative subpoenas, among others.²³¹

The possible adversary theory has some appeal in that it offers a means of reconciling the adverse-party requirement with the reality of non-contentious practice, but it cannot bear the weight that scholars have placed upon it. To begin with, whatever the theory’s appeal in the isolated context of certain ex parte proceedings, it is difficult to square with other elements of justiciability doctrine. Under bedrock justiciability principles, only ripe disputes between concretely interested parties can invoke the machinery of the federal judiciary. Indeed, in one of the Court’s more recent standing decisions, *Clapper v. Amnesty International USA*, the Court reiterated that “threatened injury must be *certainly impending* to constitute injury in fact” and that “[a]llegations of *possible* future injury” will not suffice.²³² Ripeness decisions point in the same direction, rejecting the idea that the possibility of a future disagreement can provide a sufficient basis for the invocation of the judicial power.²³³ If these proclama-

228. Jennifer C. Daskal, *The Geography of the Battlefield: A Framework for Detention and Targeting Outside the “Hot” Conflict Zone*, 161 U. PA. L. REV. 1165, 1224 n.187 (2013) (quoting *Drones and the War on Terror: When Can the U.S. Target Alleged American Terrorists Overseas?: Hearing Before the H. Comm. on the Judiciary*, 113th Cong. 31 (2013) (written statement of Robert Chesney, Professor, Univ. of Tex. Law Sch.), http://judiciary.house.gov/_files/hearings/printers/113th/113-2_79585.pdf [<http://perma.cc/MYC3-FRNT>]) (observing that the possibility that a FISC warrant will ultimately be contested in an adversarial hearing is little more than a “razor-thin legal fiction”). For background on FISA warrant applications, see Note, *supra* note 3, at 2202-04.

229. Daskal, *supra* note 228, at 1224 n.187 (suggesting that “[t]o the extent that this fiction [the possibility of future adversary proceedings] is deemed key, it could be dealt with by creating an after-the-fact damages remedy and allowing litigants to contest the initial authorization during that process”).

230. See *supra* Part I.B.1.

231. See *supra* Parts I.A.3, I.B.2, I.D.3.

232. *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138, 1147 (2013) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)).

233. See *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128 n.8 (2007) (requiring a sufficiently immediate injury for there to be an actual controversy compelling immediate relief);

tions hold, then hypothetical future adverseness cannot solve an actual justiciability problem in a pending case any more than the prospect of hypothetical future injury can confer standing and ripeness in a case where they are lacking.²³⁴ This is particularly true where the possibility of future appearance by an adverse party is, as in FISA proceedings, little more than speculative.²³⁵

Moreover, the prospect of a future adverse party does little to assuage the concerns that underlie the adverse-party requirement. Hypothetical adverseness does not improve the quality of the record presented to the court, and it does not allow for a balanced presentation of factual or legal propositions; nor does it prevent a court from deciding issues that could compromise the rights of third parties or from interfering with the prerogatives of the political branches of the government.²³⁶ And where an adverse party does not appear (a frequent outcome, as we have seen),²³⁷ these problems will persist. It thus is difficult to perceive how the hypothecation of a possible future adversary can offer a plausible justification for non-contentious federal court proceedings.

Apart from questioning the coherence of the possible adversary theory, we have serious doubts that *Tutun* actually endorsed such a theory. In hearing *Tutun*, the Court resolved a division in the lower courts as to whether a district court order adjudicating a petition of naturalization was subject to appellate review.²³⁸ The relevant statute empowered the federal appellate courts to hear

F. Andrew Hessick, *Probabilistic Standing*, 106 NW. U. L. REV. 55 (2012) (arguing that probabilistic injuries should be regarded as satisfying the standing requirement).

234. An intriguing opinion from the Office of Legal Counsel (OLC), rendered in connection with the 1978 adoption of a FISA warrant process, points to the same conclusion. See Memorandum from John M. Harmon, Assistant Att’y Gen., Office of Legal Counsel, to Hon. Edward P. Boland, Chairman, House Permanent Select Comm. on Intelligence (Apr. 18, 1978), in *Foreign Intelligence Electronic Surveillance: Hearings on H.R. 5794, H.R. 9745, H.R. 7308, and H.R. 5632 Before the Subcomm. on Legis. of the H. Permanent Select Comm. on Intelligence*, 95th Cong. 26-31 (1978) (arguing that the prospect of adversity cannot supply the sort of live dispute that justiciability doctrine requires). The OLC nonetheless concluded that FISA warrants were proper subjects for judicial cognizance by analogy to warrants issued in other settings, arguing that the “adversity in fact” between the government and the surveillance target sufficed to make the case justiciable. *Id.* at 28.

235. See *supra* note 228 and accompanying text.

236. Cf. Redish & Kastanek, *supra* note 16, at 571-73 (describing the virtues of an adversary system).

237. See, e.g., *supra* notes 92-103 and accompanying text (discussing the frequent non-appearance of adverse parties in prize, salvage, and trademark seizure proceedings).

238. *Tutun* arose on appeal from a district court decision refusing to grant an application for naturalized citizenship. The government took the position that naturalization proceedings were not “cases” within the statute conferring appellate jurisdiction over “final decisions” in “all cases” in the district court. See Brief of the United States at 9, *Tutun v. United States*, 270 U.S. 568 (1926) (No. 762); *id.* at 16-17 (acknowledging that naturalization proceedings were

appeals from final decisions in “all cases.”²³⁹ Rather than limit its analysis to the narrow question of the proper interpretation of that phrase, Justice Brandeis’s opinion tackled the more fundamental issue of Article III authority.²⁴⁰ In doing so, Justice Brandeis adverted to the fact that the congressional practice of assigning naturalization proceedings to the federal courts had begun in the 1790s and had never been questioned.²⁴¹ What’s more, Justice Brandeis noted, “[i]f the proceeding were not a case or controversy within the meaning of Art[icle] III, § 2, this delegation of power upon the courts would have been invalid.”²⁴² The accompanying citation of authority suggests that Justice Brandeis saw no problem with the practice in question under the finality requirement of *Hayburn’s Case* or under the non-advisory rule stated in *The Correspondence of the Justices*²⁴³ and applied in *Muskrat v. United States*.²⁴⁴ Indeed, he recited two possible obstacles to finality—the prospect of a second petition following the denial of the first and the prospect of a suit by the government to cancel a cer-

“cases” within “the legitimate scope of the judicial power,” but arguing that they were not “cases” within the meaning of the statute conferring appellate jurisdiction). It was this contention that Justice Brandeis rejected, see *Tutun*, 270 U.S. at 578-79, although he spent much of his opinion discussing in more general terms the nature of Congress’s power to assign naturalization proceedings to the federal courts. See *id.* at 576-78. The government specifically distinguished between the inquisitorial mode of naturalization and the adversarial mode of actions to cancel a naturalization certificate, arguing that only the latter were cases within the appellate jurisdiction. As the government’s brief explained, in many naturalization proceedings, no appearance is entered to oppose the petition and the court must make its own assessment of such factors as “demeanor, frankness, and intelligence.” Brief of the United States, *supra*, at 17. The government distinguished such non-contentious matters from actions to cancel a certificate of naturalization, which it viewed as “cases” in every sense of the word. In an unconscious echo of Justice Story’s discussion of prize litigation, see *infra* note 248, the government explained that hearings on “petitions for naturalization, on the other hand, follow a procedure which is altogether different.” Brief of the United States, *supra*, at 25. In rejecting the government’s view, in short, the Court squarely rejected the argument that cases required an adverse party.

239. *Tutun*, 270 U.S. at 579.

240. Thus, Justice Brandeis acknowledged that the statutory definition of a case for purposes of appellate review might well be narrower than its meaning in other contexts. *Id.* at 579. But reading the encompassing reference to “all cases” in context, Justice Brandeis found no intention on Congress’s part to limit appellate review of matters that were “cases” in the constitutional sense at the district court level. See *id.*

241. *Id.* at 576.

242. *Id.*

243. Letter from Justices of the Supreme Court to George Washington (Aug. 8, 1793), in 6 DHSC, *supra* note 56, at 755.

244. See *Tutun*, 270 U.S. at 576 (citing *Muskrat v. United States*, 219 U.S. 346 (1911), and *Hayburn’s Case*, 2 U.S. (2 Dall.) 409 (1792)).

tificate of citizenship—but concluded that an order granting or denying a petition for naturalization is “clearly a final decision.”²⁴⁵

Next, Justice Brandeis considered arguments that the practice of naturalization was essentially an administrative action and thus unfit for judicial cognizance. In evaluating the nature of the proceeding, Justice Brandeis explained that citizenship under the naturalization law was no mere privilege:

The applicant for citizenship, like other suitors who institute proceedings in a court of justice to secure the determination of an asserted right, must allege in his petition the fulfillment of all conditions upon the existence of which the alleged right is made dependent; and he must establish these allegations by competent evidence to the satisfaction of the court. In passing upon the application the court exercises judicial judgment. It does not confer or withhold a favor.²⁴⁶

For Justice Brandeis, then, the key to the case-like quality of the proceeding lay in the asserted claim of right and the exercise of judicial judgment in determining if the requisite showing had been made—a formulation that, we later will see, has important implications for understanding other instances of non-contentious practice.²⁴⁷ Instead of discussing the need for adversary presenta-

245. See *id.* The Hart & Wechsler casebook acknowledges the threat to finality posed by proceedings to re-open a naturalization order, but it distinguishes the kind of executive branch revision rejected in *Hayburn's Case* from motions to re-open that the parties address to the courts themselves. See HART & WECHSLER 6th, *supra* note 21, at 85-94. Read in this context, Justice Brandeis's reference to *Hayburn's Case* likely means little more than that the early Court called attention to constitutional finality problems when they appeared and had not done so in connection with naturalization. Cf. Marcus & Teir, *supra* note 224, at 542 (reading Justice Brandeis as invoking a case-or-controversy interpretation of *Hayburn's Case*). Scholars have contrasted the early Court's negative reaction to pension claims with its apparent indifference to naturalization proceedings. See, e.g., David Currie, *The Constitution in the Supreme Court: 1789-1801*, 48 U. CHI. L. REV. 819, 822-23 (1981) (arguing that, while the absence of a defendant may have been a factor in *Hayburn's Case*, the naturalization example, as confirmed in *Tutun*, points in the opposite direction).

246. *Tutun*, 270 U.S. at 578 (citations omitted).

247. Although the federal government's administrative infrastructure was not as well-developed as it is today, Congress still had administrative structures other than the courts available: it could assign administration of naturalization petitions to the marshals (as it assigned responsibility for administering the census in the Census Act of 1790, § 1, 1 Stat. 101) or to the clerks of the district courts (as it did for registering copyrights in the Copyright Act of 1790). Its choice of personnel may have reflected its considered view of the nature of the judgment required. In the Copyright Act, which was adopted by the same Congress that enacted the Naturalization Act of 1790, Congress directed parties seeking a copyright to lodge copies of the work with the “clerk” of the district court (rather than with the judge of the court or the court itself). See Copyright Act of 1790, § 3, 1 Stat. 125. The Act stated in per-

tion of issues, Justice Brandeis emphasized the obligations of the court: to conduct open proceedings, to examine the petitioner and witnesses under oath, and to enter a judgment. Plainly, then, he expected the court to perform the searching inquiry that we associate with inquisitorial proceedings.²⁴⁸

Justice Brandeis reasoned that Congress has broad discretion in structuring the assertion of administrative claims against the United States. According to the Justice, the United States may “create rights in individuals against itself and provide only an administrative remedy.”²⁴⁹ Or it may provide a legal (that is, judicial) remedy, but require that individuals first exhaust administrative remedies.²⁵⁰ Or it may create both administrative and legal remedies and give the individual a choice of which to pursue.²⁵¹ Or it may “provide only a remedy” in federal court.²⁵² Justice Brandeis held that when Congress chooses the last of these paths by creating a regular mode of procedure, and when the individual invokes the established procedure in pursuit of a claim of right, “there arises a case within the meaning of the Constitution.”²⁵³ A petition for naturalization, Justice Brandeis concluded, “is clearly a proceeding of that character.”²⁵⁴

It seems odd that the animating feature of Justice Brandeis’s opinion – that when Congress so provides, *ex parte* administrative claims qualify as cases within the meaning of Article III – has largely disappeared from view. That disappearance is all the more startling when one considers that Justice Brandeis was among the leading architects of the Court’s justiciability doctrines and had

empty terms that the “clerk of such court is hereby directed and required to record the same forthwith, in a book to be kept by him for that purpose.” *Id.*

248. In this, Justice Brandeis also echoed Justice Story, but reached a different conclusion than did the government. Justice Story understood that the procedures used in prize litigation were “modelled upon the civil law” and could not be “more unlike than those in the Courts of common law.” See Arlyck, *supra* note 87, at 265 n.81 (quoting Justice Story’s opinion in *The Adeline*, 13 U.S. (9 Cranch) 244, 284 (1815)). Accordingly, Justice Story explained that it was simply not necessary “that the adverse parties should be before the court” in a prize proceeding. Arlyck, *supra* note 87, at 265 (quoting Justice Story’s notes on practice in prize cases). Party adverseness was unnecessary because the court itself acted as the “general guardian of all interests which are brought to its notice.” *Id.* (quoting Justice Story’s account of prize procedure); see also *id.* at 265 n.81 (quoting Justice Story’s opinion in *The Adeline*, 13 U.S. (9 Cranch) at 284). One can scarcely find a clearer articulation of the inquisitorial role of a federal court in hearing uncontested matters in the exercise of its non-contentious jurisdiction.

249. *Tutun*, 270 U.S. at 576.

250. *Id.* at 576–77.

251. *Id.* at 577.

252. *Id.*

253. *Id.*

254. *Id.*

insisted in other contexts on the importance of adverse parties.²⁵⁵ One might suppose that Justice Brandeis's reputation as an adverse-party hawk would lend greater authority to his acceptance in *Tutun* of ex parte proceedings. But this has not been the case. Instead, scholars have tended to pigeonhole *Tutun* as a decision that stands for a proposition less sweeping and potentially unsettling than the one Brandeis articulated. As we have noted, some point to the fact that Justice Brandeis also invoked the lessons of history, adverting to the longstanding practice of naturalizing citizens as one that had never been questioned.²⁵⁶ And many, as we have seen, treat *Tutun* as a potential adversary case.

But that reading is not persuasive. Although the potential adversary language had appeared earlier in *Muskkrat*, Justice Brandeis did not suggest that *Muskkrat* controlled, and he did not suggest that his characterization of naturalization proceedings as "cases" turned on the possibility that an opponent might appear. Nor did he explain how much potential adverseness was enough or indicate that the actual appearance of the United States was necessary to bring the matter within the judicial power.²⁵⁷ Justice Brandeis also did not contend that the congressional creation of a potential role for the United States was essential to make Tutun's claim a case; after all, the history of naturalization to which Justice Brandeis referred did not feature an adversary, potential or otherwise. To be sure, beginning in 1906, applications for citizenship were to un-

255. See Pushaw, *supra* note 218, at 458 & n.309.

256. For the view that Justice Brandeis was simply respecting history—even history at odds with his vision—see *id.* at 458 n.309.

257. Justice Brandeis's discussion bearing on this point is as follows:

The petitioner's claim is one arising under the Constitution and laws of the United States. The claim is presented to the court in such a form that the judicial power is capable of acting upon it. The proceeding is instituted and is conducted throughout according to the regular course of judicial procedure. The United States is always a possible adverse party. By section 11 of the Naturalization Act the full rights of a litigant are expressly reserved to it. Its contentions are submitted to the court for adjudication. Section 9 provides that every final hearing must be held in open court; that upon such hearing the applicant and witnesses shall be examined under oath before the court and in its presence; and that every final order must be made under the hand of the court and shall be entered in full upon the record. The judgment entered, like other judgments of a court of record, is accepted as complete evidence of its own validity unless set aside. It may not be collaterally attacked. If a certificate is procured when the prescribed qualifications have no existence in fact, it may be canceled by suit. It is in this respect . . . closely analogous to a public grant of land, or of the exclusive right to make, use and vend a new and useful invention.

Tutun, 270 U.S. at 577-78 (quotation marks and internal citations omitted).

dergo relatively searching review.²⁵⁸ In addition to the use of hearings at which the court took testimony from the applicant and witnesses,²⁵⁹ the government could contest naturalization, both before and after the issuance of the certificate.²⁶⁰ But before 1906, the various congressional enactments defining the role of courts in naturalization never provided for intervention by the United States or any other party to contest the petitioner's application.²⁶¹ The most reasonable conclusion, therefore, is the one recognized by Henry Monaghan: that the reference to the government as a possible adverse party was not central to the Court's holding that *ex parte* naturalization proceedings are cases within Article III.²⁶²

Even if one were to ascribe a possible adversary holding to *Tutun*, that construct has done no work in subsequent cases. Although the Court has issued a series of decisions upholding *ex parte* proceedings, it has never cited the "possible adverse party" theory of *Tutun* in doing so. Rather, the Court has emphasized that the proceeding under consideration calls for the exercise of judicial judgment in resolving an issue of law or fact. That was the message in *Ullmann*, upholding the judicial power to confirm the propriety of an uncontested grant of immunity.²⁶³ It was also the message in *Hohn*, which treated *ex parte* petitions for certificates of appealability as "judicial in nature,"²⁶⁴ notwithstanding the dissent's complaint that these proceedings lacked the qualities of adverseness associated with cases.²⁶⁵ Although the Court acknowledged

258. See Naturalization Act of 1906, Pub. L. No. 59-338, § 11, 34 Stat. 596 (repealed by the Nationality Act of 1940, Pub. L. 76-853, 54 Stat. 1137).

259. On the inquisitorial nature of the judicial task in early naturalization proceedings, see *In re An Alien*, 7 Hill 137 (N.Y. Sup. Ct. 1845) (viewing the statute as requiring the court to satisfy itself through some form of inquiry that the applicant for citizenship had made out an appropriate case).

260. See *Tutun*, 270 U.S. at 577-78.

261. See *supra* note 53 and accompanying text.

262. See Monaghan, *supra* note 17, at 1374 n.68 (referring to the possible adversary discussion as a "makeweight"); see also Kenneth Culp Davis, *Standing: Taxpayers and Others*, 35 U. CHI. L. REV. 601, 607 (1968) ("From the beginning, federal courts have performed many functions in addition to deciding 'questions presented in an adversary context.' Federal courts often decide questions of law and fact and discretion in absence of an adversary context, as they do when they . . . admit aliens to citizenship when no issue arises. . . .").

263. See *Ullmann v. United States*, 350 U.S. 422, 434 (1956) (noting that the district court was acting within the judicial power in ensuring that the grand jury complied with statutory requirements).

264. *Hohn v. United States*, 524 U.S. 236, 245 (1998).

265. *Id.* at 256-58 (Scalia, J., dissenting).

that adversary disputes over COAs were commonplace, it did not invoke the possibility of such a dispute as support for its holding.²⁶⁶

For all of these reasons, it does not make sense to try to explain away *ex parte* proceedings through the possible adversary theory. Case law provides little support for such a construct, and the use of hypothetical adversary parties does not fit well with the Court's general approach to justiciability problems. In any case, such an approach would invite line-drawing problems as the courts considered how much potential adverseness was required in any particular case. FISA warrant proceedings, in particular, would seem vulnerable to a rule that required more than the slightest possibility that future party opponents would emerge (or learn that they were the subject of a FISA warrant). Better, we think, to address the problem forthrightly and to develop a coherent framework for the presence of *ex parte* and other proceedings lacking an adverse party. We offer such a framework below.

III. CONTENTIOUS AND NON-CONTENTIOUS JURISDICTION

Having described widespread *ex parte* practices in Part I, and having shown in Part II that existing adverse-party scholarship does not adequately explain their appearance on federal dockets, we offer a solution. We believe that the explanation for non-contentious federal proceedings lies outside the adversary model, in the many non-contentious forms of action that Britain, colonial America, and the United States borrowed from the Roman and civil law. Below, we demonstrate that the failure of the early federal courts to curb non-contentious proceedings resulted not from oversight or inadvertence but from an understanding shared by the Framers and the lawyers of the Founding generation that the "judicial power" conferred by Article III consists of two distinct dimensions: contentious jurisdiction and non-contentious jurisdiction. Moreover, although non-contentious jurisdiction is not generally a part of the vocabulary of a modern American judiciary less well-acquainted with the civil law, we show that this form of jurisdiction can explain the willingness of federal courts to uphold, in appropriate situations, the exercise of judicial power over *ex parte* proceedings in the face of challenges based on modern justiciability doctrines.

Such a dual-power solution has the virtue of preserving much of the Court's adverse-party learning for application to contentious disputes over matters of federal law, state law, and federal constitutional law in particular. At the same time, the construct of non-contentious jurisdiction can help rationalize, clarify, and evaluate the manner in which federal courts manage the admin-

²⁶⁶ *Id.* at 243 (majority opinion).

istration of claims and other ex parte matters. In this Part, we describe the historical background of non-contentious jurisdiction, from its origins in Roman law, to its reception in Europe, to its manifestations in legal proceedings and materials at the time of the Framing. Our findings lead us to reevaluate the adverse-party requirement and to offer a novel account of the case-controversy distinction employed by Article III.

A. *The Historical Pedigree of Non-Contentious Jurisdiction*

1. *Roman Law*

Although it did not leave much of an impression on the common law of England, non-contentious jurisdiction has a rich grounding in history. Its origins lie in the law of ancient Rome, which appears to have divided judicial actions into two forms: *iurisdictio contentiosa* and *iurisdictio voluntaria*, or contentious and “voluntary” jurisdiction.²⁶⁷ Contentious jurisdiction was “[j]urisdiction in cases involving a legal controversy between the parties to [a] trial” designed to resolve a conflict of legal or personal interests.²⁶⁸ Voluntary jurisdiction, by contrast, was “the intervention of a magistrate in matters in which there [was] no quarrel between the parties and the fictitious trial serve[d] only as a way of performing certain legal acts or transactions.”²⁶⁹

²⁶⁷. On the origins of non-contentious jurisdiction in Roman law, see Walter Neitzel, *Non-Contentious Jurisdiction in Germany*, 21 HARV. L. REV. 476, 480-81 (1908) (linking the German practice of non-contentious jurisdiction to precursors in Roman law relating to matters of adoption, guardianship, and registration of land titles); and Elisabetta Silvestri, *Non-Contentious Jurisdiction in Italy* 1 & n.1 (2013), <http://ssrn.com/abstract=2211579> [<http://perma.cc/5VUM-8V8X>] (collecting authority for the “well established” proposition “that Roman law made a distinction between contentious jurisdiction and *iurisdictio voluntaria*”). Surviving discussions of voluntary jurisdiction in Roman law are sparse and somewhat rudimentary. See MAX KASER, *DAS RÖMISCHE ZIVILPROZESSRECHT* [ROMAN CIVIL LITIGATION] 29, 134 & n.25 (1966). For our purposes, however, whether what emerged as voluntary jurisdiction in European civil law courts during the modern era accurately reflected the Roman understanding is less important than that voluntary jurisdiction was a well-known feature of court systems and legal literature at the time of the Framing. See *infra* Part III.A.2.

²⁶⁸. Adolf Berger, *Encyclopedic Dictionary of Roman Law*, in 43 TRANSACTIONS OF THE AM. PHIL. SOC’Y 333, 524 (1953); see also ANTONIO FERNANDEZ DE BUJAN, *JURISDICCION VOLUNTARIA EN DERECHO ROMANO* [VOLUNTARY JURISDICTION IN ROMAN LAW] 20-23 (1986) (describing the distinction between contentious and voluntary jurisdiction).

²⁶⁹. Berger, *supra* note 268, at 524. The “voluntary” nature of this form of jurisdiction thus lay not in any choice on the part of the magistrate on whether to exercise his jurisdiction, but rather in the voluntary appearance of the party who was submitting his petition for resolution or ratification. See FERNANDEZ DE BUJAN, *supra* note 268, at 23.

Voluntary proceedings included *in iure cessio* (the conveyance of property in the form of a feigned case, which resulted in a consent judgment sanctioning the conveyance), *emancipatio* (the emancipation of minors), *adoptio* (adoption), and *manumissio* (the manumission of slaves), as well as the “cooperation of officials in guardianship matters and legal acts for the validity of which a permission of the competent authority is required.”²⁷⁰ The court’s function in such matters was limited to sanctioning, ratifying, legitimizing, or collaborating in the creation of a legal act or relationship that was accepted by the parties in advance and that did not prejudice the rights of third parties not before the court. As such, whenever it appeared that an agreement or alignment of the parties’ interests was not present or had disappeared, the proceedings would alter and become contentious in character.²⁷¹

As this brief summary reveals, matters within *iusdictio voluntaria* arose not from a concrete dispute of law or fact among the parties, but from the desire of those parties to secure a conclusive legal recognition of their status or to obtain formal approval of “certain legal acts or transactions.”²⁷² Indeed, many of the invocations of voluntary jurisdiction described above were similar to petitions for naturalization in federal courts in that the law provided a procedure by which parties could alter their legal status through *ex parte* applications for judicial action.²⁷³ For example, *emancipatio*, or “[t]he voluntary release of a son or daughter from paternal power by the father,” could, under the law of Justinian, be “performed by a simple declaration before a competent official.”²⁷⁴

270. Berger, *supra* note 268, at 524.

271. See FERNANDEZ DE BUJAN, *supra* note 268, at 23.

272. Berger, *supra* note 268, at 524.

273. One comparative scholar expressly drew this connection between non-contentious jurisdiction and naturalization proceedings. See MAURO CAPPELLETTI ET AL., THE ITALIAN LEGAL SYSTEM: AN INTRODUCTION 121 (1967) (observing that “the judicial intervention” in non-contentious matters “borders on[] administration rather than adjudication” and commenting that, in Italy, “citizenship is conferred upon aliens by administrative act,” whereas in America it is conferred “by the courts”).

274. Berger, *supra* note 268, at 451. *Emancipatio* was a derivative form of *mancipatio*, which in the ancient Roman law was “the only method by which important kinds of property could be legally transferred from seller to buyer.” WILLIAM L. BURDICK, THE PRINCIPLES OF ROMAN LAW AND THEIR RELATION TO MODERN LAW 313 (1938); see also Berger, *supra* note 268, at 573 (describing *emancipatio* as a form of *mancipatio*). *Mancipatio* was a ceremony held before witnesses, involving a declaration of title by the purchaser not contradicted by the seller. *Id.* at 573; see also BURDICK, *supra*, at 330-31 (describing *mancipatio* as a “formal legal procedure” for the transfer of ownership, marriage by purchase, adoption, emancipation, and testaments).

Other invocations of non-contentious jurisdiction took the form of feigned controversies. Notably, *in jure cessio* (“a surrender in court”) would secure a change in property ownership as follows:

[*In jure cessio*] was a collusive or fictitious suit whereby the person to whom the property right was to be conveyed claimed in open court to be the owner. Thereupon, the magistrate asked the other party, the present owner, whether he also claimed it. Upon the denial or silence of such other party, the magistrate gave judgment (*addicit*) in favor of the claimant.²⁷⁵

Parties relied upon proceedings *in jure cessio* “for a number of legal transactions,” such as the transfer of property, the formalization of adoption and emancipation, and “the creation of servitudes.”²⁷⁶

According to Fernandez de Bujan, voluntary jurisdiction in Roman law occupied an “autonomous” zone on the border between the judicial and administrative powers and, as a result, has posed challenges for historians attempting to classify or describe its precise nature.²⁷⁷ Nevertheless, and despite the fact that it is in some respects difficult to square with our own conceptions of judicial activity, voluntary jurisdiction did comport with the Roman conception of jurisdiction as the execution of “a public function upon private juridical interests and relationships.”²⁷⁸ The judge or magistrate was not a “mere automa-

275. BURDICK, *supra* note 274, at 331.

276. *Id.* Any description of procedures in “Roman law” is incurably inexact, given that Roman law evolved over the course of several centuries to the extent that its early forms might have been unrecognizable even to later Roman citizens. *In jure cessio*, for instance, was superseded by *mancipatio*, which itself eventually fell into obsolescence. *See id.* at 331-32 (“Even in the time of Gaius, *mancipatio*, he says, was generally employed instead of *in jure cessio*, because it was less difficult to transfer property in the presence of one’s friends than to go into court before the praetor.”). On the evolution of non-contentious jurisdiction in Rome, see Neitzel, *supra* note 267, at 480, which contrasts “old” Roman law’s refusal to recognize a role for the state in guardianships with the law of the Empire, which assigned the appointment of guardians to judicial officials.

277. FERNANDEZ DE BUJAN, *supra* note 268, at 16; *see also id.* at 23-27 (describing various views of the propriety of classifying voluntary jurisdiction as truly jurisdictional or judicial in nature).

278. *Id.* at 16 (authors’ translation). As Fernandez de Bujan explains in more detail:

A mi juicio, y a pesar de las opiniones contrarias a la utilización del adjetivo voluntaria, cabría argumentar a favor de la misma que, desde el punto de vista formal, en estos supuestos los interesados o solicitantes—ya que no cabría hablar en sentido estricto de partes—de la actuación magistratural se presentan voluntariamente al magistrado sin ser citados, no para que éste ampare o declare el ejercicio de un derecho o la satisfacción de un interés de una de las partes en discordia, sino

ton,” but instead tested the factual basis for the petition, required testimony on the record before granting judicial sanction to the petition, and exercised “control over the legality of the acts of the appearing party or parties.”²⁷⁹

2. *The European Reception of Non-Contentious Jurisdiction*

Non-contentious jurisdiction further developed as Roman law was received into the civil law of continental Europe and Scotland.²⁸⁰ Thomas Wood’s influential eighteenth-century treatise *A New Institute of the Imperial or Civil Law*, for example, divides “causes” into “*Jurisdictio Contentiosa*, or Judicial, which is exercised upon Persons whether they consent to it or not,” and “*Voluntaria*, which may be used at all times without any manner of contradiction; as Emancipation, Adoption, Manumission; and in several other legal Acts granted by the Judge upon request, and by consent of all Parties.”²⁸¹ Voluntary jurisdiction also appeared in Scotland, and the distinction between contentious and non-contentious jurisdiction was described in the late eighteenth century by Sir John Erskine, author of a treatise that was well-known in Britain and in America.²⁸² Drafters of the German civil code in the sixteenth century similarly incor-

para que colabore en el nacimiento de una relación jurídica consensuada por los requirentes o comparecientes.

Id. at 27 (“In my view, although there are opinions against the use of the word ‘voluntary’ as an adjective [qualifying jurisdiction], there is room to argue in favor of such a use: that, from a formal point of view, in these cases the interested parties or petitioners—because we cannot speak of parties in a strict sense—seeking judicial intervention come before the magistrate voluntarily (without being compelled by process), not for the magistrate to protect the exercise of a right or to determine a disputed interest, but for the magistrate to collaborate in the birth of a legal relationship agreed upon by the applicants or appearing parties.” (authors’ translation)). For the Romans, jurisdiction (*iurisdictio*, or “the power to speak the law”) denoted both the power invested in the magistrate and the fulfillment of the duties for which the power was bestowed. *Id.* at 39.

279. *Id.* at 23-24 (authors’ translation).

280. On reception, see Franz Wieacker, *The Importance of Roman Law for Western Civilization and Western Legal Thought*, 4 B.C. INT’L & COMP. L. REV. 257, 258-61 (1981).

281. THOMAS WOOD, *A NEW INSTITUTE OF THE IMPERIAL OR CIVIL LAW* 293 (4th ed., J. and J. Knapton et al. 1730) (emphases in original).

282. 1 ERSKINE, *supra* note 30, at 27-28; see also *id.* at 71-72 (discussing the ministerial powers of the Court of Session, Scotland’s supreme civil court, exercised as part of its *nobile officium*, or equitable powers).

porated elements of non-contentious jurisdiction,²⁸³ although German law did not perfectly map onto ancient forms.²⁸⁴

Non-contentious jurisdiction remains a feature of many continental judicial systems today. In France, the civil code defines voluntary jurisdiction, or *jurisdiction gracieuse*, to encompass both ex parte proceedings and feigned controversies. French law empowers the proper court to assert non-contentious jurisdiction “over all claims not involving an adversary and not contestable by a third party; and . . . over all claims in which the parties, not being in disagreement, are required by their status or the nature of the affair, to obtain a court decision.”²⁸⁵ Other countries have taken a less formal approach. Italian courts exercise the functional equivalent of non-contentious jurisdiction (*giurisdizione volontaria*) in the absence of any formal codification in the rule books.²⁸⁶

Non-contentious procedures vary somewhat from nation to nation. In Italy, non-contentious matters have been handled by a judge “in chambers,” rather than during the formal sitting of the court.²⁸⁷ In Germany, by contrast, much non-contentious jurisdiction has been assigned to the local or district courts.²⁸⁸ Non-contentious proceedings have a judicial quality; one treatise on German law explained that although a certain exercise of jurisdiction was non-contentious, it was “in no way ‘non-judicial.’”²⁸⁹ But the character of the proceeding reflects its non-contentious roots. Non-contentious jurisdiction requires the judge to play an active role in developing the factual record; the court cannot rely on an adverse party to help frame the issues. One German scholar characterized the judge in non-contentious matters as enjoying “a great

283. See Neitzel, *supra* note 267, at 480-81. Neitzel suggests that a non-contentious role for the judiciary in the appointment of guardians first became a feature of German law in the sixteenth century. *See id.*

284. *See id.* (contrasting, for example, the Roman law treatment of property “as a mere *res*” with the German notion of property as a communal matter, and describing the greater formalities that were employed to secure a transfer of property in German law).

285. CAPPELLETTI ET AL., *supra* note 273, at 122 n.52. Notably, France distinguishes between *jurisdiction gracieuse* and *jurisdiction contentieuse*. *Id.*

286. *See id.* at 120 (noting the inclusion of non-contentious jurisdiction in the German code and that the Italian code “makes no mention of it except in connection with the recognition of foreign judgments,” although the concept is widely used); Silvestri, *supra* note 267, at 2 (observing that the Italian Code of Civil Procedure “makes no specific reference to non-contentious jurisdiction,” but noting that the Code “provides for a variety of special proceedings that are conventionally ascribed to non-contentious jurisdiction”).

287. *See* CAPPELLETTI ET AL., *supra* note 273, at 121-22; Silvestri, *supra* note 267, at 3.

288. *See* PETER L. MURRAY & ROLF STÜRNER, GERMAN CIVIL JUSTICE 442-43 (2004) (describing the use of local courts); Neitzel, *supra* note 267, at 482-83 (describing reliance on the district courts).

289. MURRAY & STÜRNER, *supra* note 288, at 444.

deal of freedom” to “take any evidence.”²⁹⁰ An Italian scholar echoed that conclusion: non-contentious proceedings “are marked by the extensive inquisitorial powers bestowed upon the judge in charge of the case.”²⁹¹ These powers ensure that the judge has “ample discretion as regards the evidence-taking phase of the procedure.”²⁹²

A broad range of matters has been assigned to non-contentious jurisdiction in Europe. Many countries, for example, provide for judicial oversight of probate matters in an effort to ensure proper resolution of potentially fraught issues of inheritance and succession.²⁹³ (As we will see, common-form probate proceedings in Anglo-American law derive from this form of non-contentious jurisdiction in European civil law countries.²⁹⁴) In addition, European civil-law countries often rely on non-contentious jurisdiction to oversee the appointment and supervision of guardians,²⁹⁵ and the formal registry of interests in real property.²⁹⁶ Finally, European countries have provided for the formal registration of contracts of suretyship and the acknowledgement of debts through non-contentious proceedings²⁹⁷ and have assigned certain matters of insolvency and bankruptcy to such a mode.²⁹⁸

290. Neitzel, *supra* note 267, at 483-84.

291. Silvestri, *supra* note 267, at 4.

292. *Id.* at 5.

293. See KARL GAREIS, INTRODUCTION TO THE SCIENCE OF LAW: SYSTEMATIC SURVEY OF THE LAW AND PRINCIPLES OF LEGAL STUDY 261 (Albert Kocourek trans., 1911) (describing the role of non-contentious jurisdiction in matters of German inheritance and succession); MURRAY & STÜRNER, *supra* note 288, at 442-43 (same, in matters of German inheritance); Silvestri, *supra* note 267, at 2 (same, in Italian law).

294. See *infra* Part III.A.3.

295. See GAREIS, *supra* note 293, at 261 (noting that the appointment of guardians falls under non-contentious jurisdiction in German law); MURRAY & STÜRNER, *supra* note 288, at 442-43 (same); Silvestri, *supra* note 267, at 2 (noting that Italian law provides for non-contentious proceedings for the appointment of guardians).

296. See GAREIS, *supra* note 293, at 262 (including registry officers who take action to effect the transfer of land under non-contentious jurisdiction in German law); MURRAY & STÜRNER, *supra* note 288, at 442 (same, for registration of real estate interests).

297. See Neitzel, *supra* note 267, at 494.

298. In nineteenth-century German procedure, non-contentious forms were used in insolvency and bankruptcy proceedings. GAREIS, *supra* note 293, at 263 (describing property concerns in insolvency and bankruptcy proceedings as belonging to the “sphere of non-contentious jurisdiction”); *cf.* Silvestri, *supra* note 267, at 7-8 (noting that the Italian legislature has sometimes assigned matters, such as bankruptcy and the management of companies, to courts for processing in chambers under the forms of non-contentious jurisdiction, but questioning the wisdom of such assignments).

Although defining the construct of non-contentious jurisdiction in its modern guise presents conceptual challenges,²⁹⁹ scholars agree that courts exercising non-contentious jurisdiction perform somewhat the same role as administrative officers or agencies. Thus, one scholar contrasted contentious matters with non-contentious matters, which he characterized as “prudential administration of justice, for the security of private legal interests.”³⁰⁰ Another scholar defined non-contentious jurisdiction as “a form of judicial intervention that borders on the field of tasks falling, as a rule, within the realm of executive power, that is, tasks that could (at least in principle) be performed by administrative bodies as well.”³⁰¹ Mauro Cappelletti and his co-authors report that the traditional definition is that voluntary jurisdiction involves the “public administration of private law by judicial organs.”³⁰² Often, non-contentious proceedings seek a form of official recognition viewed as “necessary to create individual rights,”³⁰³ comparable in some respects to petitions for the recognition of patents, copyrights, and titles to public land.

The frequently *ex parte* character of non-contentious proceedings has led to predictable concern with the protection of the rights of third parties. European countries have dealt with third-party rights in a variety of ways. Most commonly, as in Italy, the courts simply deny preclusive effect to the decrees of tribunals exercising non-contentious jurisdiction, thereby limiting their potentially prejudicial effect.³⁰⁴ In Germany, the Federal Constitutional Court has found that individuals have a due process right to be informed about and to participate in any non-contentious proceedings that might affect their interests. The German Federal Constitutional Court also has held that parties to a non-contentious proceeding may seek the recusal of an interested or biased judge.³⁰⁵

299. See, e.g., CAPPELLETTI ET AL., *supra* note 273, at 120 (“It is not easy to define ‘voluntary jurisdiction.’”); MURRAY & STÜRNER, *supra* note 288, at 443 (describing the boundary between contentious and non-contentious jurisdiction as “not always very clear”).

300. GAREIS, *supra* note 293, at 261 (footnote omitted).

301. Silvestri, *supra* note 267, at 2.

302. CAPPELLETTI ET AL., *supra* note 273, at 121 (quoting PIERO CALAMANDREI, *ISTITUZIONI DI DIRITTO PROCESSUALE CIVILE* § 23 (2d ed. 1943)). Cappelletti and his co-authors also note that many scholars do not accept this definition. *Id.*

303. Neitzel, *supra* note 267, at 477; see also CAPPELLETTI ET AL., *supra* note 273, at 121 (describing the unifying element in the voluntary jurisdiction cases as the presence of a “private law activity” that “cannot be undertaken without an order, authorization, or some other kind of judicial intervention”).

304. See CAPPELLETTI ET AL., *supra* note 273, at 122 (confirming that decrees in non-contentious proceedings have no *res judicata* effect); Silvestri, *supra* note 267, at 5 (same).

305. Mauro Cappelletti, *Fundamental Guarantees of the Parties in Civil Litigation*, 25 STAN. L. REV. 651, 686 n.198 (1973).

3. *Non-Contentious Jurisdiction in England and America*

The situation in England and America was more complicated, if only because of the somewhat rockier reception the civil law encountered in those countries. The common-law courts of England resisted, and largely prevented, Roman and civil law from usurping the central place of the common law as the foundation of the English legal system,³⁰⁶ and the common law (eventually at least) was adopted as the primary source of law in much of the United States.³⁰⁷ Nevertheless, many English and American courts adopted civil-law practices, and many exercised non-contentious jurisdiction.³⁰⁸

Many of these non-contentious practices took place in courts bearing the stamp of continental and civil influence – such as courts of equity and the ecclesiastical and admiralty courts – but the practices actually predated the Norman Conquest and grew organically out of the common business of local courts well before the time of Blackstone.³⁰⁹ For example, the courts of Anglo-Saxon Eng-

306. On the reception of Roman law in England, see BRIAN P. LEVACK, *THE CIVIL LAWYERS IN ENGLAND 1603-1641: A POLITICAL STUDY* (1973). On the efforts of common-law courts to resist and circumscribe the jurisdiction of rival courts, see 5 WILLIAM HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 423-30 (photo. reprint 1966) (3d ed. 1945).

307. See, e.g., Pfander & Birk, *supra* note 14, at 1628, 1646 (discussing adoption of common law in America and citing sources).

308. Although the reception of Roman law was nowhere near as complete in England as it was in Scotland or on the continent, Roman and civil law nevertheless bore decided influences on the practices of non-common law courts in England and were regular features of the law of nations, conflicts of laws, and mercantile law. For an overview of civil-law practice in England, see LEVACK, *supra* note 306. On the influence of Roman law in England, see Thomas Edward Scrutton, *Roman Law Influence in Chancery, Church Courts, Admiralty, and Law Merchant*, in 1 *SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY* 208, 212-14 (1907) (explaining that the judges of the common-law courts did not recognize civil law as authoritative, but that the admiralty, equity, and ecclesiastical courts “were largely influenced by the Civil Law, if their procedure was not entirely derived from it”). On the differences between civil and common law as practiced in English courts, see Charles Donahue, Jr., *Ius Commune, Canon Law, and Common Law in England*, 66 *TUL. L. REV.* 1745 (1992); Peter G. Stein, *Roman Law, Common Law, and Civil Law*, 66 *TUL. L. REV.* 1591 (1992).

309. The *witengamote*, or “public moots,” of Anglo-Saxon England regularly exercised a voluntary jurisdiction in ceremonial acts that was influenced to varying degrees by custom and the proliferation of “Roman ideas and forms.” Paul Vinogradoff, *Transfer of Land in Old English Law*, 20 *HARV. L. REV.* 532, 532, 546 (1907). England’s Statutes of Merchants of 1283 and 1285 called for merchants and their debtors to register their contracts in a non-contentious proceeding before the Mayor’s Court. The Statute gave these registered obligations the status of a matter of record and would trigger in cases of default the speedy seizure of debtor’s goods or the imprisonment of the debtor. See Statute of Merchants, 11 Edward I (1283); Statute of Merchants, 13 Edward I (1285), both cited in 1 Statute of the Realm 53, 98 (1235-1377), http://aalt.law.uh.edu/AALT1/H6/CP4ono677/aCP4ono677fronts/IMG_0555.htm [<http://perma.cc/DQ4E-4NKQ>].

land and the county courts of medieval England conducted the voluntary transfer of land and the sanctioning of documents through judicial process.³¹⁰ By witnessing these and other formal acts, such as marriages, the courts provided legal recognition and public legitimacy.³¹¹ Later, British ecclesiastical courts consciously exercised non-contentious jurisdiction in a wide variety of proceedings, including the probate of wills and the issuance of marriage licenses,³¹² and, as we already have noted, one of the chief functions of admiralty courts was the condemnation of prizes in what frequently were *ex parte* proceedings. Similarly, according to William Burdick, the non-contentious Roman procedure *in jure cessio* was “undoubtedly the inspiration of the collusive or fictitious suits in early English law known as fine and common recovery,” a cognizable action in English common-law courts.³¹³

The Court of Chancery also possessed a non-contentious jurisdiction, which it exercised in such matters as the appointment of guardians for infants, and, as noted previously, in the creation of equitable receiverships.³¹⁴ Much as

310. See Lolabel House, *The County Court in the Thirteenth Century*, 49 AM. L. REGISTER 284, 284 (1901) (explaining that the work of county courts in the thirteenth century “was mainly in civil cases and in voluntary jurisdiction, such as witnessing transfers of land and sanctioning documents” (citing 1 WILLIAM STUBBS, *THE CONSTITUTIONAL HISTORY OF ENGLAND: IN ITS ORIGIN AND DEVELOPMENT* 425-26 (Oxford, Clarendon Press 5th ed. 1891)). Transfer of land under old English law also was accomplished through judicial process, and the manorial courts of England later used voluntary jurisdiction to effect various transactions related to real property through the practices of surrender and admittance. See Vinogradoff, *supra* note 309, at 533-36.

311. Vinogradoff, *supra* note 309, at 543-47.

312. See Lewis M. Simes, *The Function of Will Contests*, 44 MICH. L. REV. 503, 505-11 (1945); see also Herbert Wood, *The Destruction of the Public Records: The Loss to Irish History*, 43 STUD.: IRISH Q. REV. 363, 374 (1922) (noting that the voluntary jurisdiction of Irish ecclesiastical courts extended to granting probates of wills and administrations, issuing marriage licenses, setting “institutions and collations to livings,” conserving churches and churchyards, and the “granting of faculties for building and altering glebe houses and churches, of licences for curates, schoolmasters &c.”); *id.* at 375 (discussing the administrative and regulatory functions of ecclesiastical courts). Until most of their powers were abolished or transferred to the Court of Probate and the Divorce Court in the mid-nineteenth century, the ecclesiastical courts in England “exercised a very extended jurisdiction, comprising not only what we should ordinarily call ecclesiastical causes, but matrimonial suits and divorces *a mensa et thoro*, all testamentary causes and suits, suits for church rates, and suits for defamation.” *The English Law Courts VI: The Ecclesiastical Courts*, 8 GREEN BAG 330, 330 (1896). For a description of the types of cases commonly heard by ecclesiastical courts during the fourteenth and fifteenth centuries, see David Millon, *Ecclesiastical Jurisdiction in Medieval England*, 1984 U. ILL. L. REV. 621.

313. BURDICK, *supra* note 274, at 332.

314. See STORY, *supra* note 108, § 1338, at 927. Justice Story explained that the “Court of Chancery will appoint a suitable guardian to an infant, where there is none other, or none who

an application for a receivership assumed the form of an often-fictional dispute,³¹⁵ courts of equity predicated the appointment of a guardian for a minor upon a fictional suit over property held in the district.³¹⁶ Justice Joseph Story reported on this development with some puzzlement, wondering why the fiction of a dispute was necessary to trigger a court's equitable powers of appointment.³¹⁷ It should come as no surprise, then, that many of these same non-contentious proceedings made their way to the American colonies and were employed in the equity, admiralty, and probate courts of the early United States.

Indeed, although many of their judges had little or no legal training or education,³¹⁸ local colonial courts often exercised jurisdiction over both contentious and non-contentious matters, and some even performed purely executive or legislative functions, such as maintaining county buildings, conducting inquests, raising taxes, and planning highways.³¹⁹ Many colonial courts were as-

will, or can act, at least, where the infant has property . . . Guardians appointed by the court are treated as officers of the court, and are held responsible accordingly to it." *Id.*

315. See *supra* note 181 and accompanying text.

316. STORY, *supra* note 108, § 1351 n.4.

317. Justice Story described the fictional dispute as follows: "It often occurs, that a bill is filed for the sole purpose of making an infant a ward of chancery; but in such a case the bill always states, however untruly, that the infant has property within the jurisdiction, and the bill is brought against the person in whose supposed custody or power the property is." *Id.* Story continued: "Why such a mere fiction should be resorted to, has never, as it seems to me, been satisfactorily explained; and why the Lord chancellor, exercising the prerogative of the crown as *parens patriae*, might not, in his discretion, appoint a guardian to an infant, having no other guardian, without any bill being filed, seems difficult to understand upon principle." *Id.* § 1351 n.4. Notably, the chancellor's power to appoint conservators of the estates of "idiots and lunatics" derived from the Crown's prerogative and authorized appointment without any need to invoke a fictional dispute. See A. HIGHMORE, A TREATISE ON THE LAW OF IDIOCY AND LUNACY 11-15 (Exeter, N.H., G. Lamson 1822) (describing the Crown's prerogative power to act as "trustee of the persons and fortunes of idiots [sic] and lunatics" but distinguishing the Crown's power over infants as "by no means similar").

318. See, e.g., Erwin C. Surrency, *The Evolution of an Urban Judicial System: The Philadelphia Story, 1683 to 1968*, 18 AM. J. LEGAL HIST. 95, 109 (1974) (noting that "[t]he judges of the [Pennsylvania] Supreme Court prior to the Revolution were not required to be 'learned in the law,'" and that until 1786, "the great majority of the judges of [the Court of Common Pleas in Philadelphia County] were laymen").

319. See, e.g., MARTIN H. REDISH, FEDERAL COURTS 14 (2d ed. 1989) (stating that colonial courts "performed innumerable executive, administrative, and even legislative tasks" (internal quotation marks omitted)); Warren M. Billings, *Pleading, Procedure, and Practice: The Meaning of Due Process of Law in Seventeenth-Century Virginia*, 47 J. S. HIST. 569, 578 (1981) (observing that in colonial Virginia, "[s]ome counties simply did without coroners, and . . . the justices themselves convened and conducted the inquest"); Hendrik Hartog, *The Public Law of a County Court: Judicial Government in Eighteenth Century Massachusetts*, 20 AM. J. LEGAL HIST. 282, 282 (1976) (describing colonial county courts as having in effect a "general obligation to

signed quintessentially non-contentious tasks, such as recording land transfers and other instruments, conducting examinations for the admission of attorneys to the bar, and evaluating petitions for liquor licenses.³²⁰ Colonies and territories established orphans' courts for the protection of the estates and welfare of orphans and invested courts with probate powers to administer estates.³²¹ Still others were granted wide-ranging and non-specialized jurisdiction over common law as well as probate, admiralty, and equity cases, thereby assuming the role played by both the Court of Chancery and the ecclesiastical courts in England.³²²

Nevertheless, we do not make specific claims about the process by which the tradition of non-contentious jurisdiction made its way to the new world. In some respects, governmental systems lacking a sophisticated administrative apparatus, such as Anglo-Saxon England and the early colonial American settlements, would understandably use courts to exercise jurisdiction over non-contentious business regardless of whether that business was seen as grounded in the Roman tradition of voluntary jurisdiction.³²³ The sixteenth-century development of the administration of prize cases, for example, seems to have grown organically out of the need of the state to provide conclusive legal title to the captures taken by privateers acting under the state's authority rather than out of regular disputes over such matters or as a direct outgrowth of Roman law.³²⁴

act as regulatory agencies"). Despite their ability to exercise such powers, the county sessions courts of colonial Massachusetts were subject to the traditional limitation on courts: that they could only act "insofar as public business was brought before [them]." See *id.* at 284. For a description of the administrative powers exercised by the early Virginia colonial county courts, see George B. Curtis, *The Colonial County Court, Social Forum and Legislative Precedent: Accomack County, Virginia, 1633-1639*, 85 VA. MAG. HIST. & BIOGRAPHY 274 (1977).

320. See Curtis, *supra* note 319, at 275, 282 (registration of certificates of sale, payment or acknowledgement of debt, wagers, and indenture agreements); Alan F. Day, *Lawyers in Colonial Maryland, 1660-1715*, 17 AM. J. LEGAL HIST. 145, 146-47 (1973) (bar admissions); Hartog, *supra* note 319, at 288-91 (liquor licenses); George L. Haskins, *The Beginnings of the Recording System in Massachusetts*, 21 B.U. L. REV. 281 (1941) (land transfers); John T. Hassan, *Land Transfer Reform*, 4 HARV. L. REV. 271, 272 (1890-91) (same).

321. See Surrency, *supra* note 318, at 97, 119.

322. See, e.g., Billings, *supra* note 319, at 572 (describing colonial Virginia's "simplified system of inferior and appellate courts that combined the jurisdictions of such English courts as the leet, quarter sessions, the assizes, king's bench, common pleas, chancery, and the admiralty, as well as that of the church courts"); Spencer R. Liverant & Walter H. Hitchler, *A History of Equity in Pennsylvania*, 37 DICK. L. REV. 156, 165-67 (1932-33) (describing the equitable powers conferred on the general common-law courts of Pennsylvania).

323. See *supra* notes 230-232 and accompanying text. We thank John Langbein for this insight.

324. See R.G. Marsden, *Early Prize Jurisdiction and Prize Law in England*, 26 ENG. HIST. REV. 34 (1911).

We believe that by incorporating non-contentious jurisdiction, Article III simply responds to the actual needs of the federal system to administer its law. For example, the decision of Congress to bring the judicial power to bear on naturalization petitions by assigning them to “courts of record” made functional sense. Open proceedings would ensure a searching judicial inquiry into the status of the applicant and could help to prevent the naturalization of those with suspiciously limited ties to the community.³²⁵ Such an assignment could also ensure the creation of a permanent and conclusive record of the alien’s admission to citizenship. A permanent record was of central importance in a world in which only citizens enjoyed the right to own land.³²⁶ In addition, the conclusive quality of judgments “of record” protected citizenship decisions from attack in subsequent disputes over title to property.³²⁷

This practical response to perceived needs provides the best account of how these non-contentious proceedings arrived on federal dockets and how they fit with the practice of federal courts today. Nonetheless, we do see an obvious link between European developments and the non-contentious practices catalogued in Part I of this Article. The Framers and others of the Founding generation were well versed in Roman political history,³²⁸ and many were close stu-

325. Early legislation frequently relied on the people as a check on official action. The first census law directed the marshal of the district court to conduct an enumeration and to place the results before the grand jury for an assessment of the quality of the returns. *See* Act of 1790, ch. 2, 1 Stat. 101. On the nature of the inquiry required in naturalization proceedings, see *In re an Alien*, 7 Hill 137 (N.Y. 1845) (viewing the statute as requiring the court to satisfy itself through some form of inquiry that the applicant for citizenship had made out an appropriate case).

326. On the connection between naturalized citizenship and the ownership of land (a right denied to aliens at common law), see Pfander & Wardon, *supra* note 47, at 366-68.

327. In a variety of early Republic disputes over property ownership, the official record was introduced to resolve questions about an alien’s admission to citizenship. *See, e.g.*, *Spratt v. Spratt*, 29 U.S. (4 Pet.) 393 (1830) (quoting the naturalization record of James Spratt); *Stark v. Chesapeake Ins. Co.*, 11 U.S. (7 Cranch) 420 (1813) (quoting the naturalization record of John Philip Stark). Thus, in *Spratt*, a dispute over the inheritance of land, the Supreme Court expressed great reluctance to look behind the record:

It seems to us, if it be in legal form, to close all inquiry; and, like every other judgment, to be complete evidence of its own validity. . . . It might be productive of great mischief, if, after the acquisition of property on the faith of his certificate, an individual might be exposed to the disabilities of an alien, on account of an error in the court, not apparent on the record of his admission.

29 U.S. (4 Pet.) at 408. *See also* *Stark*, 11 U.S. (7 Cranch) 420 (viewing the judgment of naturalization by the court of record as conclusive); *Campbell v. Gordon*, 10 U.S. (6 Cranch) 176 (1810) (same); *McCarthy v. Marsh*, 5 N.Y. 263 (1851) (same).

328. *See* DAVID J. BEDERMAN, *THE CLASSICAL FOUNDATIONS OF THE AMERICAN CONSTITUTION* 17-26 (2008); FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE AMERICAN CONSTITUTION* 67-69 (1985).

dents of Roman and civil law³²⁹ and of the practices of the English admiralty, equity, and ecclesiastical courts.³³⁰ Civil law was in fact central to the education of the more sophisticated American lawyers, including such luminaries as Chief Justice John Marshall, Thomas Jefferson, and John Adams.³³¹ In 1786, James Madison examined the practices of the Dutch admiralty courts as part of his pre-constitutional study of confederacies,³³² and Alexander Hamilton and James Wilson, among others, were well familiar with principles of admiralty jurisdiction and practice.³³³ The courts of the colonies and the early Republic often, implicitly or explicitly, looked to the courts of England in developing

329. The deep familiarity of many Americans in the Founding generation with Roman and civil law has been canvassed exhaustively elsewhere. See Pfander & Birk, *supra* note 14, at 1629-31, for a summary. For more in-depth discussions, see PAUL M. HAMLIN, *LEGAL EDUCATION IN COLONIAL NEW YORK* (Da Capo Press 1970) (1939); M.H. HOEFLICH, *ROMAN AND CIVIL LAW AND THE DEVELOPMENT OF ANGLO-AMERICAN-JURISPRUDENCE IN THE NINETEENTH CENTURY* (1997); and Thomas H. Lee, *The Civil Law Tradition in American Constitutional Jurisprudence*, <http://www.law.harvard.edu/faculty/faculty-workshops/lee.faculty.workshop.spring2013.pdf> [<http://perma.cc/Q6EQ-HEDN>] (manuscript in progress). A surprising amount of documentation of the legal texts studied by colonial and early American lawyers has been collected. It provides a wealth of insight into the extensive and diverse internationalist character of legal education during that period. See, e.g., WILLIAM HAMILTON BRYSON, *CENSUS OF LAW BOOKS IN COLONIAL VIRGINIA* (1978); *THE COMMONPLACE BOOK OF THOMAS JEFFERSON: A REPERTORY OF HIS IDEAS ON GOVERNMENT* (Gilbert Chinard ed., 1926); GEORGE C. GROCE, JR., *WILLIAM SAMUEL JOHNSON: A MAKER OF THE CONSTITUTION* 27 (1937); HAMLIN, *supra*; FORREST McDONALD, *ALEXANDER HAMILTON* 52-53 (1979); CHARLES WARREN, *A HISTORY OF THE AMERICAN BAR* 157-87 (1911); Daniel R. Coquillette, *Justinian in Braintree: John Adams, Civilian Learning, and Legal Elitism, 1758-1775*, in 62 *PUBL'NS OF THE COLONIAL SOC'Y OF MASS., LAW IN COLONIAL MASSACHUSETTS 1630-1800*, at 359 (Daniel R. Coquillette et al. eds., 1984) [hereinafter Coquillette, *Justinian*]; Daniel R. Coquillette, *The Legal Education of a Patriot: Josiah Quincy Jr.'s Law Commonplace (1763)*, 39 *ARIZ. ST. L.J.* 317, 326 (2007); Charles R. McKirdy, *The Lawyer as Apprentice: Legal Education in Eighteenth Century Massachusetts*, 28 *J. LEGAL EDUC.* 124, 130-31 (1976); James Wilson, *Commonplace Book* (unpublished James Wilson Papers) (located at the Historical Society of Pennsylvania) (on file with authors). One also can glean the importance of civil law sources to American legal practice by viewing Alexander Hamilton's application of such sources in his law practice. See 4 *THE LAW PRACTICE OF ALEXANDER HAMILTON: DOCUMENTS AND COMMENTARY* 627-35 (Julius Goebel, Jr. & Joseph H. Smith eds., 1980).

330. For a time, the civil law possessed a surprising amount of traction in the United States, particularly in those quarters that disdained the English legal tradition and hoped for the emergence of a distinctively American jurisprudence based on internationalist sources. For an overview, see Peter Stein, *The Attraction of the Civil Law in Post-Revolutionary America*, 52 *VA. L. REV.* 403 (1966).

331. See Pfander & Birk, *supra* note 14, at 1629-31. One of the questions asked of John Adams when he sought admission to the bar, for instance, was what he had "lately read" in Latin. Coquillette, *Justinian*, *supra* note 329, at 363.

332. See Casto, *supra* note 69, at 139 n.114.

333. See *id.* at 130-39.

processes and procedures, including the procedures employed in local courts, courts of equity, and probate and prize proceedings. Application of the civil law in appropriate cases was assumed at the Constitutional Convention,³³⁴ and the Process Act of 1789 prescribed that the forms and modes of proceedings of civil law would govern in cases of admiralty and equity jurisdiction.³³⁵ Later, as Thomas Lee has noted, Edmund Randolph reported to Congress that “a federal judge in the early Republic had to be not only ‘a master of the common law in all its divisions’ but also a ‘civilian.’”³³⁶ The judicial power with which federal courts were invested surely encompassed both the common-law and civil-law traditions.

Regardless of whether the Framers specifically contemplated a link between the judicial power they conferred on federal courts and the voluntary jurisdiction of Roman and civil law, we have little doubt that non-contentious jurisdiction was a regular feature of the judicial proceedings in equity, admiralty, and probate with which the Framers were familiar from everyday experience. In this cosmopolitan legal world, the decision of Congress to assign non-adverse proceedings to federal courts does not present much of a mystery. Indeed, the uncontroversial decision to include equity and admiralty “cases” in the federal constitutional catalog provides solid evidence that non-contentious jurisdiction was considered an acceptable dimension of the business of Article III courts.

B. The Adverse-Party Requirement Reconsidered

What, then, of the adverse-party requirement? After all, if the judicial power conferred by Article III includes a role for non-contentious jurisdiction (as history and practice tend to suggest), then the adverse-party requirement must be modified—or at least be rendered more malleable—to account for the exercise of that power. But if an inflexible adverse-party requirement is part of the irreducible core of Article III or of the Court’s justiciability doctrines, then one might argue that non-contentious jurisdiction simply cannot be considered part of the judicial power, and that the many departures from adverse-party proceedings in the federal reports are (at least from an originalist perspective) fundamentally impermissible. Below, we explain that the supposed roots of an

334. See 2 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 431 (1911) (“Mr. Govr. Morris wished to know what was meant by the words ‘In all the cases before mentioned it (jurisdiction) shall be appellate with such exceptions &c,’ whether it extended to matters of fact as well as law—and to cases of Common law as well as Civil law. Mr. Wilson. The Committee he believed meant facts as well as law & Common as well as Civil law. The jurisdiction of the federal Court of Appeals had he said been so construed.”).

335. Act of Sept. 29, 1789, ch. 21, 1 Stat. 93.

336. Lee, *supra* note 329, at 7.

inflexible adverse-party requirement stand on textually and historically infirm ground. Although adverseness has work to do in defining and circumscribing the judicial power in contentious proceedings, the imposition of an inflexible, across-the-board requirement does not fit with the text of Article III or the practice of federal courts in administering federal law. Indeed, we think non-contentious jurisdiction may help to explain some other enduring mysteries of federal jurisdiction, including why the Framers chose to use two terms, “cases” and “controversies,” to describe the work of the federal judiciary.

1. *Cases, Controversies, and the Judicial Power*

The well-known words of Article III extend the “judicial power” to “Cases” arising under the Constitution, laws, and treaties of the United States, and to “Controversies” between certain configurations of parties.³³⁷ Although the terms are not actually linked in the text, since the twentieth century the Supreme Court has frequently conjoined them in its discussions of justiciability, referring to a “case-or-controversy” requirement in a manner suggesting that the two terms are wholly synonymous.³³⁸ The case-or-controversy requirement has been invoked repeatedly by courts and scholars seeking a textual foundation for the adverse-party requirement, as Justice Scalia did in *Windsor* and *Hohn*.³³⁹ The most careful and comprehensive attempt to ground the adverse-party requirement in the text, structure, and history of Article III – that of Redish and Kastanek in their investigation of settlement class actions – places particular emphasis on the term “controversy,” arguing that the adverseness in-

337. U.S. CONST. art. III, § 2. The intended meaning of the terms “case” and “controversy” is a richly canvassed topic. For various accounts, see Susan Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227 (1990); Anthony J. Bellia Jr., *Article III and the Cause of Action*, 89 IOWA L. REV. 777, 800-12 (2004); William A. Fletcher, *The “Case or Controversy” Requirement in State Court Adjudication of Federal Questions*, 78 CALIF. L. REV. 263 (1990); Pushaw, *supra* note 11; Robert J. Pushaw, Jr., *Bridging the Enforcement Gap in Constitutional Law: A Critique of the Supreme Court’s Theory that Self-Restraint Promotes Federalism*, 46 WM. & MARY L. REV. 1289, 1313-34 (2005).

338. See Pushaw, *supra* note 11, at 451-53.

339. See *supra* notes 8-13, 146-148 and accompanying text; see, e.g., *Windsor v. United States*, 133 S. Ct. 2675, 2701 (2013) (Scalia, J., dissenting); *Hohn v. United States*, 524 U.S. 236, 241-42 (1998) (listing adverseness as one of the “requisite qualities of a ‘case’ as the term is used in . . . Article III of the Constitution”); *Flast v. Cohen*, 392 U.S. 83, 95 (1968) (“In part [the terms ‘case’ and ‘controversy’] limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process.”); Alexander M. Bickel, *The Supreme Court, 1960 Term – Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 42 (1961) (arguing that, because the judicial power “may be exercised only in a case,” courts “may not decide non-cases, which are not adversary situations and in which nothing of immediate consequence to the parties turns on the results”).

herent in that term should be imputed to the definition of “case” as well.³⁴⁰ On this view, both terms imply the existence of opposing parties with adverse interests presenting their dispute for adjudication in a standard legal action.

From the perspective of modern lawyers steeped in the assumptions of the American adversary system and long accustomed to the Supreme Court’s conflation of “case” with “controversy,” the conclusion that a justiciable case requires the participation of an adverse party makes a fair amount of sense. Indeed, Redish and Kastanek have argued that the Court’s conjunction of the terms casts a “heavy burden” on those who propose to read the term “cases” as broader in scope than the term “controversies.”³⁴¹ But the modern view must confront burdens of its own. To begin with, judicial opinions conflating cases with controversies are of relatively recent vintage,³⁴² and it is by no means clear that such a reading was shared by the Framers or by the early Supreme Court.³⁴³ In fact, important early definitions of the term “cases” within the meaning of Article III provided by Chief Justice John Marshall and Justice Joseph Story do not refer to adverseness and do not assume the appearance of more than one party to the proceeding. Chief Justice Marshall and Justice Story were both familiar with the range of *ex parte* matters that had been assigned to the federal courts. Both Justices, moreover, upheld the exercise of judicial power in such matters.³⁴⁴

340. See Redish & Kastanek, *supra* note 16, at 564-65.

341. *Id.* at 566.

342. See text accompanying *infra* note 349.

343. Given that the early Supreme Court reporter provided the label “case” to the decidedly non-adverse *Hayburn’s Case*, 2 U.S. (2 Dall.) 409 (1792), such an assumption seems somewhat tenuous.

344. Chief Justice Marshall flatly rejected the argument that *ex parte* judicial proceedings to naturalize were merely ministerial and did not enjoy the conclusive quality of matters of record. See *Spratt v. Spratt*, 29 U.S. (4 Pet.) 393, 402 (1830) (argument of counsel) (contending that naturalization proceedings were not judicial but merely “ministerial,” and that there were no parties to the proceeding but that instead “[a]ll is *ex parte*”). Justice Story was equally convinced that *ex parte* petitions for the remission or mitigation of tax forfeitures were proper subjects of judicial cognizance. *The Margareta*, 16 F. Cas. 719, 721 (Story, Circuit Justice, C.C.D. Mass. 1815) (“In the performance of this duty, the judge exercises judicial functions, and is bound by the same rules of evidence, as in other cases.”). In an important encounter with the forfeiture statute, the Supreme Court apparently reached the same conclusion. It ruled that the Treasury Secretary could remit both portions of the forfeited sum, including that owed to the government and that owed to the custom-house officers who brought the forfeiture proceeding. See *United States v. Morris*, 23 U.S. (10 Wheat.) 246, 295-96 (1825). Daniel Webster appeared for the customs officials and argued that the Secretary lacked power to remit after the condemnation had taken effect and had invested the officers with a property right. Webster expressly invoked the separation of powers, reasoning as follows: “All judicial power, under the constitution, is vested in one Supreme Court, and such inferior tribunals as Congress shall establish. How, then, can any portion of that power be vested

Against this background, it is striking that Chief Justice Marshall and Justice Story couched their canonical definitions of the term “case” in terms broad enough to encompass *ex parte* matters. Listen first to the familiar words of Chief Justice Marshall’s opinion in *Osborn v. Bank of the United States*:

This clause [extending jurisdiction to federal question “cases”] enables the judicial department to receive jurisdiction to the full extent of the constitution, laws, and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case, and the constitution declares, that the judicial power shall extend to all cases arising under the constitution, laws, and treaties of the United States.³⁴⁵

Justice Story’s *Commentaries on the Constitution* adopts the same formulation: “A case, then, in the sense of this clause of the constitution, arises when some subject touching the constitution, laws, or treaties of the United States is submitted to the courts by a party who asserts his rights in the form prescribed by law.”³⁴⁶

The Marshall-Story account provides a straightforward basis for the exercise of jurisdiction over both contentious and non-contentious cases. Consider the typical contentious federal question claim, one in which a party demands a remedy from an opposing party for the claimed violation of a legal right.³⁴⁷ Such a claim for redress of violations would clearly qualify as an assertion of one’s rights within the Marshall-Story paradigm.³⁴⁸ Yet the Marshall-Story definitions would also encompass non-contentious federal question claims.

in the treasury department, or in any other executive department?” *Id.* at 277. The Court did not address the argument directly, but its decision to uphold the forfeiture suggests that it did not harbor constitutional misgivings with the procedure.

345. *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 819 (1824); *see also* *Weston v. City Council of Charleston*, 27 U.S. (2 Pet.) 449, 464 (1829) (explaining that the term “suit” encompasses “any proceeding in a court of justice, by which an individual pursues that remedy . . . which the law affords him”); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 408 (1821) (defining the term “suits” to include “all cases were [sic] the party suing claims to obtain something to which he has a right”).

346. 3 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 1646, at 424 (photo. reprint 2005) (2d ed. 1851).

347. We have framed this definition of contentious jurisdiction to track that put forward by Pushaw. *See* Pushaw, *supra* note 11, at 472.

348. We thus view the Marshall-Story definition as broad enough to encompass the “cases” for redress identified in early dictionaries but not as limited to them. *See* Redish & Kastanek, *supra* note 16, at 565 n.71 (reporting early legal dictionary definitions for the word “case”).

The definitions require only the assertion of claims by a single “party” and say nothing about the joinder of an opposing party. In addition, the formulations require only the assertion of one’s “rights,” and thus encompass claims in the nature of *ex parte* applications for pension benefits, naturalized citizenship, and other legal entitlements, such as warrants, conferred by law. As both Chief Justice Marshall and Justice Story would have understood, one can certainly assert claims of right on an *ex parte* basis without seeking redress from an opposing party.³⁴⁹

The formulations provided by Chief Justice Marshall and Justice Story to some extent tracked civil-law definitions of the “causes” cognizable before a judicial tribunal. The term “case” in Article III bears an obvious linguistic similarity to the Latin term *causa*, or cause, and both terms cover much the same ground. Indeed, the *Oxford Latin Dictionary* defines “*causa*” to mean “judicial proceedings,” or a “legal case.”³⁵⁰ The definition of “cause” in an eighteenth-century English treatise anticipates Justices Marshall and Story:

A Cause (called in the Latine *Causa*) is defined (by Logicians) That, by whose Vertue or Efficacy, any thing is made to have a Being or Existence [i.e., causation] . . . The word Cause is Metaphorically used here [i.e., in a legal treatise], for the word Action: which (amongst those many Significations the Glossaries seem to put upon it) we shall only define to be the right of prosecuting or pursuing (in a Court of Judicature) whatsoever any one supposes, is properly his Due, &c.³⁵¹

349. See Arlyck, *supra* note 87, at 265 (quoting Justice Story’s view that it was “not necessary that the adverse parties should be before the court,” because the court itself acted as the “general guardian of all interests which are brought to its notice”); see also *id.* at 265 n.81 (quoting Justice Story’s opinion in *The Adeline*, 13 U.S. (9 Cranch) 244, 284 (1815), which described prize proceedings as “modelled upon the civil law” and indicated that prize proceedings could not be “more unlike than those in the Courts of common law”).

350. See *Causa*, 1 OXFORD LATIN DICTIONARY (2d ed. 2012) (“Judicial proceedings, a legal case, trial.”). As Pushaw reports, moreover, the term “cause of action” was often shortened to simply a “cause” or an “action.” Pushaw, *supra* note 11, at 473 n.134; cf. JOHN COWELL, A LAW DICTIONARY: OR, THE INTERPRETER OF WORDS AND TERMS, USED EITHER IN THE COMMON OR STATUTE LAWS OF THAT PART OF GREAT BRITAIN, CALL’D ENGLAND (London, D. Browne et al. 1708) (equating “case” and “cause” in defining the term “extra-judicial”).

351. H.C. [HENRY CONSETT], THE PRACTICE OF THE SPIRITUAL OR ECCLESIASTICAL COURTS: TO WHICH IS ADDED, A BRIEF DISCOURSE OF THE STRUCTURE AND MANNER OF FORMING THE LIBEL OR DECLARATION 15 (London, W. Battersby, 2d ed. 1700). Noah Webster’s 1828 *American Dictionary of the English Language* contains a similar definition of “cause”:

A suit or action in court; any legal process which a party institutes to obtain his demand, or by which he seeks his right or his supposed right. This is a legal, scriptural and popular use of the word, coinciding nearly with *case* from *cado*, and *action* from *ago*, to urge or drive.

Like the Marshall-Story formulation, this definition of “cause” encompasses ex parte proceedings in which an individual “pursu[es]” in a court of judicature that which he supposes to be “properly his Due” and does not require the joinder of an adverse party.

Indeed, if one canvasses antebellum judicial decisions, one sees nothing like the modern use of the conjoined terms “cases or controversies” to suggest adverse-party restrictions on the work federal courts can perform. Our research suggests that the conjunction of terms did not appear until an 1887 circuit court opinion of Justice Stephen Field that refused to enforce a subpoena at the behest of the federal Pacific Railway Commission.³⁵² Justice Field’s account of the term “cases” follows:

The judicial article of the [C]onstitution mentions cases and controversies. The term ‘controversies,’ if distinguishable at all from ‘cases,’ is so in that it is less comprehensive than the latter, and includes only suits of a civil nature. By cases and controversies are intended the claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs. Whenever the claim of a party under the constitution, laws, or treaties of the United States takes such form that the judicial power is capable of acting upon it, then it has become a case. *The term implies the existence of present or possible adverse parties whose contentions are submitted to the court for adjudication.*³⁵³

Note the move here. Justice Field first suggests the broad similarity of the terms “cases” and “controversies.” Then, after restating and expanding the Marshall-Story definition, Justice Field makes the then-novel claim that the term “case” implies the features of a controversy; namely, the existence of present or possible adverse parties with competing contentions. In short, Justice Field used the idea of a controversy to transform the non-contentious Marshall-Story definition of a “case” into one that requires the existence of an adverse-party dispute. He perceived no such dispute in the matter before him; a federal commission was conducting an investigation for regulatory purposes and had not brought suit in federal court against the Pacific Railway.³⁵⁴

Cause, 1 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE cclxi-cclxii (1828). The dictionary defined “case” as “[a] cause or suit in court” and stated that “*case* is nearly synonymous with *cause*, whose primary sense is nearly the same.” *Case*, *id.* at ccliv.

352. *In re Pac. Ry. Comm’n*, 32 F. 241, 258 (C.C.N.D. Cal. 1887).

353. *Id.* at 255 (emphasis added) (citations omitted).

354. *Id.* at 259.

Justice Field may have recognized that he was breaking new ground and consequently may have labored to explain how other non-contentious applications differed from the administrative subpoenas under consideration.³⁵⁵ Nevertheless, and perhaps because his efforts at distinguishing other non-contentious proceedings did not prove persuasive, his opposition to a federal judicial role in administrative subpoena enforcement did not take hold. The Court later ruled that applications for such subpoenas were proper subjects of judicial cognizance,³⁵⁶ and the federal courts today oversee the enforcement of administrative subpoenas without raising Article III doubts.³⁵⁷

Yet Justice Field's reformulation of the Marshall-Story definition of a "case," from one that contemplates *ex parte* applications to one that requires adverse parties, has had great influence. Justice Field himself imported *Pacific Railway's* case-controversy conjunction into Supreme Court jurisprudence in *Smith v. Adams* in 1889: "By those terms [cases and controversies] are intended the claims or contentions of litigants brought before the courts for adjudication by regular proceedings established for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs."³⁵⁸ Later, in *Muskrat*, the Court recited the "present or possible adverse parties" idea from *Pacific Railway* in the course of rejecting what it perceived as an improper attempt to secure an advisory opinion.³⁵⁹ And by the middle of the twentieth century, the conflation of cases with controversies was complete.³⁶⁰

355. Justice Field distinguished the subpoena enforcement surrounding grand jury proceedings from the administrative subpoenas at issue on the ground that grand juries were required by the Fifth Amendment. *Id.* at 257 n.2. He distinguished letters rogatory on the ground that, in those cases, a controversy was pending on the docket of a foreign tribunal. *Id.* at 256-57. Finally, he distinguished petitions for habeas corpus relief, treating them as an exception to the Article III adverse-party requirement. *Id.* at 255 & n.1. The tone and focus of the opinion as a whole suggest that Justice Field's approach may have been driven by an antipathy to the regulatory power of the commission and a desire to protect federal dockets from administrative-agency support functions. In a wide-ranging discussion of the nature of judicial power, Justice Field sought to show that the federal courts could not perform administrative work and in particular lacked power to issue and enforce investigative subpoenas at the behest of the newly created federal railway commission. *See id.* at 249-59. Justice Field also argued that the proposed investigation threatened the railroad's privacy. *See id.* at 253-54.

356. *See Interstate Commerce Comm'n v. Brimson*, 154 U.S. 447, 476 (1894).

357. *See supra* Part I.D.3.

358. 130 U.S. 167, 173 (1889). The conjunction gained wider currency thereafter, appearing in *Tregea v. Modesto Irrigation Dist.*, 164 U.S. 179, 185 (1896), and *La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 456 (1899), before taking hold completely in twentieth-century doctrine.

359. *Muskrat v. United States*, 219 U.S. 346, 357 (1911).

360. *See Pushaw*, *supra* note 11, at 451.

Perhaps needless to say, we think the Marshall-Story formulation better and more faithfully captures the idea of a “case” as used in Article III, and we propose that scholars and jurists disavow the Justice Field gloss. In any event, it now seems clear that the case-controversy conjunction arrived on the scene after nearly a century of *ex parte* practice and provides scant support for the view that an adverse-party requirement applies across the board to all matters brought before Article III courts.

Stepping back from this genealogy, we observe that, from a textual perspective, the conjunction of cases and controversies runs afoul of the common-place presumption that legal drafters use different terms to convey different meanings.³⁶¹ That presumption bears particular force here, given that in Article III, the terms “cases” and “controversies” are repeatedly deployed in two different ways. The term “cases” is generally used where a grant of jurisdiction depends on the subject matter of the action, whereas the term “controversies” is used exclusively where the grant of jurisdiction depends on the identity of the parties opposing one another.³⁶² Indeed, some scholars (including one of us) have treated the terms as potentially conveying different meanings, arguing that “cases” may be the broader of the two and may include both civil and criminal matters, while the narrower “controversies” may include only disputes of a civil character.³⁶³ Pushaw, by contrast, has questioned this civil-criminal distinction and argued that the terms may actually describe two different functions of the federal judiciary.³⁶⁴ For Pushaw, cases that implicate federal law invite the federal courts to play an expositional role, and controversies simply call upon the federal courts to provide an unbiased forum for the adjudication

361. See, e.g., J.G. SUTHERLAND, *STATUTES AND STATUTORY CONSTRUCTION* §§ 255-56 (Chicago, Callaghan & Co., 1891).

362. See U.S. CONST. art. III, § 2, cl. 1 (“The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; – to all Cases affecting Ambassadors, other public Ministers and Consuls; – to all Cases of admiralty and maritime Jurisdiction; – to Controversies to which the United States shall be a Party; – to Controversies between two or more states; – between a State and Citizens of another State; – between Citizens of different States; – between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.”).

363. Fletcher, *supra* note 337, at 266-67; James E. Pfander, *Rethinking the Supreme Court’s Original Jurisdiction in State-Party Cases*, 82 CALIF. L. REV. 555, 604-12 (1994). This argument echoes Justice Field’s speculation in *Pacific Railway*. See *In re Pac. Ry. Comm’n*, 32 F. 241, 255 (C.C.N.D. Cal. 1887) (“The term ‘controversies,’ if distinguishable at all from ‘cases,’ is so in that it is less comprehensive than the latter, and includes only suits of a civil nature.”).

364. Pushaw, *supra* note 11, at 460-65.

of disputes.³⁶⁵ While many scholars now agree that controversies differ from cases, no consensus has yet emerged to explain what the difference is.

Our construct of non-contentious jurisdiction helps to explain the conspicuous difference in usage between the terms “case” and “controversy” in a manner that accounts for the presence of *ex parte* proceedings on federal dockets. On our view, and in keeping with the Marshall-Story definition of a “case,” federal courts have the power to exercise non-contentious jurisdiction in federal question proceedings that have been assigned to them by Congress. We think “cases” include both criminal and civil matters and at the same time contemplate a special function for federal courts. As this Article has noted, non-contentious matters crop up on both the civil and criminal side of the federal docket. Just as federal bankruptcy proceedings require federal judicial administration of the bankruptcy estate, so too do federal criminal matters frequently lead to the issuance of *ex parte* search or arrest warrants and the entry of convictions on the basis of non-adverse guilty pleas.³⁶⁶ The term “case,” particularly as defined by Chief Justice Marshall and Justice Story, extends broadly enough to encompass all such proceedings. Article III “controversies,” by contrast, require a dispute between designated opponents and exclude original petitions for the performance of the administrative functions associated with non-contentious jurisdiction.³⁶⁷

365. Pushaw later described his thesis as follows: “In federal question, admiralty, and foreign officer ‘Cases,’ the judiciary’s main role would be to ‘expound’ (i.e., interpret and apply) laws having national and international significance. By contrast, in ‘Controversies,’ federal judges would serve chiefly as neutral umpires in resolving bilateral disputes involving the designated parties.” Robert J. Pushaw, Jr., *Congressional Power over Federal Court Jurisdiction: A Defense of the Neo-Federalist Interpretation of Article III*, 1997 B.Y.U. L. REV. 847, 851. For criticisms of Pushaw’s law-declaration thesis, see David E. Engdahl, *Intrinsic Limits of Congress’ Power Regarding the Judicial Branch*, 1999 B.Y.U. L. REV. 75, 149 n.278, which argues that the law-declaration model of the judicial role did not appear in federal jurisprudence until the twentieth century; and John Harrison, *The Power of Congress To Limit the Jurisdiction of Federal Courts and the Text of Article III*, 64 U. CHI. L. REV. 203, 229-30 (1997), which criticizes Pushaw’s account as lacking direct evidence and failing to fit with available evidence about foreign officer jurisdiction.

366. We describe guilty pleas as “non-adverse” in the sense that both sides agree as to liability and the sentence to be imposed. For a suggestion that non-contentious jurisdiction includes causes both criminal and civil, see Layton B. Register, *Spanish Courts*, 27 YALE L.J. 769, 772 (1918), which states:

The civil affairs of the courts of first instance are either contentious or non-contentious. The non-contentious jurisdiction consists of uncontested or *ex parte* acts, and includes categories both civil and criminal. The contentious jurisdiction comprises contested causes and includes all civil and commercial actions which . . . can not be brought before the municipal courts.

367. For our suggested distinction between original and ancillary non-contentious jurisdiction, see *infra* Part IV.A.1.

We thus take Pushaw's suggested distinction in a new direction,³⁶⁸ emphasizing less the special law-exposition role of the federal courts and more their power to exercise their judicial functions despite the lack of a controversy when Congress has called for the exercise of federal judicial power. A "case," on this view, might arise under federal law or touch matters of admiralty and maritime jurisdiction, without invariably entailing the joinder of adverse parties. Federal courts might plausibly be given – and, as we have seen, often *have* been given – the authority to exercise judicial judgment in the administration of federal law "cases" on an *ex parte* or non-contentious basis. That was certainly the view of the Court in *Tutun*, which concluded that naturalization petitions give rise to "cases" within the meaning of Article III,³⁶⁹ and it is a view that permits theory for the first time to cohere with text and practice.

2. Hayburn's Case and the Lessons of History

How, then, to account for *Hayburn's Case*?³⁷⁰ Congress did, after all, assign the circuit courts responsibility for processing the pension claims of disabled veterans on an *ex parte* basis, and three circuit courts did, indeed, refuse to entertain the claims in question³⁷¹ (although the judges of some of the courts agreed to hear the claims, extrajudicially, as "commissioners"³⁷²). While the

³⁶⁸ Pushaw did not tackle the problem of *ex parte* proceedings. He did not include *ex parte* matters in his discussion of "cases" that lack attendant disputes. See Pushaw, *supra* note 11, at 480-82 (arguing that English courts expounded the law in such undisputed matters as advisory opinions, prerogative writs, and relator and informer actions). Nor did he suggest that his account of the meaning of cases would solve the puzzle of *ex parte* proceedings. Cf. *id.* at 526-30 (arguing that his case-exposition theory should apply to issues of mootness, ripeness, and standing).

³⁶⁹ *Tutun v. United States*, 270 U.S. 568 (1926).

³⁷⁰ 2 U.S. (2 Dall.) 409 (1792).

³⁷¹ See *supra* Part I.A.2. A consideration of *Hayburn's Case* can be aided by distinguishing between *ex parte* proceedings and *extrajudicial* activities or duties. The former involve proceedings before a court by a single party or by parties without adverse interests seeking an order of the court or some other judicial action. By contrast, *extrajudicial* activities are functions performed by a judge outside the course of regular court or judicial proceedings, whether by virtue of the judge's office or by special appointment. Some notable examples of *extrajudicial* activities include the Chief Justice's service on the Board of Regents of the Smithsonian Institution, Justice Robert H. Jackson's role as prosecutor at the Nuremberg trials, and Chief Justice Earl Warren's appointment to head the commission that investigated President Kennedy's assassination. See Pfander, *supra* note 60, at 6. As will be seen *infra* Part IV, some of the objections taken by the Justices to the use of courts to administer Congress's pension scheme included work, such as examining injuries, that was viewed as not properly judicial in character.

³⁷² Pfander, *supra* note 60, at 35.

Court did not decide the question itself, the circuit courts wrote letters to President George Washington, explaining their refusal to do the business. Set forth in footnotes to the Court's inconclusive proceedings, the letters point to two flaws in the pension scheme. The first was a lack of judicial finality: the circuit court decisions were subject to revision by an executive branch official (the Secretary of War) and then by Congress.³⁷³ The second was a concern with the judicial nature or the "judicial manner" of the proceeding.³⁷⁴ Although the finality concern seems straightforward, the letters do not say precisely what they mean by the second critique.

Lacking a clear explanation, some scholars have speculated that these doubts as to the judicial nature of the proceeding were meant to express concern with the ex parte nature of the claims. The first edition of Hart and Wechsler's federal courts casebook put the issue, characteristically, in the form of a question: "Was the lack of provision for any party defendant one of the reasons why the judges thought that the statute did not call for the exercise of 'judicial power'?"³⁷⁵ The current edition, also characteristically, puts the matter more forthrightly. After posing the hypothetical possibility of a statute assigning the determination of federal Social Security disability claims to the federal courts on an ex parte basis, the current edition suggests such a statute would fail: "Hayburn's Case, however, seems to reject rather decisively Congress's effort to enlist federal courts to act as administrative agencies by applying law to fact outside the context of a concrete dispute between adverse parties."³⁷⁶ The

373. 2 U.S. (2 Dall.) at 410 n. On the centrality of the concern with judicial finality, see 8 DHSC, *supra* note 56, at 547-49 (quoting notes from Justice James Iredell that highlighted his concern with that feature of the statute); see also 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 70 (1926) (quoting a newspaper account of the Pennsylvania circuit decision and emphasizing revision by the Secretary of War); *id.* at 71 (quoting a letter from Judge Richard Peters, a district judge on the Pennsylvania circuit, that cited the pension law as one that was rendered improper by the "danger of [e]xecutive control over the judgments of Courts").

374. 2 U.S. (2 Dall.) at 410 n.

375. HENRY M. HART, JR. & HERBERT WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 99 (1st ed. 1953) [hereinafter HART & WECHSLER 1st].

376. HART & WECHSLER 6th, *supra* note 21, at 84. This possibility is not entirely hypothetical. Some federal courts have refused to exercise jurisdiction over original administrative petitions, citing *Hayburn's Case* as governing precedent. See, e.g., *In re Beck*, 526 F. Supp. 2d 1291, 1300-01 (S.D. Fla. 2007) (finding that a statutorily prescribed ex parte license application from a salvage vessel operator did not present a case or controversy under Article III because of a lack of an adverseness and citing *Hayburn's Case* as support).

view that *Hayburn's Case* forecloses ex parte administration of claims has become quite widespread.³⁷⁷

Widespread – but, we think, anachronistic. Perhaps the strongest evidence against an adverse-party reading of *Hayburn's Case* lies in the federal courts' contemporary and subsequent acceptance of ex parte duties of various sorts. Indeed, in *Hayburn's Case* itself, the Supreme Court did not insist on the appearance of adverse parties. Randolph proceeded by “motion” on behalf of his client, William Hayburn, and that appears to have been thought sufficient to authorize an initial evaluation of the merits.³⁷⁸ No one demanded service on, or the appearance of, the respondent circuit court.³⁷⁹ In the wake of *Hayburn's Case*, moreover, Congress reassigned pension duties to the district judges on an ex parte basis.³⁸⁰ More significantly, as we showed earlier, Congress repeatedly

377. See, e.g., Bloch, *supra* note 129, at 594, 595 & n.108, 599; Wheeler, *supra* note 17, at 135-36; cf. Marcus & Teir, *supra* note 224, at 528 n.11 (listing cases citing to *Hayburn's Case* as precedent for the case-or-controversy requirement).

378. To be sure, the Court divided 3-3 and thus refused to permit the Attorney General to appear to seek an order compelling the enforcement of pension rights by virtue of his office alone. But that decision simply obliged Randolph to proceed on behalf of Hayburn as his client. Randolph's motion sought a writ of mandamus directed to the United States Circuit Court for the District of Pennsylvania, the court to which Hayburn had applied for a pension. See 6 DHSC, *supra* note 56, at 70 n.1.

379. Standard practice in seeking mandamus required service of the petition on the party against whom mandamus was being sought. See THOMAS TAPPING, THE LAW AND PRACTICE OF THE HIGH PREROGATIVE WRIT OF MANDAMUS, AS IT OBTAINS BOTH IN ENGLAND, AND IN IRELAND 297-98 (London, William Benning & Co., 1848) (observing that the court has the power to issue mandamus in the first instance, thereby compelling the respondent to comply with the order on pain of contempt before being given an option to appear and respond to the motion); *id.* at 300-01 (describing the rules that govern service of the rule to show cause on the respondent, thus making clear that notice of the proceeding comes after the petitioner has made a proper showing in support of the rule and the court has agreed to issue the rule and demand a response). None of the documents we have encountered refers to service of Randolph's motion on the circuit court or to the appearance of any other formal defendant. Yet, curiously, the first edition of Hart & Wechsler asserts that, with the appearance of Hayburn as a party, “there were two perfectly good adverse parties in the Supreme Court.” HART & WECHSLER 1ST, *supra* note 375, at 99. Perhaps the authors of Hart & Wechsler (and the participants) viewed service as unnecessary given the presence of two Pennsylvania circuit judges (Wilson and Blair) on the Supreme Court bench. In any case, the Court's willingness to proceed without a formal respondent appears to have been a commonplace feature of their supervision of their judicial inferiors. In other early cases, the Court entertained ex parte motions for supervisory writs and did not demand prior notice to, or joinder of, defendants. See *supra* text accompanying notes 131-136 (describing the petition for a writ of mandamus in *United States v. Lawrence*, 3 U.S. (3 Dall.) 42 (1795)).

380. The curative 1793 legislation made a number of changes. In particular, it avoided the finality problem by instructing the district judge to collect evidence under oath and send the evidence along to the Secretary of War and ultimately to Congress, which reserved to itself the power to make any “proper” order. See An Act To Regulate the Claims to Invalid Pensions,

assigned administrative matters to the federal courts.³⁸¹ Such matters surely would have implicated the rule against the judicial acceptance of administrative assignments, had such a rule emerged from *Hayburn's Case*. That was what Justice Brandeis apparently meant by referring to the case in the course of upholding *ex parte* naturalization proceedings in *Tutun*.³⁸²

In addition, we have reviewed the contemporaneous commentary and do not believe that the circuit judges' refusal to act was based upon the *ex parte* character of the proceedings.³⁸³ Apart from the concern with finality, which was prominently featured in every account of the case, one finds a smattering of additional concerns, unrelated to the lack of adverseness, that may explain why some of the judges considered Congress's scheme to require the performance of non-judicial duties. In proceedings before the House of Representatives in April 1792, held shortly after the Pennsylvania circuit refused to act, the reporter described the problems as follows:

[I]t appeared that the Court thought the examination of Invalids a very extraordinary duty to be imposed on the Judges: and looked on the law . . . as an unconstitutional one, inasmuch as it directs the Secretary of War to state the mistakes of the Judges to Congress for their revision Another objection, on the part of the Judges, was, that whereas there are laws now in force, prescribing a day, beyond which the court shall not sit, this new law declares that the court shall *not* sit five days for the purpose of hearing claims, whether they be offered or not; and

ch. 17, § 2, 1 Stat. 324, 325 (1793) (calling on the Secretary of War to make a report based on the evidence submitted as would enable Congress to "take such order thereon, as [it] may judge proper"); Pfander, *supra* note 60, at 37-38 (recounting the terms of curative legislation in which Congress directed the district courts either to collect evidence on pension claims in the first instance or to assign the task to duly appointed commissioners). In addition, the task of inspecting wounds and disabilities was transferred from federal judges to physicians, who were expected to offer their opinion as to the extent of the claimant's disability. See Act of March 23, 1792 § 2, 1 Stat. 243.

381. See *supra* Part I (collecting early Republic examples of naturalization proceedings, remission petitions, and warrant applications).

382. See *Tutun v. United States*, 270 U.S. 568, 576 (1926).

383. We have relied primarily on the original documents collected by the editors of the Documentary History series and on the reports of contemporaneous newspaper accounts in Warren's history. See 6 DHSC, *supra* note 56, at 33-72, 285-95, 370-86 (collecting documents relating to *Hayburn's Case*, *Ex parte Chandler* (unreported), and *United States v. Todd* (unreported), in Wilfred J. Ritz, *United States v. Yale Todd* (U.S. 1794), 15 WASH. & LEE L. REV. 220, 227-31 (1958)); 1 WARREN, *supra* note 373, at 69-82.

leaves nothing to the discretion and integrity of the Judges, to sit as long as they have public business to do.³⁸⁴

On this account (which precedes the court’s letter to President Washington), the Pennsylvania circuit viewed the absence of finality as the master objection and identified two other criticisms that we might today characterize as matters of judicial dignity. First, the statute called upon the court to conduct a physical examination of the wounds of the invalids, a duty the judges apparently regarded as distasteful.³⁸⁵ Second, the statute required that the circuit courts “remain at [their] places” for “five days, at the least, from the time of opening the sessions thereof” to allow disabled veterans to file their claims.³⁸⁶ In the early days, many circuit courts would sit for a day or two at most and then adjourn.³⁸⁷ Viewing the duty to sit as inconsistent with the “discretion and dignity” of their judicial office, the Pennsylvania circuit judges may have had this affront to their discretion in mind in criticizing the law as imposing duties not of a “judicial” character.³⁸⁸

Apart from the report in the House proceedings, the editors of the *Documentary History of the Supreme Court* have published a previously overlooked set of notes, authored by Justice James Iredell during the August 1792 argument in

384. 6 DHSC, *supra* note 56, at 48 (emphasis added). The term “not,” italicized here, was apparently included by mistake. *Id.* at 49 n.6.

385. See Act of March 23, 1792 § 2 (directing that the circuit courts “shall forthwith proceed to examine into the nature of the wound” and make a finding as to the degree of disability).

386. *Id.* § 3.

387. See Pfander, *supra* note 60, at 36-37 & n.189.

388. For the suggestion that the judges were unhappy with the workload associated with pension duty, see *id.* at 48-50. One participant in the House investigation of the Pennsylvania circuit, William Vans Murray, thought it rather “singular” that the judges would exercise the right to declare a statute unconstitutional when doing so permitted them to “avoid” “merely a personal duty.” Letter from William Vans Murray to John Gwinn (Apr. 15, 1792), in 6 DHSC, *supra* note 56, at 50. For the identification of Murray as a member of the committee, see 6 DHSC, *supra* note 56, at 49 n.7. The need for a physical examination may help to explain the logic of Congress’s decision to assign the task of initial assessment to the federal circuit courts. See Mark Tushnet, *Dual Office Holding and the Constitution: A View from Hayburn’s Case*, in ORIGINS OF THE FEDERAL JUDICIARY: ESSAYS ON THE JUDICIARY ACT OF 1789, at 196, 199 (Maeva Marcus ed., 1992) (noting the geographic logic that underlay Congress’s decision to assign fact-finding to the circuit courts in the first instance rather than to the War Department). Unlike district courts, which typically sat in maritime commercial centers, the circuit courts convened at various cities in the several states and were more accessible to disabled veterans.

Hayburn's Case.³⁸⁹ In describing “objections” to the pension statute, Justice Iredell’s notes read as follows:

Objections.

1. Not of a Judicial nature.
2. Not to be exercised in a Judicial manner.

As to the first, it must be found in the Constitution
all Laws under the United States &c.

Contracts equally valid &c.

Pensioners. all public Services

Congress have done nothing more than to direct [the pensioners’] titles
to be re-examined

In effect a Suitor.

Petitions of Right & *Monstrans de droit* Destitute of forms of Writ
Suit a Demand of any thing.

A more dignified mode of becoming a Defendant

2. Not to be executed in a Judicial way.

Examples.

To inspect wounds in the case of *Mayhems*.

Substance only to be regarded where a Sovereignty permits itself to be
sued.

Forms may be disregarded where Parties agree.³⁹⁰

389. See 8 DHSC, *supra* note 56, at 547-550 & n.1 (2007) (reproducing notes from Justice Iredell that were omitted from the treatment of *Hayburn's Case* in Volume 6 of the *Documentary History*). Although Justice Iredell often took copious notes, see 5 DHSC, *supra* note 56, at 164-93, 214-17 (collecting the Justice’s extensive notes on his views about the susceptibility of states to suit and his account of the argument in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793)), we do not know how well he captured the discussion or whether his notes reflect the views of the Justices or the arguments of counsel.

390. 8 DHSC, *supra* note 56, at 548-49. It appears that the two prior “objections” were those of the other Justices that he did not necessarily share. Notably, the language of those two objections in Justice Iredell’s notes closely tracked the language of the Pennsylvania circuit court’s objections. The conversation appeared to range widely and included a discussion of the possibility that the Supreme Court might correct the pension errors of the Secretary of War through the use of mandamus. *Id.* (expressing doubts that the secretary’s duty was clear enough to warrant mandamus, but noting that the oath to support the Constitution might trigger mandamus in any case involving conduct in violation of constitutional duty). In a later case, the Court rejected the use of mandamus to add individuals to the pension list, opining somewhat cryptically that “Mandamus cannot issue to the secretary of War for [such] purposes.” *Ex parte Chandler* (unreported), in 6 DHSC, *supra* note 56, at 294-95 (reproducing Chandler’s application for mandamus to compel his addition to the pension list and the minutes of the Court’s rejection of the motion).

Even as it poses obvious interpretive challenges, this evocative fragment may provide a window into the nature of the Justices' concerns. The second "objection" tends to confirm that one or more Justices continued to view the obligation to examine the wounds of the petitioners as casting doubt on the "judicial manner" of the proceeding. Justice Iredell's notes suggest that someone attempted to respond by invoking the "example" of "mayhems." At common law, as various digests and abridgments of the day confirm, a judge called upon to hear a case of "mayhem" was obliged to inspect the plaintiff's wounds in the course of adjudicating the claim.³⁹¹ The mayhem example seems intended to answer any doubts (apparently unrelated to any concern with a need for adverse parties) that had arisen as to the "judicial" quality of the examination obligation.³⁹²

Justice Iredell's account of the first objection addresses a different issue. One could argue that the arguments in Justice Iredell's notes denote a lingering concern with the formal joinder of the United States as a defendant and therefore provide some support for an interpretation of the circuit court letters as reflecting a concern with proper parties. But a variety of considerations point away from adopting this adverse-party gloss on *Hayburn's Case*. First, none of the Justices suggested, either in the letters or in comments collected in Justice Iredell's notes, that the federal courts lacked power over the proceedings in the absence of adverse parties. The concern instead appeared to focus on sovereign dignity and formal consent to suit.³⁹³ Second, of the broad mix of considera-

391. See 2 MATTHEW BACON, A NEW ABRIDGMENT OF THE LAW 10 (London, A. Strahan 1768) (reporting that the Justices "cannot increase the Damages without their View" in a case of mayhem); 1 ISAAC ESPINASSE, A DIGEST OF THE LAW OF ACTIONS AT NISI PRIUS 399-400 (Philadelphia, J. Crukshank & W. Young 1791) (reporting that in cases of wounding or mayhem, the court "may upon view encrease the damages," and noting cases in which such an increase was allowed "on a view of the party, and examination of the surgeon"); 2 CHARLES VINER, A GENERAL ABRIDGMENT OF LAW AND EQUITY 532-33 (Lawbook Exchange 2009) (1742) (reporting on prayer by defendant for "examin[ation] by Justices" in case of mayhem and reporting that a judgment of mayhem adjudged upon "by Inspection of the Court" was peremptory); WOOD, *supra* note 30, at 546 (reporting that in cases of battery and mayhem, "[t]he Court may Encrease the Damages upon View of the Record and the Person").

392. Potentially confirming this interpretation, when Congress adopted a new pension law in 1793, it called for physicians to conduct the examinations and to provide their opinions to the judge as to the extent of any disability. An Act To Regulate the Claims to Invalid Pensions, ch. 17, § 2, 1 Stat. 324, 325 (1793).

393. Issues of sovereign dignity may have been much on the mind of the Attorney General, the Justices, and Justice Iredell in particular. Justice Iredell joined in dismissing the precursor to *Chisholm* while serving as a Circuit Justice in 1791. The case reappeared on the Supreme Court's original docket in February 1792. Arguments in *Chisholm* at the Supreme Court were held one year later in February 1793. Edmund Randolph appeared as counsel of record for *Chisholm*. See *Chisholm*, 2 U.S. (2 Dall.) at 419 (identifying Randolph as counsel for plain-

tions in play, only the concern with finality was consistently articulated and broadly shared.³⁹⁴ Third, the Justices' views were apparently evolving; while the five-day provision informed the circuit court's initial response in April, it did not appear in Justice Iredell's notes of the argument in August.³⁹⁵ Fourth, it may be difficult ultimately to separate the concern with the manner of suing the United States from the problem of finality. Congress's desire to retain control over the purse strings certainly informed its approach to pension claims and later led it to assign money claims to legislative courts that were not constrained by Article III's judicial finality requirement.³⁹⁶

The lesson of *Hayburn's Case* is not that the federal courts lack power to hear *ex parte* proceedings, but that they can act only where their decision will have a binding, legally determinative effect. The prospect of executive revision would have denied that effect to the courts' pension decisions. And the lack of finality explains subsequent cases in which the Court has invoked *Hayburn's Case* to support the proposition that the work of commissioners lies beyond the judicial power conferred in Article III. In such well-known cases as *Ferreira* and *Gordon*,³⁹⁷ the Court refused to accept an appellate role in reviewing the preliminary work of non-Article III tribunals. In each case, Congress had failed to ascribe finality to the adjuncts' work, bringing the cases squarely within the finality principle of *Hayburn's Case*. Rather than a precedent that rejects judicial administration, in short, *Hayburn's Case* should be read as a precedent that insists on judicial finality.

tiff); 5 DHSC, *supra* note 56, at 129-32. Justice Iredell's notes of the proceedings in *Hayburn's Case* were taken in August 1792. See 8 DHSC, *supra* note 56, at 547-49.

394. Justice Iredell later explained that the "Objection" that "weighed most with him" was the proviso subjecting the courts' determination to executive and legislative revision. 8 DHSC, *supra* note 56, at 549.
395. Randolph strongly urged the legality of the pension scheme, and his views, as well as those of the other Justices, may have changed some minds. On Randolph's attitude, see Letter from Edmund Randolph to George Washington, in 6 DHSC, *supra* note 56, at 45, which describes a brief conversation with Justice Wilson; and Letter from Edmund Randolph to James Madison, *id.* at 67-68, which recounts Randolph's attempt to persuade the Court in the pension case and offering a somewhat critical view of Chief Justice Jay's command of the law.
396. See Floyd D. Shimomura, *The History of Claims Against the United States: The Evolution from a Legislative Toward a Judicial Model of Payment*, 45 LA. L. REV. 625, 643-47, 651-53 (1985) (describing the *Hayburn's Case* finality rule as making Congress reluctant to authorize the federal courts to hear claims against the United States and discussing the compromise that led in 1855 to the creation of a non-final Article I tribunal, known as the Court of Claims, that acted in an advisory capacity and was subject to congressional oversight).
397. *Gordon v. United States*, 117 U.S. 697, 702-04 (1864); *United States v. Ferreira*, 54 U.S. (13 How.) 40, 51-52 (1851).

3. *Feigned Cases and Adverse Parties*

In attempting to justify the adverse-party requirement, scholars also sometimes point to the hostility that courts now direct towards feigned or collusive cases, which were a commonplace of early federal practice but now are soundly repudiated.³⁹⁸ Feigned cases, which have a long pedigree in English and American judicial proceedings, are cases constructed by the parties upon a contrived or assumed set of facts in order to obtain a judicial decree or decision on a point of law.³⁹⁹ Importantly, however, the decisions that restrict the use of collusive cases do not actually question the power of the federal courts to hear non-contentious proceedings in general, but only collusive proceedings that assume the form of contentious ones. Consider *Lord v. Veazie*,⁴⁰⁰ the decision that Justice Scalia (in *Windsor*) and many scholars have identified as an important early articulation of the adverse-party requirement.⁴⁰¹ There, Chief Justice Taney minced no words in decrying the parties' invocation of judicial power in collusive proceedings:

It is the office of courts of justice to decide the rights of persons and of property, when the persons interested cannot adjust them by agreement between themselves, — and to do this upon the full hearing of both parties. And any attempt, by a mere colorable dispute, to obtain the opinion of the court upon a question of law which a party desires to know for his own interest or his own purposes, when there is no real and substantial controversy between those who appear as adverse parties to the suit, is an abuse which courts of justice have always reprehended, and treated as a punishable contempt of court.⁴⁰²

In accordance with these views, the Court dismissed an appeal after it became clear that the parties were not true adversaries but had conspired in presenting a feigned case that was meant to secure an advantageous statement of the law for use against an unrepresented third party.⁴⁰³

Given the potential for abuse of the rights of third parties, one can readily understand why the Court attempted to limit the use of feigned proceedings.

398. See Morley, *supra* note 18, at 661; Redish & Kastanek, *supra* note 16, at 567-70.

399. See Lindsay G. Robertson, "A Mere Feigned Case": *Rethinking the Fletcher v. Peck Conspiracy and Early Republican Legal Culture*, 2000 UTAH L. REV. 249, 259-60.

400. 49 U.S. (8 How.) 251 (1850).

401. See *United States v. Windsor*, 133 S. Ct. 2675, 2703 (2013) (Scalia, J., dissenting) (citing *Lord*, 49 U.S. (8 How.) at 255-56).

402. *Lord*, 49 U.S. (8 How.) at 255.

403. See *id.*

Yet historians agree that feigned proceedings were a fairly commonplace tool of adjudication in the early Republic.⁴⁰⁴ Previous work identifies property disputes and tax cases as primary exemplars of feigned cases. For example, in *Hylton v. United States*, the officials of the Treasury Department structured a feigned dispute to obtain a test of the federal carriage tax.⁴⁰⁵ Similarly, in *Pennington v. Coxe*, the parties set up a wager agreement that would satisfy the amount-in-controversy threshold needed to procure review in the Supreme Court.⁴⁰⁶ Other well-known examples of cases alleged to be feigned include *Fletcher v. Peck*,⁴⁰⁷ *McCulloch v. Maryland*,⁴⁰⁸ and *Cohens v. Virginia*,⁴⁰⁹ where fictitious factual circumstances were pleaded in order to secure a test of the constitutionality of state laws.⁴¹⁰

One can best grasp the early appeal of feigned proceedings when one understands their similarity to a modern declaratory judgment action. Most feigned proceedings enabled parties to secure a definitive judicial clarification of law or fact as the basis for ordering their affairs. In *Hylton*, the parties genuinely disputed the constitutionality of the carriage tax; ownership of 150 carriages was feigned only to ensure access to the Court's docket. Similarly, in *Pennington*, the feigned wager between the parties was designed to secure ac-

404. See Bloch, *supra* note 129, at 612 (treating collusive suits as a commonplace feature of the early Republic).

405. 3 U.S. (3 Dall.) 171 (1796). For an account, see Robert P. Frankel, Jr., *Before Marbury: Hylton v. United States and the Origins of Judicial Review*, 28 J. SUP. CT. HIST. 1 (2003).

406. See *Pennington v. Coxe*, 6 U.S. (2 Cranch) 33 (1804); see also Charlotte Crane, *Pennington v. Coxe: A Glimpse at the Federal Government at the End of the Federalist Era*, 23 VA. TAX REV. 417 (2003) (explaining the wager contrivance in *Pennington*).

407. 10 U.S. (6 Cranch) 87 (1810).

408. 17 U.S. (4 Wheat.) 316 (1819).

409. 19 U.S. (6 Wheat.) 264, 387 (1821).

410. See 1 WARREN, *supra* note 373, at 146-47, 392-95 & n.1 (describing both *Hylton* and *Fletcher* as feigned cases); Robertson, *supra* note 399, at 256-65; see also Eric Kades, *The Dark Side of Efficiency: Johnson v. M'Intosh and the Expropriation of American Indian Lands*, 148 U. PA. L. REV. 1065, 1073, 1092-93 (2000) (suggesting that *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823), was a feigned case); R. Kent Newmyer, *John Marshall, McCulloch v. Maryland, and the Southern States' Rights Tradition*, 33 J. MARSHALL L. REV. 875, 912-13 (2000) (discussing charges that *Cohens* was a feigned case); Pfander & Hunt, *supra* note 57, at 1884-87, 1894-1903 (describing the feigned case of *Maley v. Shattuck*, 7 U.S. (3 Cranch) 458 (1806), in which such prominent early American statesmen as Thomas Jefferson, James Madison, and Chief Justice John Marshall all played central roles in procuring a feigned judicial test of the legality of the capture of a vessel by officers of the United States during the quasi-war with France); Harold J. Plous & Gordon E. Baker, *McCulloch v. Maryland: Right Principle, Wrong Case*, 9 STAN. L. REV. 710, 725 (1957) (noting accusation that *McCulloch* was a feigned case).

cess to a federal trial docket for a resolution of a genuine dispute.⁴¹¹ Taking account of these developments, the Court explained in *Lord* that amicable actions are “approved and encouraged, because they facilitate greatly the administration of justice.”⁴¹²

Yet the very idea of an agreed-upon dispute posed a threat to the interests of courts and third parties. Just as courts today issue declaratory judgments only in cases of “actual controversy,”⁴¹³ so too courts in the eighteenth and nineteenth centuries worried that litigants would present amicable cases to obtain a legal pronouncement for reasons other than to resolve a genuine disagreement about the law.⁴¹⁴ Hence the idea, also expressed in *Lord*, that “there must be an actual controversy, and adverse interests.”⁴¹⁵ The Court attempted to ensure compliance with this adverse-party limit by threatening lawyers who brought improper feigned cases with contempt sanctions.⁴¹⁶

Lord thus introduces the idea that parties may contrive amicable proceedings to obtain a declaration of their respective rights only in cases of genuine uncertainty as to the law applicable to their own circumstances. When the parties lack adverse interests, feigned litigation often aims to secure a precedent rather than to resolve a dispute. Feigned cases to procure advantageous precedents became particularly troublesome during the Gilded Age, as railroads and other regulated entities hit upon ingenious strategies to structure private litigation that would necessitate the adjudication of constitutional issues.⁴¹⁷ In one

411. Robertson, *supra* note 399, at 262–63 (discussing *Hylton* and *Pennington*).

412. *Lord v. Veazie*, 49 U.S. (8 How.) 251, 255 (1850).

413. 28 U.S.C. § 2201(a) (2012).

414. See, e.g., Robertson, *supra* note 399, at 259–63; cf. Harold Chesnin & Geoffrey C. Hazard, Jr., *Chancery Procedure and the Seventh Amendment: Jury Trial of Issues in Equity Cases Before 1791*, 83 YALE L.J. 999, 1009–10 (1974) (describing growing antipathy towards the trying of feigned issues in England).

415. *Lord*, 49 U.S. (8 How.) at 255.

416. *Id.* Contempt was commonly used by the superior courts in England to punish lawyers for bringing improper feigned proceedings. See Bethany R. Berger, “Power over This Unfortunate Race”: Race, Politics and Indian Law in *United States v. Rogers*, 45 WM. & MARY L. REV. 1957, 2000–01 (2004) (citing *Hoskins v. Berkeley*, 100 Eng. Rep. 1086, 1086 (K.B. 1791)).

417. *United States v. Johnson*, 319 U.S. 302 (1943) (refusing to entertain a collusive challenge to the constitutionality of federal law); *Chicago & Grand Trunk Ry. Co. v. Wellman*, 143 U.S. 339, 345 (1892) (observing that action brought by passenger to challenge constitutionality of rates charged by railroad was a collusive suit designed to secure an appeal from the legislature to the courts). See generally William C. Wiecek, *The Debut of Modern Constitutional Procedure*, 26 REV. LITIG. 641 (2007) (tracing the impact of Justices Frankfurter and Brandeis on the Court’s development of prudential doctrines of avoidance). On the importance of the facts, see Felix Frankfurter, *A Note on Advisory Opinions*, 37 HARV. L. REV. 1002 & n.2 (1924) (explaining that the “stuff of these contests” over constitutional rights “are facts, and judgments upon facts”).

such case, a railroad contrived to have a passenger bring suit for damages after seeking and being denied the opportunity to purchase a ticket at a new regulated rate.⁴¹⁸ In other cases, friendly shareholders would initiate a derivative suit to block the corporation from purchasing bonds issued by a federal agency,⁴¹⁹ and friendly trustees would request instructions as to the legality of a course of action in the face of feigned constitutional uncertainty.⁴²⁰

The Court's willingness to entertain more or less friendly constitutional challenges to government regulation came under fire from Progressives and New Dealers. In *Ashwander v. Tennessee Valley Authority*, Justice Brandeis spoke for four members of the Court in arguing against the friendly shareholder's derivative suit as a tool of constitutional adjudication.⁴²¹ Concurring in the majority's decision to uphold the Authority's role in the market for electricity, Justice Brandeis argued that the Court should not have reached the merits.⁴²² The first precept on Justice Brandeis's well-known list of justiciability limits focused on the need for adverse parties:

418. See *Chicago & Grand Trunk Ry. Co.*, 143 U.S. at 345 (indicating hostility to "friendly" constitutional challenges to legislative enactments absent an "honest and actual antagonistic" relationship between the parties). After the parties agreed to the factual record, the railroad sought an instruction that the new law, restricting passenger ticket prices, violated its constitutional rights as a taking of property. When the state court refused the instruction, the railroad appealed to the Supreme Court of Michigan. *Wellman v. Chicago & G.T. Ry. Co.*, 47 N.W. 489, 489-90 (Mich. 1890). The Attorney General of Michigan appeared for the first time in the proceeding to defend the state law and characterized the proceeding as a feigned case. See *id.* The Supreme Court agreed and expressed concern lest the parties construct an artificial factual record on which the constitutional evaluation was to be made. See *Chicago & Grand Trunk Ry. Co.*, 143 U.S. at 345.

419. See *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180, 199-202 (1921) (upholding jurisdiction over suit to block the company from investing in a federal bond issue on the ground that Congress lacked power under the Constitution to clothe a federal instrumentality with such authority). On the use of derivative suits by an out-of-state shareholder to procure access to federal court on the basis of diversity, see John C. Coffee, Jr. & Donald E. Schwartz, *The Survival of the Derivative Suit: An Evaluation and a Proposal for Legislative Reform*, 81 COLUM. L. REV. 261, 265-71 (1981) (discussing *Dodge v. Woolsey*, 59 U.S. (18 How.) 331 (1855)).

420. See Comment, *The Case-Concept and Some Recent Indirect Procedures for Attacking the Constitutionality of Federal Regulatory Statutes*, 45 YALE L.J. 649 (1936) (describing the use of stockholder's suits and cases framed in reorganization proceedings as weapons in the battle between American business and the New Deal); cf. *In re Cent. W. Pub. Serv. Co.*, 13 F. Supp. 239 (D. Del. 1935) (refusing to adjudicate constitutionality of federal law in an ex parte petition for instructions).

421. See *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring).

422. *Id.*

The Court will not pass upon the constitutionality of legislation in a friendly, non-adversary, proceeding, declining because to decide such questions ‘is legitimate only in the last resort, and as a necessity in the determination of real, earnest, and vital controversy between individuals. It never was the thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act.’⁴²³

Justice Brandeis knew from his own experience as an advocate that the record was crucial to the defense of the constitutionality of government regulation.⁴²⁴ He presumably also knew that parties to a friendly dispute over the constitutionality of regulation could not be relied upon to develop a record that would ensure a searching evaluation of the law’s justification and its impact on regulated entities.

Apart from helping to ensure that the Court could effectively perform its role in constitutional adjudication, Justice Brandeis’s emphasis on the need for adverse parties was echoed by Congress’s actions to secure a place for the government in the litigation of constitutional claims. In legislation enacted in 1937, one year after *Ashwander*, Congress called upon the district courts to notify the Attorney General of the United States of constitutional issues that arise in private litigation.⁴²⁵ In addition, the legislation conferred a right of intervention on the federal government, enabling it to defend the constitutionality of federal statutes.⁴²⁶ Now codified in Title 28, the federal intervention right has been buttressed by rules of procedure that oblige the parties in private litigation to

423. *Id.* at 346 (quoting *Chicago & Grand Trunk Ry.*, 143 U.S. at 345).

424. Justice Brandeis was the author, with his sister-in-law Josephine Goldmark, of the brief for the prevailing party in *Muller v. Oregon*, 208 U.S. 412 (1908), which relied upon an extensively developed factual record detailing the effects of long working hours on women’s health. In the brief, Justice Brandeis and Goldmark argued successfully in favor of upholding a state restriction on working hours for women. For an account of the use of the so-called “Brandeis brief” to defend social legislation, see OWEN M. FISS, 8 HISTORY OF THE SUPREME COURT OF THE UNITED STATES: TROUBLED BEGINNINGS OF THE MODERN STATE, 1888-1910, at 175-76 (1993); and NANCY WOLOCH, *MULLER V. OREGON: A BRIEF HISTORY WITH DOCUMENTS* 28-33 (1996).

425. See Act of Aug. 24, 1937, Pub. L. No. 75-352, § 1, 50 Stat. 751, 751 (codified at 28 U.S.C. § 2403). For background on the adoption of the statute, see Raoul Berger, *Intervention by Public Agencies in Private Litigation in the Federal Courts*, 50 YALE L.J. 65 (1940). The intervention provision originally appeared as part of President Roosevelt’s court-packing plan, but it was eventually enacted as part of a less ambitious and controversial set of provisions. See Note, *Federal Intervention in Private Actions Involving the Public Interest*, 65 HARV. L. REV. 319, 322 & nn.15-16 (1951).

426. See Note, *supra* note 425, at 321-22.

perform the notification function.⁴²⁷ Notably, upon intervention the government was to have the right to present “evidence” and was to enjoy “all the rights of a party and be subject to all liabilities of a party . . . to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.”⁴²⁸ Congress, then, sought to buttress the factual and argumentative record on which findings as to constitutionality were to be based.⁴²⁹

Congress displayed much the same concern with institutionalizing adverse-party procedures in adopting the Declaratory Judgment Act of 1934.⁴³⁰ The act authorizes “courts of the United States” to declare “the rights and other legal relations of any interested party seeking such declaration.”⁴³¹ But the act carefully limits the issuance of such declaratory judgments to cases “of actual controversy.”⁴³² By authorizing declaratory judgments, the legislation significantly undercut the need for any further reliance on feigned or collusive suits to obtain the same sort of relief (thereby further pushing those proceedings to the margins of federal practice). By including a statutory requirement of an “actual controversy,” moreover, the Declaratory Judgment Act addressed concerns that the granting of declaratory judgments would be akin to the impermissible issuance of advisory opinions.⁴³³ Finally, the requirement of adverse parties helped to protect the interests of third parties from proceedings that might affect their rights.

427. See FED. R. CIV. P. 5.1 (obliging a party to serve the Attorney General with notice of any paper filed in federal court that calls into question the constitutionality of a federal statute). Advisory committee notes explain that the notice obligation imposed by rule on the parties “supplements the court’s duty to certify a constitutional challenge.” FED. R. CIV. P. 5.1 cmt. (2006).

428. 28 U.S.C. § 2403(a) (2012).

429. *United States v. Johnson*, 319 U.S. 302, 305 (1943) (treating the adverse-party requirement as essential to the integrity of the judicial process and indispensable to the adjudication of constitutional questions by the Supreme Court).

430. Federal Declaratory Judgment Act of 1934, Pub. L. No. 73-343, 48 Stat. 955.

431. 28 U.S.C. § 2201(a) (2012). For background on the Declaratory Judgment Act, see HART & WECHSLER 6th, *supra* note 21, at 56-57.

432. 28 U.S.C. § 2201(a).

433. Compare *Willing v. Chi. Auditorium Ass’n*, 277 U.S. 274 (1928) (questioning the power of federal courts to entertain declaratory judgment actions in light of the case-and-controversy requirement), with *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937) (upholding the Declaratory Judgment Act after limiting its application to “definite and concrete” disputes that touch “the legal relations of parties having adverse legal interests”). The decision in *Haworth* upholding the Declaratory Judgment Act casts serious doubt on earlier cases that questioned the legitimacy of declaratory-style adjudication. Cf. *Muskrat v. United States*, 219 U.S. 346, 361-62 (1911) (refusing, despite express congressional authority, to address the constitutionality of a statute that reallocated land rights conferred in earlier law).

The “cryptic” decision in *Muskrat* anticipated these statutory developments to some extent.⁴³⁴ The case arose after Congress enlarged the number of tribal members who were to participate in a land allotment, thereby reducing the stake of the original members of the group.⁴³⁵ When litigation was later filed seeking to enjoin the Interior Department from enforcing the later legislation, Congress authorized certain tribal members to challenge their reduced allotment by suing the United States in the court of claims.⁴³⁶ When that suit was dismissed, the tribal members sought review under a provision of the law authorizing direct appeal to the Supreme Court.⁴³⁷ The Court held that the matter lay beyond the power of the Article III judiciary.⁴³⁸ In the Court’s view, Congress was simply seeking an advisory opinion as to the constitutionality of the subsequent legislation, whereas the resolution of constitutional questions was limited to disputes between adverse parties.⁴³⁹ Notably, the Court agreed one year later to address the issue in the more familiar context of adversary litigation between tribal members and the Interior Department.⁴⁴⁰

Time has not been kind to *Muskrat*. Judge Fletcher argued that *Muskrat* has been superseded by the recognized power of federal courts to issue declaratory judgments and by subsequent cases that exercise that power in more adventuresome contexts.⁴⁴¹ The Hart and Wechsler casebook reaches much the same conclusion, treating the case as “puzzling” and “cryptic” and suggesting that it would lack contemporary relevance if it did nothing more than cast doubt on

434. *Muskrat*, 219 U.S. at 361.

435. *Id.* at 348-49.

436. *Id.* at 349-50.

437. *Id.* at 350.

438. *Id.* at 363. That the case lay beyond the power of Article III courts would not necessarily defeat the jurisdiction of the court of claims, a legislative court. But the Court viewed the case as one entirely unsuited for resolution by the court of claims because it did not seek an award of damages for a taking of property or any other form of relief cognizable in the court of claims. Rather, the Court simply sought a decision as to constitutionality, as a prelude to further review in the Supreme Court under a statute that conferred appellate review as of right. *See id.* at 350 (conferring a “right of appeal” on either party to obtain final decision in the Supreme Court). Because the Court viewed the preliminary action in the court of claims as inseparable from Congress’s desire to procure a determination by the Court, it chose to invalidate the statute in its entirety and directed the court of claims (which had reached the merits) to dismiss for want of jurisdiction. *Id.* at 363.

439. *See id.* at 361 (“That judicial power, as we have seen, is the right to determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction.”).

440. *See* William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 282 n.284 (1988) (citing *Gritts v. Fisher*, 224 U.S. 640 (1912)).

441. *Id.* at 281-82.

the validity of declaratory judgments.⁴⁴² One might argue that the decision anticipates Justice Brandeis's effort to ensure (through the rejection of collusive claims) a proper record for constitutional adjudication.⁴⁴³ But it does not cast doubt on the power of federal courts to entertain non-contentious proceedings assigned to them by Congress. Indeed, Justice Brandeis cited *Muskrat* in *Tutun* for the proposition that the presence of a case or controversy was vital for jurisdiction, without suggesting that its insistence on adverse parties posed any threat to the power of the federal courts to hear naturalization petitions.⁴⁴⁴

IV. TOWARD A THEORY OF NON-CONTENTIOUS JURISDICTION

A. The Theory Sketched

1. Original and Ancillary Non-Contentious Jurisdiction

Having demonstrated the constitutional basis for the non-contentious jurisdiction of federal courts, we now face the task of delineating the forms of that jurisdiction and the principles governing it. First, we must distinguish between "original" and "ancillary" non-contentious jurisdiction. In our view, the non-contentious matters we have described in this Article can be separated into actions that are originally non-contentious and non-contentious features of actions that are ancillary to an actual or potential dispute. A federal statute conferring original non-contentious jurisdiction must provide for the assertion of a

442. See HART & WECHSLER 6th, *supra* note 21, at 97-98, 140.

443. The Court relied on the fact that the United States, though nominally a defendant, did not have any interest in the resolution of the claims:

The whole purpose of the law is to determine the constitutional validity of this class of legislation, in a suit not arising between parties concerning a property right necessarily involved in the decision in question, but in a proceeding against the government in its sovereign capacity, and concerning which the only judgment required is to settle the doubtful character of the legislation in question. Such judgment will not conclude private parties, when actual litigation brings to the court the question of the constitutionality of such legislation. In a legal sense the judgment could not be executed, and amounts in fact to no more than an expression of opinion upon the validity of the acts in question.

Muskrat, 219 U.S. at 361-62.

444. See *Tutun v. United States*, 270 U.S. 568, 576 (1926). Justice Brandeis may have borrowed the possible adverse party formulation from *Muskrat*, which had approvingly quoted Justice Field's use of the construct in defining "cases." See *Muskrat*, 219 U.S. at 356-57 (quoting *In re Pac. Ry. Comm'n*, 32 F. 241, 258 (C.C.N.D. Cal. 1887)). For an argument that Justice Field improperly added the potential adverse-party element to the Marshall-Story definition of a case, see *supra* notes 354-362 and accompanying text.

claim of right. Typically, the party will claim an entitlement to a benefit created by federal law, such as the right to naturalized citizenship or to seek a mitigation of penalties or the waiver of fees. In other contexts, the party seeks legal validation of an act or status, such as in the application for a warrant or the condemnation of property. In still other contexts, the party claims a right to the invocation of administrative or judicial machinery for the disposition of an estate, as in bankruptcy proceedings or the appointment of an equity receiver.

Apart from assigning federal courts “original” jurisdiction over non-contentious matters, we believe that Congress may also confer power on the federal courts to entertain “ancillary” non-contentious proceedings. Many of the examples of non-contentious jurisdiction that we cataloged in Part I arise in connection with a dispute between actual or potential adversaries. Consent decrees settle disputes between contending parties, just as guilty pleas resolve criminal charges, and default judgments are entered in connection with litigation to secure an unmet demand upon a party who has failed to answer the court’s summons. In all these instances, the power of federal courts grows out of their duty, in any case properly before them, to provide parties with the relief to which applicable law entitles them.⁴⁴⁵ Like consent decrees, which are ancillary to the resolution of pending disputes (as Redish and Kastanek have recognized), much of the non-contentious work of the federal courts takes place in the shadow of potential or actual contention. Both original and ancillary non-contentious jurisdiction have a place in our conception of federal judicial power.

2. *The Elements of Non-Contentious Jurisdiction*

Drawing on the Marshall-Story formulation of a case, as well as on the features of non-contentious jurisdiction handed down from the Romans, we think that Congress has power to assign federal courts responsibility for the adjudication or administration of certain claims brought without the presence of an adverse party. Recall what Chief Justice Marshall said in defining power over federal question “cases” (but not “controversies”) in especially broad terms:

[The federal question grant] enables the judicial department to receive jurisdiction to the full extent of the constitution, laws, and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it. That pow-

445. Some matters that are entertained under a court’s original non-contentious jurisdiction share some of these features. For instance, equity receiverships provide relief to creditors whose legitimate claims cannot be satisfied, and bankruptcy proceedings involve potentially conflicting claims of creditors to an estate insufficient to satisfy them all.

er is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law.⁴⁴⁶

Here, Chief Justice Marshall emphasizes three elements: the party must assert a claim of right, the claim must implicate federal law, and the claim must proceed in the “form prescribed by law.”⁴⁴⁷

Although Chief Justice Marshall did not say so expressly, the second element of his definition—the requirement that cases must implicate the Constitution, laws, or treaties of the United States—imposes an important limit on the scope of original non-contentious jurisdiction. While the federal courts may hear non-contentious “cases” that seek to vindicate a claim of federal right, the original non-contentious power does not extend to “controversies” defined by the alignment of the parties. Controversies really do require opposing parties, as Justice Scalia and Pushaw and Redish have observed. The paradigmatic example of such a controversy, a diversity dispute between citizens of different states, helped to define the early contentious work of the federal courts. Apart from the linguistic fact that a controversy connotes a dispute between parties, the federal courts have little business exercising original non-contentious jurisdiction over matters of non-federal law. State legislatures would not ordinarily welcome federal judicial administration of state law, for example, and lack the power to assign such matters to the federal courts even if they did welcome their assistance. The familiar “probate exception” to Article III might best be understood as an outgrowth of the principle that federal judicial power over controversies requires a dispute between adversaries and does not extend to original non-contentious applications for rights created by state law.⁴⁴⁸

But the inability of the federal courts to exercise “original” non-contentious jurisdiction over matters of state law does not preclude those courts’ exercise of “ancillary” non-contentious jurisdiction in controversies otherwise properly before them. As long as a dispute within the contentious jurisdiction of the federal courts implicates the judicial power of the United States, the court may grant the full range of approved remedies. This means that a federal court may undertake the inquisitorial duties associated with entry of consent decrees and de-

446. *Osborn v. Bank of the United States*, 22 U.S. 738, 819 (1824).

447. *Id.* Chief Justice Marshall’s definitions of a “suit” in *Weston v. City Council of Charleston*, 27 U.S. (2 Pet.) 449, 454 (1829) (“any proceeding in a court of justice, in which an individual pursues that remedy in a court of justice which the law affords him”), and in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 408 (1821) (“all cases were the party suing claims to obtain something to which he has a right”), echo these elements.

448. See Pfander & Downey, *supra* note 86 (evaluating claims that the probate exception stems from Article III’s omission of ecclesiastical jurisdiction, from Article III’s law and equity limits, and from general principles of federalism, and concluding that it stems from the limits on the power to administer the law in controversies governed by state law).

fault judgments in any matter properly before the court, even in diverse-party controversies that do not seek to vindicate any federal right. In this sense, at least, our construct of ancillary non-contentious jurisdiction applies to some matters that others might characterize as involving potential adversaries.

The final element of Chief Justice Marshall's definition requires the party seeking to invoke the non-contentious jurisdiction of the federal courts to follow the form "prescribed by law." This element of the definition properly captures the primacy of Congress in defining the scope of non-contentious jurisdiction. Congress can, as Justice Brandeis observed, assign administrative matters to federal agencies or to federal courts or create a system of shared responsibility among them.⁴⁴⁹ While the federal courts presume that Congress intends to preserve contentious judicial review of final agency action,⁴⁵⁰ no similar presumption should operate in favor of judicial resolution of non-contentious proceedings in the first instance. Federal courts, on this view, should accept congressional assignments of non-contentious work but should not seek out such assignments through the "alchemy" of statutory interpretation.⁴⁵¹ Nor should they develop a counterpart to their disputed (and to some extent disavowed) power to recognize the existence of implied rights of action to enforce federal statutes that contain no explicit right of action.⁴⁵² We see no basis for the creation of an implied non-contentious right of action that would enable private parties to choose a federal judicial proceeding instead of one in the proper agency (nor do we think it likely that federal judges would clamor to create such a doctrine).

At the same time, the common-law tradition, as confirmed by federal practice, can provide a form "prescribed by law" within which a party or parties may pursue uncontested proceedings. Default judgments, both in law and equity, have deep roots in the legal tradition. From the power to issue default judgments, courts derive the power to register settlement agreements and enter guilty pleas. In all of these instances, the federal courts proceed in ancillary

449. See *Tutun*, 270 U.S. at 576-77.

450. See, e.g., *Traynor v. Turnage*, 485 U.S. 535, 542 (1988).

451. "Alchemy" was the label that Justice Frankfurter attached to what he viewed as a particularly aggressive form of statutory interpretation in support of the power of federal courts to entertain suits for violation of collective bargaining agreements. See *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 462 (1957) (Frankfurter, J., dissenting) (concluding that Justice Douglas's majority opinion had attempted to accomplish more than could fairly be achieved through the "alchemy" of statutory interpretation); cf. James E. Pfander, *Judicial Purpose and the Scholarly Process: The Lincoln Mills Case*, 69 WASH. U. L. Q. 243 (1991) (arguing that Justice Frankfurter's claim was based on a selective and ultimately unpersuasive evaluation of the statute's text and legislative history).

452. See *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, 552 U.S. 148, 164-65 (2008).

non-contentious jurisdiction and do so without any specific grant of authority from Congress. Yet congressional approval of these practices can be easily inferred from the available legal materials. In the case of default judgments, authorized by Rule 55 of the Federal Rules of Civil Procedure, the Rules Enabling Act confers rulemaking authority on the Supreme Court, culminating in the promulgation of rules that take effect unless Congress disapproves of them.⁴⁵³ Judicial activity in uncontested bankruptcy proceedings, the entry of plea agreements, and the registration of settlements enjoy a similar foundation in positive law.⁴⁵⁴

3. *Other Requirements for the Exercise of Non-Contentious Jurisdiction*

Apart from the elements embedded in the Marshall-Story formulation of a “case,” several other requirements deserve a place in the definition of the scope of federal non-contentious jurisdiction.⁴⁵⁵ First, the federal courts can exercise non-contentious jurisdiction only where their decisions will enjoy the finality demanded by Article III. The finality requirement emerges from *Hayburn’s Case*, in which various justices and district judges adverted to the prospect of executive revision in refusing to accept the judicial role thrust upon them by Congress.⁴⁵⁶ The Court has consistently reaffirmed the finality rule in various settings,⁴⁵⁷ particularly in the context of ex parte proceedings. For example, fi-

453. See 28 U.S.C. § 2072 (2012).

454. See 28 U.S.C. § 157 (2012) (bankruptcy); FED. R. CIV. P. 23(e) (settlements); FED. R. CRIM. P. 11 (pleas).

455. Of the elements of non-contentious jurisdiction sketched in this section, we regard both the finality requirement and the requirement that the jurisdiction call for the exercise of judicial, rather than ministerial, judgment as rooted in Article III’s provision for federal courts to exercise only the “judicial power” of the United States. Finality has been a hallmark of the exercise of federal judicial power since 1792. See *Hayburn’s Case*, 2 U.S. (2 Dall.) 408 (1792). Similarly, the Court has long recognized that the assignment of non-judicial duties to federal judges may pose a threat to branch independence. Thus, the Court has insisted that federal judges called upon to play legislative and administrative roles in certain matters must remain free to refuse the assignment and must honor the primacy of their judicial assignments. See *Mistretta v. United States*, 488 U.S. 361 (1989). Mandatory assignment of ministerial work to federal courts would violate this separation-of-powers precept. We view the third element, the court’s duty to conduct an inquisitorial investigation into the facts underlying any application for the exercise of non-contentious power, as implicit in statutes conferring such power on the court. But we recognize that it may be easier to enforce such an obligation through the creation of a judicial culture sympathetic to inquisitorial duties than through appellate review.

456. See *Hayburn’s Case*, 2 U.S. (2 Dall.) 408 (1792).

457. See, e.g., *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995) (invalidating congressional legislation because it violated the finality rule).

nality concerns informed the Court's approach to naturalization proceedings in *Spratt v. Spratt*.⁴⁵⁸ Speaking through the Chief Justice, the Court emphasized that a decision granting a petition for citizenship was subject to review but was to be regarded as a binding judgment unless it was overturned through proper proceedings.⁴⁵⁹ Justice Brandeis made much the same argument in *Tutun*, emphasizing that a judgment conferring citizenship was conclusive, although subject to proper forms of judicial revision.⁴⁶⁰ Under the common-law system, writs of scire facias and coram nobis were available to reopen proceedings and challenge matters of record. (Those writs no longer control in federal courts, having been superseded by the all-purpose Rule 60 motion.)⁴⁶¹ As long as the courts themselves preside over the revision of their own decrees, no problem of executive revision would appear to arise, even where the government itself is the party seeking to reopen the judgment.⁴⁶²

Although finality is justly regarded as essential to the exercise of judicial power, finality in the context of non-contentious jurisdiction does not require final judicial resolution of an entire dispute. That is the function of contentious jurisdiction. Instead, finality simply requires the conclusive determination of the issue that has been assigned to the federal courts for decision (subject, perhaps, to appeal to a higher Article III court). On this view, federal courts can determine a single issue in the context of a proceeding that will ultimately be resolved by a different institution. Consider the initial fact-finding preceding the resolution of a petition for remission of penalties; Justice Story explained that it was upon the district court's "statement of the facts, and this only, that the secretary is authorized to proceed."⁴⁶³ Consider as well the enforcement of discovery requests, whether in support of a foreign proceeding (through letters rogatory) or in support of administrative investigations (through administrative subpoenas). In such matters, the federal court conclusively resolves the right to discovery, but the court does so in support of another judicial or administrative institution's proceeding.⁴⁶⁴

458. 29 U.S. (4 Pet.) 393 (1830).

459. *Id.* at 407.

460. *Tutun v. United States*, 270 U.S. 568, 576 (1926).

461. See FED. R. CIV. P. 60 (providing procedures for obtaining relief from a judgment); see also FED. R. CIV. P. 60(e) (abolishing coram nobis); FED. R. CIV. P. 80(b) (abolishing scire facias).

462. See HART & WECHSLER 6th, *supra* note 21, at 85-94.

463. *The Margaretta*, 16 F. Cas. 719, 721 (Story, Circuit Justice, C.C.D. Mass. 1815); see also *supra* Part I.A.3 (discussing remission proceedings).

464. See *supra* Part I.F.6.

Second, non-contentious jurisdiction obligates the federal trial court to conduct its own investigation of the facts and law that govern the propriety of the proposed judgment. We saw in the example of prize cases, for instance, the robust role assumed by the admiralty court in determining the basis for condemnation.⁴⁶⁵ An explanation for this role may lie in the concern that courts might have felt for the accuracy or completeness of cases presented to them on an ex parte basis; as was seen in Roman law and in proceedings under the Naturalization Act of 1790, in cases of non-contentious jurisdiction, the court bears responsibility to test fully the legality of the claim.

The inquisitorial duty that we propose can be illustrated in today's terms by the rules governing the entry of default judgments, which require the district court to determine if the well-pleaded facts in the complaint support the entry of judgment and to fix the amount of damages based on the court's own investigation.⁴⁶⁶ A similar inquisitorial duty attaches to the judicial role in overseeing class action settlements, bankruptcy orders of various kinds, guilty pleas, and consent decrees.⁴⁶⁷ The FISA court has taken important steps to improve the quality of its ex parte decisions, hiring a group of legal advisors to conduct thorough initial investigations of important petitions and inviting the Department of Justice to highlight and thoroughly brief any suggested changes in the law.⁴⁶⁸

Inquisitorial proceedings also cast special duties of candor on the advocates who appear before the federal courts. The Court's dismay in *Lord v. Veazie* reflected its dissatisfaction with the parties' failure to disclose that the proceeding lacked true adversaries; the threat of contempt was meant to ensure that lawyers attended to their duty of candor to the court in the future.⁴⁶⁹ Rule 3.3 of the American Bar Association's Model Rules of Professional Conduct similarly recognizes a duty of candor in ex parte proceedings: "In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the

465. See *supra* Part I.B.1.

466. See *supra* Part I.F.1.

467. See *supra* Part I.C (discussing bankruptcy proceedings); Part I.F.3-5 (discussing consent decrees, guilty pleas, and class action settlements).

468. Although it exceeds the scope of our project, we hope future scholarship on the nature of non-contentious jurisdiction will build upon the findings of this Article by considering the varied ways in which courts discharge their inquisitorial duties and exploring the kinds of best practices that might improve the quality of judicial investigations in the matters that require them.

469. See 49 U.S. (8 How.) 251, 254-55 (1850).

facts are adverse.”⁴⁷⁰ This duty of candor has been thought to apply with special force to proceedings before the FISA court, where the absence of an adversary and the secret nature of the proceedings impose a particularly demanding duty on the government attorneys who appear before that court.⁴⁷¹

Third, the federal courts may accept non-contentious assignments only where the task at hand involves the exercise of judicial, rather than ministerial, judgment. Here again is Chief Justice Marshall’s description of the judicial role in naturalization: “[The courts] are to receive testimony, to compare it with the law, and to judge on both law and fact. This judgment is entered on record as the judgment of the court.”⁴⁷²

Chief Justice Marshall’s description anticipates later comments from Justices Story and Brandeis. In discussing petitions for remissions of forfeitures, Justice Story worked hard to defend the judicial quality of the proceeding: in taking evidence and making factual findings, “the judge exercises judicial functions, and is bound by the same rules of evidence, as in other cases.”⁴⁷³ Justice Brandeis’s comment in *Tutun* was similar: the applicant seeking naturalization “must allege in his petition the fulfillment of all conditions upon the existence of which the alleged right is made dependent; and he must establish these allegations by competent evidence to the satisfaction of the court. In passing upon the application the court exercises judicial judgment.”⁴⁷⁴ In all of these instances, the Court confirmed the judicial quality of the judgment being exercised and the point that this quality is crucial to the propriety of the exercise of non-contentious jurisdiction.⁴⁷⁵

The Supreme Court’s emphasis on the judicial quality of the work in these cases suggests that while some administrative assignments are proper grist for

470. MODEL RULES OF PROF’L CONDUCT R. 3.3(d) (2013). As the comment to Model Rule 3.3 explains, “Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in any ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result.” *Id.* at cmt. [14].

471. See David S. Kris, *On the Bulk Collection of Tangible Things* 7 J. NAT’L SEC. L. & POL’Y 209, 252-53 (2014).

472. *Spratt v. Spratt*, 29 U.S. (4 Pet.) 393, 408 (1830).

473. *The Margareta*, 16 F. Cas. 719, 721 (Story, Circuit Justice, C.C.D. Mass. 1815).

474. *Tutun v. United States*, 270 U.S. 568, 578 (1926) (citation omitted).

475. See also *Hohn v. United States*, 524 U.S. 236, 241-42 (1998) (holding that because of its procedural resemblance to other matters in the court of appeals, “an application for a certificate of appealability constitutes a case under” 28 U.S.C. § 1254, which permits the Supreme Court to review “[c]ases in the courts of appeals . . . [b]y writ of certiorari.” 28 U.S.C. § 1254 (2012)).

the mill of the Article III judiciary, others might be considered ministerial in character and therefore appropriate only for assignment to another department or officer. The idea of ministerial action played an important and somewhat unsettled role in the early Republic. Ministerial action was subject to judicial control through writs of mandamus, while the exercise of judicial discretion by a lower court was not typically subject to mandamus control.⁴⁷⁶ Similarly, officers acting in a discretionary capacity typically enjoyed immunity from suit for actions taken within the scope of their jurisdiction, while officers acting in a ministerial capacity were subject to suit when they failed to perform duties required by law.⁴⁷⁷ Marshals, though assigned to serve process and execute the judgments of federal courts, were officers of the executive branch and thus were subject to suit for the unlawful performance of their duties.⁴⁷⁸ Judicial clerks were also considered ministerial officers in the sense that individuals who claimed a legal entitlement to action by the clerk (for example, copying a court record or entering a judgment) could apply to the court to compel performance of the duty.⁴⁷⁹

The judicial/ministerial distinction has provided grounds for the Court to reject administrative assignments that were improperly ministerial or that simply required the rote performance of a duty and did not call for the exercise of judicial judgment.⁴⁸⁰ One can get a sense of the intuition underlying this admittedly blurry line by considering the initial judicial reaction to the pension law: the Circuit Court for the District of Pennsylvania reportedly refused the assignment in part because the statute compelled the court to sit for five days to receive pension applications and thus abrogated the court's discretion to close the court session when the work was complete. Such obligatory work was apparently viewed as not of a "judicial" nature.⁴⁸¹ The nation's first copyright law furnishes an additional example. An author seeking a copyright on a "map,

476. See James E. Pfander, *Sovereign Immunity and the Right To Petition: Toward A First Amendment Right To Pursue Judicial Claims Against the Government*, 91 NW. U. L. REV. 899, 917 & n.63 (1997); see also *United States v. Lawrence*, 3 U.S. (3 Dall.) 42, 53 (1795) (refusing to issue a writ of mandamus to control discretionary judicial decision not to issue a warrant).

477. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 166 (1803).

478. On the marshal's status as an officer of the executive branch, see James E. Pfander, *The Chief Justice, the Appointment of Inferior Officers, and the "Court of Law" Requirement*, 107 NW. U. L. REV. 1125, 1153 (2013) (describing statutory provision vesting appointment of marshals by the President).

479. See *Jeter v. State*, 117 So. 460 (Ala. 1928) (mandamus to compel court clerk to perform ministerial duty); *State ex rel. Boller v. Peffley*, 67 N.E.2d 87 (Ohio Ct. App. 1946) (same); *English v. Treacchar*, 153 S.W.2d 539 (Tex. Civ. App. 1941) (same).

480. See *Morrison v. Olson*, 487 U.S. 654, 677-78 (1988); *United States v. Ferreira*, 54 U.S. (13 How.) 40 (1851).

481. See *supra* notes 386-388 and accompanying text.

chart, book, or books” was obliged to lodge a copy with the Secretary of State and to “deposit” a printed copy of the title of the work with the federal district court of the district in which the author resided.⁴⁸² In specifying the duty to record, no judicial judgment was contemplated. Instead of assigning the duty to the court itself, Congress provided that “the clerk of such court is hereby directed and required to record the same forthwith, in a book to be kept by him for that purpose.” Congress apparently held the view that work of a clearly ministerial character was properly assigned to the clerk, leaving the court to enforce the duty (if necessary) through a proper judicial proceeding.⁴⁸³

The judicial/ministerial distinction provides a straightforward answer to the question of how the federal courts in the early Republic came to view themselves as empowered to hear *ex parte* matters in certain cases but not in others. While the pension applications at issue in *Hayburn’s Case* lacked the finality necessary to make them proper objects of the judicial power, the same criticism cannot be made of the naturalization process. Federal courts passing on naturalization applications were making conclusive determinations of aliens’ entitlement to citizenship. They were also, as Chief Justice Marshall and Justice Brandeis later observed, exercising judicial judgment in determining whether the petition met the statute’s parameters and was adequately supported by the factual record.⁴⁸⁴ The apparent tension between pension claims and naturalization petitions disappears on our account; both were forms of non-contentious jurisdiction, but the pension claims lacked the finality necessary to bring them within the judicial power.

Although the judicial/ministerial distinction provides the federal courts with authority to reject proceedings that do not call for the exercise of judicial judgment, the practice of the federal courts has been to defer to Congress and accept *ex parte* assignments in doubtful cases.⁴⁸⁵ This practice of deference poses a potential threat to the federal courts, since Congress has control over the assignment of a truly staggering array of federal administrative chores. The threat may appear more pointed given the implicit obligation of the federal courts in such cases to conduct their own investigation of the facts on which

482. Copyright Act of 1790, ch. 15, §§ 3-4, 1 Stat. 124, 125.

483. Thus, the statute specifically provided that the clerk would give a copy of the copyright record to the author upon request. *Id.* § 3.

484. See *Tutun v. United States*, 270 U.S. 568, 578 (1926) (Brandeis, J.); *Spratt v. Spratt*, 29 U.S. (4 Pet.) 393, 408 (1830) (Marshall, C.J.).

485. For example, although District Judge Thomas Bee privately complained in 1800 of the ministerial or administrative nature of the court’s role in assessing petitions for remission or mitigation of forfeitures, see *Pfander*, *supra* note 60, at 26, courts nevertheless accepted the task and treated it as judicial in character. See, e.g., *The Margareta*, 16 F. Cas. 719, 721 (Story, Circuit Justice, C.C.D. Mass. 1815).

their determination will be made.⁴⁸⁶ While we recognize that a threat does exist, we remain fairly sanguine. Congress for the most part values the dispute-resolution and law-elaboration roles of the federal judiciary and generally works to support those roles.⁴⁸⁷ Moreover, Congress can be expected to monitor the cost effectiveness of its administrative systems. It seems unlikely that a Congress already concerned with the cost of, say, administering Social Security benefit claims would turn that task over to the federal courts. However efficiently the courts might process the claims, the cost per claim would predictably far exceed that of the current administrative arrangement. Except when Congress decides that proper administration requires the high-powered (and high-priced) judgment of the federal judiciary, as in the case of the FISA courts, we can expect Congress to continue to rely on agencies instead.

Fourth and finally, as was the case under Roman law, non-contentious jurisdiction should end where the proposed judicial order or judgment threatens to encroach on the rights of third parties not before the court. This principle is central to the notion of non-contentious jurisdiction and, under the Due Process Clause of the Fifth Amendment, applies to all proceedings in federal court.⁴⁸⁸ To the extent that a single party seeks to register or claim an individual federal right or benefit, third-party rights are unlikely to be implicated in most circumstances. More for one individual, such as a naturalized citizenship or pension benefit, does not necessarily mean less for someone else (except for the taxpayer, of course, who lacks standing to mount a federal court challenge to congressional decisions to distribute such largesse).⁴⁸⁹ But in other circumstances, where the exercise of non-contentious jurisdiction does pose a potential threat to the rights of third parties (such as in the case of settlement class actions, the issuance of FISA warrants, and some bankruptcy proceedings), federal courts must be especially vigilant to ward off the entry of judgments that burden those who have not been brought before the court.⁴⁹⁰ Potential

486. See *supra* note 468.

487. See Tara Leigh Grove, *The Exceptions Clause as a Structural Safeguard*, 113 COLUM. L. REV. 929 (2013).

488. See U.S. CONST. amend. V; *Hansberry v. Lee*, 311 U.S. 32, 40 (1940) (“It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.”).

489. See *Massachusetts v. Mellon*, 262 U.S. 447 (1923).

490. On the whole, the Fifth Amendment’s Due Process Clause may provide a more effective instrument for moderating non-contentious forms than a strict adherence to an adverse-party rule that would foreclose the exercise of all judicial power over such matters. Non-contentious practice frequently occurs in connection with the assertion of what was once called in rem jurisdiction over such estates as those in probate, prize, and bankruptcy. The Supreme Court has long since ruled that the due process rights to notice and an opportunity

problems with third-party rights may not deprive the court of power to hear a case on the non-contentious side of its docket, but they certainly require a more searching investigation and may require those seeking to invoke the court's jurisdiction to offer separate justification.

B. The Theory's Implications for the Article III Injury-in-Fact Requirement and Separation of Powers

The recognition of non-contentious jurisdiction places some pressure on the rules that govern standing under Article III. As the Court frequently has reiterated, a plaintiff may invoke the judicial power of the judicial branch only when she has suffered an "injury in fact," only when the injury is "traceable to" the defendant's violation of a legally protected interest, and only when the relief sought from the court will "redress" that injury.⁴⁹¹ This focus on the redress of injuries reflects judicial suspicion of attempts on the part of Congress to confer standing to enforce general compliance with the law through citizen-suit provisions. The Court rejected one such attempt in *Lujan v. Defenders of Wildlife*, turning back a claim that sought to vindicate the public's interest in government compliance with environmental consultation requirements,⁴⁹² and it has taken a hard look at other congressional grants of standing.⁴⁹³ In the context of *qui tam* litigation, where an individual pursues fraud claims against government contractors on behalf of the federal government, the Court refused to regard the bounty payable to a successful claimant as creating a sufficient interest to warrant standing.⁴⁹⁴ Instead, in order to accommodate the historical pedigree of *qui tam* actions without casting standing doctrine into doubt, the

to be heard apply with equal force to in rem proceedings as to in personam proceedings, thereby limiting the potential threat to third-party rights. *See Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (requiring "notice reasonably calculated . . . to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections").

⁴⁹¹ *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000).

⁴⁹² 504 U.S. 555 (1992).

⁴⁹³ *See, e.g., Summers v. Earth Island Inst.*, 555 U.S. 488, 496-97 (2009) (rejecting an environmental group's standing to enforce a procedural right in the absence of a concrete injury); *Massachusetts v. EPA*, 549 U.S. 497 (2007) (recognizing state's standing to challenge EPA's refusal to regulate greenhouse gases); *FEC v. Akins*, 524 U.S. 11 (1998) (upholding a citizen's right to challenge an agency's determination that the American Israel Public Affairs Committee was not subject to registration as a "political committee" within the meaning of federal law).

⁴⁹⁴ *Vt. Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000).

Court treated the right to pursue a *qui tam* action as one that the United States (which possesses the real injury-in-fact) assigns to another party.⁴⁹⁵

Whatever sense the Court's three-pronged inquiry makes when one party seeks redress from an opponent following an invasion of his rights, it simply does not fit with the realities of non-contentious jurisdiction as practiced by federal courts. In deploying non-contentious jurisdiction, Congress can create individual rights and enable individuals to bring an *ex parte* action in federal court to secure formal recognition of the right in question. Such individuals have not suffered an "injury-in-fact"; rather, they seek to establish a legal interest through the assertion of their claim. Such an *ex parte* proceeding bears more than a passing resemblance to a claim for a bounty, in that the petitioner seeks recognition of a right as a "byproduct" of the litigation process.⁴⁹⁶ In *Tutun*, for instance, the petitioner sought relief from the district court's denial of his application for naturalized citizenship.⁴⁹⁷ Clearly, the petitioner could make out a conventional claim of Article III standing at the appellate level: reversal of the district court decision would redress the injury caused by the denial and provide the relief sought. But the *initial* petition sought a benefit—a certificate of citizenship—rather than redress for some injury-in-fact. Non-citizens suffer no Article III "injury" from the creation of a system of naturalization; in seeking naturalized citizenship, they pursue a change in status that will arise as the byproduct of the proceeding. Nonetheless, by treating the original petition as a case within Article III, Justice Brandeis pointedly rejected the government's argument that jurisdiction did not exist because the petitioner sought a mere "privilege."⁴⁹⁸

As with the adverse-party requirement, one might be tempted to resolve the tension between non-contentious jurisdiction and the injury-in-fact requirement by adapting the Court's rejection of "byproducts" to the lessons of

495. *Id.*

496. In *Vermont Agency*, the Court concluded that the congressional provision of a bounty to a *qui tam* relator was insufficient to confer Article III standing:

The interest must consist of obtaining compensation for, or preventing, the violation of a legally protected right. A *qui tam* relator has suffered no such invasion—indeed, the "right" he seeks to vindicate does not even fully materialize until the litigation is completed and the relator prevails. This is not to suggest that Congress cannot define new legal rights, which in turn will confer standing to vindicate an injury caused to the claimant. As we have held in another context, however, an interest that is merely a "byproduct" of the suit itself cannot give rise to a cognizable injury in fact for Article III standing purposes.

Id. at 772-73 (citations omitted).

497. *Tutun v. United States*, 270 U.S. 568, 574 (1926).

498. *Id.* at 578.

history. After all, the Court has sometimes adjusted its standing doctrine to take account of historical practice.⁴⁹⁹ As we have also seen, however, non-contentious proceedings are not a one-off aberration, but a well-established category of federal court jurisdiction. A cleaner solution therefore lies in our suggested bifurcation of the judicial power. By dividing judicial power into contentious and non-contentious jurisdiction, the Court can retain much of the doctrinal framework that now governs the handling of adversary disputes, which to a large extent tracks the plaintiff's entitlement to a remedy of damages or injunctive relief. At the same time, the Court can develop a new body of rules to govern the practice of non-contentious jurisdiction, in which the plaintiff's requested relief dictates a different formulation of the standing requirement.⁵⁰⁰ We propose the following reformulation of the standing test in matters of non-contentious jurisdiction: *the Court need not insist on an "injury-in-fact," but should require, in the words of Chief Justice Marshall, a party who "asserts his rights in the form prescribed by law."*⁵⁰¹

Adopting this reformulation of the current standing test in matters of non-contentious jurisdiction will not frustrate the important role the standing doctrine plays in maintaining the separation of powers between the judiciary and the political branches. Many argue that the separation-of-powers principle mandates the injury-in-fact rule, which prevents courts from asserting supremacy over Congress or the executive.⁵⁰² Although the Court's standing deci-

499. *Sprint Commc'ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 285 (2008) (describing the weight of historical practice as "well nigh conclusive" (quoting *Vermont Agency*, 529 U.S. at 777)).

500. Perhaps needless to say, the three-pronged "injury-in-fact" test for standing is not itself present in the text of Article III. Nor was this test articulated during the early Republic as a necessary antecedent for the exercise of judicial power as traditionally understood. *But cf.* Thomas W. Merrill, *Marbury v. Madison as the First Great Administrative Law Decision*, 37 J. MARSHALL L. REV. 481, 489-92 (2004) (hypothesizing that Chief Justice Marshall's opinion in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), set forth a precursor of standing doctrine in determining whether Marbury had a right to challenge the executive branch's failure to deliver his commission appointing him a justice of the peace).

501. *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 819 (1824).

502. To some extent, this argument tends to beg the question. If one begins with an assumption of a purely adversarial system, it would seem to follow that federal courts sit to resolve disputes and lack power to engage in the inquisitorial work entailed in some administrative matters. But if one recognizes that the federal courts have been assigned and have exercised a broad range of non-contentious jurisdiction throughout history, then the line separating judicial work from administrative work might seem much less distinct. Just as the Europeans have difficulty drawing an ideal distinction between contentious and non-contentious jurisdiction, *see supra* Part III.A.2, so too might one recognize that, say, the administrative work of naturalization can be given to either courts (as it was in 1790) or agencies (as it is today). The blurry quality of the line underscores the wisdom of Justice Brandeis's recognition that Congress has a good deal of discretion in deciding how to structure administrative claims. *See Tutun*, 270 U.S. at 576-77.

sions often invoke the separation of powers and the need to avoid judicial aggrandizement at the expense of the political branches, one has difficulty identifying judicial hubris in the acceptance of *ex parte* assignments from Congress. Most of the time, the *ex parte* matters that the federal courts have heard over the years have tended to present fact-bound issues with little broader significance than their contribution to the administration of a statutory scheme, and it would be unusual for such matters to embroil the courts in attempts to supervise the decisions of the political branches.⁵⁰³

Moreover, when a non-contentious proceeding requires explication of federal law or judicial review of the constitutionality of legislative or executive action, standing should still play a role. As was seen in *Ex parte Fitzbonne*,⁵⁰⁴ such occasions do arise, but the mere invocation of non-contentious jurisdiction should not permit a party to evade Article III's justiciability requirements. Standing doctrine prevents parties from seeking determination of a question of law when they lack a concrete, individual interest in the determination of that question and when that determination will not yield anything of consequence other than the court's pronouncement itself. Although the traditional formulation of standing requirements for parties in contentious proceedings is not readily translatable to parties in non-contentious proceedings, the core of standing doctrine can be reformulated to perform largely the same function in non-contentious actions. The standing test we propose above would require that, before addressing a question of law, a court should satisfy itself that the parties before it have asserted an actual, concrete right and that their entitlement to that right necessarily turns on resolution of the question of law.

In addition, to prevent a lack of adverseness from undermining the integrity of a court's resolution of legal issues, it might be prudent to accord legal pronouncements in non-contentious cases less precedential weight in future cases. Such treatment would have the further benefits of preventing non-contentious proceedings from yielding precedents binding on adverse third parties (the lesson of feigned cases) and of discouraging invocations of non-contentious jurisdiction for purely ideological ends (the lesson of the Progressive era's attack on friendly constitutional litigation).⁵⁰⁵

503. Arguably, the acceptance of such assignments honors the separation of powers by acknowledging the power of Congress to decide how to structure the assertion of non-contentious claims. So long as the work genuinely calls for the exercise of judicial judgment in the application of law to fact, and the other elements of judicial power are respected, federal judicial acceptance of non-contentious work should not pose a structural problem.

504. See *supra* text accompanying notes 56–58.

505. Decisions by the federal district courts — the locus of much non-contentious jurisdiction — lack precedential effect. See *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2540 (2011) (“[F]ederal district judges, sitting as sole adjudicators, lack authority to render precedential

Our emphasis on the need for prudence in the management of non-adverse proceedings provides a natural foundation for Justice Kennedy's conclusion in *Windsor* that the adverse-party requirement is not constitutional in dimension.⁵⁰⁶ Although our adversarial system has come to emphasize the need for fully adverse presentations as a prelude to constitutional adjudication, Article III does not limit the judicial power to cases in which adverse parties contest the matter at hand. Nevertheless, the Court's teachings about the need for concrete adverseness in contentious cases counsel prudence before proceeding to decision in a case such as *Windsor*.⁵⁰⁷

C. The Theory Applied: Judicial and Administrative Work

Traditional assumptions about the adversary nature of the federal court system have led to frequent confusion in attempts to properly classify the *ex parte* work of courts and judges, and such encounters still engender confusion today. We argue in this section that the theory presented in this Article offers a more persuasive account of the practice of federal jurisdiction than the adverse-party theory. In addition, we show that the theory of non-contentious jurisdiction helps to solve a surprising number of difficulties that have arisen in the judicial management of administrative chores.

1. The Distinction Between Courts and Judges

The construct of non-contentious jurisdiction may help to clarify the line between the work assigned to Article III courts and the work assigned to the judges who staff those courts. Since the Founding, the nation's jurists and lawyers have debated both the nature of the "judicial Power" that Article III confers on federal courts and the scope of Congress's power to assign additional chores to federal judges. Consider an early episode associated with the pension claims of disabled veterans. Congress first assigned claim-assessment duties to

decisions binding other judges, even members of the same court.") When a disappointed party seeks review of the denial of a claim, the resulting appellate court decision may have precedential effect if the panel designates it as precedential. See, e.g., 7TH CIR. R. 32.1(b).

506. See *United States v. Windsor*, 133 S. Ct. 2675, 2685-88 (2013).

507. Cf. Henry P. Monaghan, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665, 707-08 (2012) ("[T]he [Supreme] Court still disclaims any freestanding authority to pronounce on issues of constitutional law. . . . A live controversy of some kind must still exist.").

the circuit courts, as courts.⁵⁰⁸ Later, after the circuits refused those assignments, Congress conferred an initial fact-finding function on the “judges” of the district courts or on commissioners appointed by those judges.⁵⁰⁹ One might raise various questions about that solution. First, one might question Congress’s power to assign non-judicial work to the Article III judiciary. Second, one might doubt Congress’s power to assign federal judges work outside of their normal judicial responsibilities. To the extent one regards the fact-finding office as an inferior office of the United States, Article II of the Constitution casts doubt on congressional appointment.

One might be tempted to treat all assignments to the “courts” as grants of judicial power and all assignments to “judges” as presumptively operating to assign ministerial work of a non-judicial character. But that simple distinction does not appear to explain either the history or the modern treatment of such assignments. For example, when Congress conferred power on the federal courts to hear *ex parte* warrant applications in connection with Alexander Hamilton’s tax on distilling, the grant of power was assigned to “any judge of any court of the United States, or either of them.”⁵¹⁰ This economical grant of authority extends warrant-review powers to the courts themselves as well as to the judges who staff those courts. The logic underlying such a dual grant lies in the way that Congress had restricted the terms or meeting times of the courts it had created. If an inspector or collector needed a warrant, and the court was not in session, the statute would have clearly authorized the judge to act in a judicial capacity. Similarly, when Congress conferred habeas power on the federal courts in the Judiciary Act of 1789, it was careful to invest both the courts themselves (in the first clause of section 14) and the judges of those courts (in the second clause) with the power to review the legality of detention.⁵¹¹

The construct of non-contentious jurisdiction helps to explain why this dualism did not trouble the lawyers and jurists of the early Republic and should not cause distress today. Whether brought before a court or a judge, applica-

508. An Act To Provide for the Settlement of the Claims of Widows and Orphans Barred by the Limitations Heretofore Established, and To Regulate the Claims to Invalid Pensions, ch. 11, § 2, 1 Stat. 243, 244 (1792).

509. An Act To Regulate the Claims to Invalid Pensions, ch. 17, § 2, 1 Stat. 324, 325 (1793).

510. An Act Repealing, After the Last Day of June Next, the Duties Heretofore Laid upon Distilled Spirits Imported from Abroad, and Laying Others in Their Stead; and also upon Spirits Distilled Within the United States, and for Appropriating the Same, ch. 15, § 3, 1 Stat. 199, 199 (1791).

511. For an account, see Pfander, *supra* note 57 (arguing that the grant of power both to courts and judges was meant to ensure access to the “great writ” when federal courts with limited terms were not in session).

tions for warrants and writs of habeas corpus call upon courts to exercise judicial judgment and therefore present cases within the meaning of Article III.

Such an understanding of assignments of judicial work to Article III judges remains relevant today. Consider the Court's comparatively recent decision in *Hohn*,⁵¹² which began with an ex parte petition to a circuit judge for a COA in a habeas post-conviction proceeding. Justice Scalia argued vigorously that such a proceeding could not be regarded as a case or controversy within the judicial power of the federal courts.⁵¹³ But the Court disagreed, concluding that the application for a COA was a "case" in the circuit court for purposes of the exercise of the Court's certiorari authority.⁵¹⁴ We think the Court correctly recognized that Congress has the power to confer non-contentious jurisdiction either on Article III courts or on the judges of those courts, depending on its view of the nature of the proceeding, without placing the matter at hand outside Article III or the statutory provisions for appellate review that would otherwise apply.

2. *The Probate Exception*

The inability of the federal courts to exercise original non-contentious jurisdiction over "controversies" may help to clarify that most arcane of federal jurisdiction doctrines, the probate exception.⁵¹⁵ While many theories have been proposed to account for the exception,⁵¹⁶ and while the Supreme Court has sought to whittle the exception down to size,⁵¹⁷ one can best explain the cases as reflecting the belief that the federal courts should not exercise non-contentious jurisdiction over matters grounded in state law. Probate proceedings can be non-contentious in character. They often begin with an uncontested "common form" application for the probate, or proof, of a will.⁵¹⁸ If the court agrees that the will qualifies under applicable law for admission to probate, the court will appoint an administrator to oversee the collection and dis-

512. *Hohn v. United States*, 524 U.S. 236 (1998).

513. *Id.* at 256 (Scalia, J., dissenting).

514. *Id.* at 253 (majority opinion).

515. See *Dragan v. Miller*, 679 F.2d 712, 713 (7th Cir. 1982) ("The probate exception is one of the most mysterious and esoteric branches of the law of federal jurisdiction.").

516. See, e.g., Pfander & Downey, *supra* note 86, at 1541-60 (discussing prior theories claiming that the probate exception stems from Article III's omission of ecclesiastical jurisdiction, from Article III's law and equity limits, or from general principles of federalism).

517. See *Marshall v. Marshall*, 547 U.S. 293, 306-07 (2006) (treating the probate exception as an outgrowth of the limited scope of the statutory grant of diversity jurisdiction); see also *Markham v. Allen*, 326 U.S. 490, 494 (1946) (limiting the reach of the probate exception by reference to the proper subjects of a suit at equity).

518. See *supra* notes 81-84 and accompanying text.

tribution of the estate's assets.⁵¹⁹ Although disputes may crop up in the course of administration and may present a controversy between diverse citizens within the scope of federal jurisdiction, the initial proceeding is not a "controversy." On this reading, then, the initial petition does not satisfy the controversy requirement of Article III and does not come within the jurisdiction conferred on federal courts over state-law controversies between diverse parties.

The Supreme Court offered precisely this account of the probate exception in an overlooked nineteenth-century decision:

There are, it is true, in several decisions of this court, expressions of opinion that the Federal courts have no probate jurisdiction, referring particularly to the establishment of wills; and such is undoubtedly the case under the existing legislation of Congress. The reason lies in the nature of the proceeding to probate a will as one *in rem*, which does not necessarily involve any controversy between parties: indeed, in the majority of instances, no such controversy exists. . . . [B]ut whenever a controversy in a suit between such parties arises respecting the validity or construction of a will, or the enforcement of a decree admitting it to probate, there is no more reason why the Federal courts should not take jurisdiction of the case than there is that they should not take jurisdiction of any other controversy between the parties.⁵²⁰

These passages (interestingly, written by the same Justice Field who appears to have begun the conjunction of cases and controversies) convey two important ideas: that the power of the federal courts extends to any controversy or dispute between diverse parties, even where it happens to involve the validity of a will, and that the proceedings at the core of the probate exception were those of a non-adversarial character.⁵²¹ The distinction thus presented tracks entirely with the limits of federal non-contentious jurisdiction put forth in this Article.

519. See *supra* note 83.

520. *Gaines v. Fuentes*, 92 U.S. 10, 21-22 (1875).

521. Consider as well this comment from *Ellis v. Davis*:

Jurisdiction as to wills, and their probate as such, is neither included in nor excepted out of the grant of judicial power to the courts of the United States. So far as it is *ex parte* and merely administrative, it is not conferred and cannot be exercised by them at all until, in a case at law or in equity, its exercise becomes necessary to settle a controversy of which a court of the United States may take cognizance by reason of the citizenship of the parties.

109 U.S. 485, 497 (1883).

3. *The Extradition Puzzle*

The construct of non-contentious jurisdiction also helps to resolve doubts that have long dogged the process of international extradition. In the typical case, a foreign government applies to the United States for the extradition of an individual, and the Department of Justice initiates the proceeding by filing an extradition complaint before a judge or magistrate.⁵²² Following the issuance of a warrant for apprehension, the judge or magistrate holds a hearing to determine the legality of the extradition request.⁵²³ If the judge or magistrate agrees that the case for extradition has been made (after considering the treaty and assessing the case for probable cause), the magistrate certifies the propriety of detention to the Secretary of State, who makes the final determination as to whether extradition should be ordered.⁵²⁴ The target of extradition may seek limited review by petition for a writ of habeas corpus, but the system does not provide for direct appellate review of initial extradition decisions,⁵²⁵ and a variety of questions have arisen as to the nature of the habeas tribunal's power.⁵²⁶ From a practical perspective, moreover, reliance on habeas review can result in a series of duplicative proceedings.⁵²⁷

For reasons rooted in history, federal courts have often characterized the initial consideration of the complaint for extradition as a proceeding outside of Article III.⁵²⁸ This characterization apparently dates from the case *In re Metzger*.⁵²⁹ In *Metzger*, the government opposed the attempt of a detained individual to seek review, via habeas corpus, of a district judge's decision to issue a certifi-

522. For an overview of extradition processes, see *Lindstrom v. Graber*, 203 F.3d 470, 472-74 (7th Cir. 2000). See generally John T. Parry, *The Lost History of International Extradition Litigation*, 43 VA. J. INT'L L. 93 (2002) (outlining the history of extradition in the United States).

523. 18 U.S.C. § 3184 (2012).

524. *Id.* §§ 3184, 3186.

525. See *Lindstrom*, 203 F.3d at 473.

526. See Parry, *supra* note 522, at 153-69.

527. See, e.g., *DeSilva v. DiLeonardi*, 181 F.3d 865, 870 (7th Cir. 1999) (decrying delay and multiplicity of proceedings in an extradition matter pending in the federal system for seven years).

528. One scholar suggests with some force that the modern view of extradition as taking place outside of Article III traces to Judge Henry Friendly's synthesis of extradition law. See Parry, *supra* note 522, at 160-64 (discussing Judge Friendly's decision in *Matter of Mackin*, 668 F.2d 122, 125-26 (2d Cir. 1981), interpreting *In re Metzger*, 46 U.S. (5 How.) 176 (1847), and *In re Kaine*, 55 U.S. (14 How.) 103 (1852), as placing extradition outside of Article III and prohibiting any appellate review of extradition certificates); see also *United States v. Doherty*, 786 F.2d 491, 495 (2d Cir. 1986) (rejecting the government's application for declaratory judgment review of the denial of an extradition certificate).

529. 46 U.S. (5 How.) at 176.

cate of extradition.⁵³⁰ Because the judge was said to be acting as a magistrate, and doing so outside of any established “tribunal,” the government claimed that the Court lacked supervisory power by way of habeas.⁵³¹ The Court agreed that it lacked habeas jurisdiction because the case was decided by the district judge “at chambers” rather than in “court” in the exercise of a “special authority.”⁵³² Having characterized the district judge’s action as non-judicial, or executive in character, the Court applied the rule of *Marbury*: the proposed issuance of a supervisory writ to the district judge was said to represent an exercise of the Court’s original, rather than appellate, jurisdiction, and to lie beyond the Court’s power.⁵³³ Since *Metzger*, many have regarded the district judge’s role in extradition proceedings as outside the traditional judicial power.⁵³⁴

Scholars have identified two reasons why the *Metzger* Court regarded the district judge’s extradition decision as outside of Article III.⁵³⁵ The first reason is based on a characterization of the executive’s inherent authority over extradition. A variant of this argument was made in 1799 by then-Representative John Marshall in the well-known case of accused British mutineer Jonathan Robbins. Marshall argued on the floor of the House that the issue of extradition “was a case for Executive and not Judicial decision.”⁵³⁶ Acknowledging that the federal courts might test detention through habeas corpus, Marshall nonetheless suggested that President Adams had properly made the final determination about extradition.⁵³⁷

The second reason is statutory. The treaty under which the *Metzger* Court acted (and which the Court considered self-executing) provided for “judges and other magistrates” to certify evidentiary sufficiency “to the proper Execu-

530. See *id.* at 183.

531. *Id.* at 186.

532. *Id.* at 191.

533. *Id.* at 191-92.

534. Parry, *supra* note 522, at 129.

535. See, e.g., Allison Marston, *Innocents Abroad: An Analysis of the Constitutionality of the International Extradition Statute*, 33 STAN. J. INT’L L. 343, 356-60 (1997) (discussing the proper characterization of the judicial role in extradition); Parry, *supra* note 522, at 125-34 (discussing the nature of the judicial role in extradition); Jacques Semmelman, *Federal Courts, the Constitution, and the Rule of Non-Inquiry in International Extradition Proceedings*, 76 CORNELL L. REV. 1198, 1208-10 (1991) (discussing the ministerial character of judicial practice under the 1848 extradition statute).

536. 10 ANNALS OF CONG. 605 (1800). Robbins, also known as Thomas Nash, was accused by the British of committing murder during a mutiny aboard a British ship. Some who felt that the Adams administration improperly capitulated to British demands decried his extradition and execution. For an account, see Parry, *supra* note 522, at 108-14.

537. See Parry, *supra* note 522, at 112-13.

tive authority.”⁵³⁸ This treaty apparently gave the executive discretion over the final extradition decision.⁵³⁹ By incorporating the judicial determination into a process in which the executive was to make the final decision, the treaty may appear to have enlisted the judiciary into an essentially administrative or executive task. *Hayburn’s Case*, *Ferreira*, and *Gordon* all viewed the absence of judicial finality as rendering the judicial role merely executive or ministerial.⁵⁴⁰

Yet modern decisions correctly recognize that extradition presents no finality problem. Judge Frank Easterbrook, writing in *DeSilva v. DiLeonardi*,⁵⁴¹ recognized that the Secretary of State does not have power to *revise* the judicial certificate but only to *refrain* from extraditing in cases in which the judge has found just cause. As Judge Easterbrook explained, the judicial decision finally determines the government’s right to extradite, and the Secretary simply decides whether to carry out the extradition (as she almost invariably does).⁵⁴² But the Secretary cannot extradite without a judicial certificate and cannot overturn a judicial decision rejecting extradition on probable cause, treaty, or other grounds.⁵⁴³ Judge Easterbrook drew the logical conclusion: the government’s application for an extradition certificate gives rise to a “case” within the meaning of Article III to which the judicial power extends.⁵⁴⁴ He noted in a later decision involving the same parties that such applications could be assigned to the district courts as courts, and they could be subject to appellate review in the Article III hierarchy.⁵⁴⁵

538. *Id.* at 115 & n.115 (quoting Webster-Ashburton Treaty, U.S.-U.K., Aug. 9, 1842, art. 10, 8 Stat. 572, 576, T.S. No. 119); see *Metzger*, 46 U.S. (5 How.) at 188 (treating the extradition procedure set forth in the treaty as “the supreme law of the land”).

539. See Parry, *supra* note 522, at 116. The extradition statute, An Act for Giving Effect to Certain Treaty Stipulations Between This and Foreign Governments, for the Apprehension and Delivering Up of Certain Offenders, 9 Stat. 302 (1848), allows commissioners (now magistrate judges) to hear extradition proceedings, though “district judges often preside over these cases.” Parry, *supra* note 522, at 134 n.219.

540. *Gordon v. United States*, 117 U.S. 697, 702, 704 (1864); *United States v. Ferreira*, 54 U.S. (13 How.) 40, 51-52 (1851); *Hayburn’s Case*, 2 U.S. (2 Dall.) 409, 410 n. (1792).

541. 125 F.3d 1110 (7th Cir. 1997).

542. See *id.* at 1113.

543. See *id.* (characterizing an extradition certificate as one that “authorizes, but does not compel,” the executive to carry out an extradition and concluding that federal courts have the constitutional authority to certify for extradition).

544. See *id.*

545. *DeSilva v. DiLeonardi*, 181 F.3d 865, 870 (7th Cir. 1999) (excoriating the multiple levels of review occasioned by the current structure of extradition litigation and calling upon Congress to replace this structure with the usual practice of an initial district court decision followed by appellate review).

That conclusion fits well with our view that non-contentious jurisdiction enables the district courts to conduct an administrative evaluation of an application for certification without exceeding the bounds of Article III. While extradition proceedings get underway with an *ex parte* submission, the evaluation of an application for a warrant or certificate of extradition surely qualifies as an exercise of judicial judgment and often includes adverse parties. District courts or magistrates evaluate the factual basis for the claim that the underlying criminal charge enjoys the support of probable cause, and they consider legal challenges to the extradition treaty or process. Recall that the Court in 1795 characterized Judge Laurance's analysis of the warrant application in the case of Captain Barré as having occurred in the judge's "judicial capacity."⁵⁴⁶ On this basis, the Court concluded that the matter was not subject to review on mandamus. The *Lawrence* decision thus represents an early rejection of the administrative or ministerial conception of extradition work. Building on *Lawrence*, *DeSilva*, and *Tutun*, one might construct a plausible argument for the exercise of appellate review of extradition decisions under the current jurisdictional statutes. As we have seen, section 1291's provision for appellate review of final district court "decisions" encompasses all "cases" in the district courts;⁵⁴⁷ on the logic of *Tutun*, appellate review would follow as a matter of course (thereby lessening the need for a second round of habeas review).

4. FISA Courts

Since the adoption of FISA in 1978, the Foreign Intelligence Surveillance Court has reviewed government applications for the approval of certain surveillance practices on an *ex parte* basis.⁵⁴⁸ As with other warrant applications,⁵⁴⁹

546. See *supra* text accompanying note 135. As noted *supra* note 131, the judge's name is styled Lawrence in the opinion, but is typically spelled Laurance.

547. See *Tutun v. United States*, 270 U.S. 568 (1926).

548. The statutory scheme for the approval of FISA warrants was amended in 2008 and now allows the government to "seek the FISC's authorization of certain foreign intelligence surveillance targeting the communications of non-U.S. persons located abroad." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1144 (2013). See generally Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436 (2008) (codified in scattered sections of 50 U.S.C.) (setting forth the statutory scheme); Note, *Standing—Challenges to Government Surveillance—Clapper v. Amnesty International USA*, 127 HARV. L. REV. 298 (2013) (discussing *Clapper*). Current law requires the government to obtain FISC approval of proposed foreign surveillance, including approval of the government's certification "(1) that procedures are 'reasonably designed' to limit targeting to individuals outside the United States; (2) that procedures will minimize acquisition, retention, and dissemination of nonpublic information about non-consenting U.S. persons; (3) that 'guidelines have been adopted to ensure compliance with targeting limits and the Fourth Amendment'; and (4) that all these procedures comport with the Fourth Amendment." See Note,

the government submits the request to the court without notice to the target of the proposed surveillance.⁵⁵⁰ But unlike the targets of other warrant proceedings, most FISA targets will never learn that the surveillance has been carried out and will never have occasion to challenge the warrant in the course of criminal proceedings. Unlike other warrant proceedings, moreover, the proceedings do not take place in the local federal courthouse; rather, they require the FISA judges to travel to a secret courthouse.⁵⁵¹ If the FISC denies the government's application, FISA provides for oversight by the Foreign Intelligence Surveillance Court of Review.⁵⁵² The government does not invariably release either the decisions of the trial court or the opinions of the court of review, although a few decisions have come to light as a result of the leaks by Edward Snowden.⁵⁵³

Critics have argued that the FISC's ex parte process presents both constitutional and practical problems and have put forward a variety of suggested cures.⁵⁵⁴ For example, Orin Kerr has argued that Congress should establish a special advocate within an existing security-cleared government department to offer adversary presentations during FISC proceedings.⁵⁵⁵ Steve Vladeck has

supra, at 299. Typical requests may seek orders approving of electronic surveillance, physical searches, use of a pen register or a trap and trace device, or access to certain business records. See ANDREW NOLAN, RICHARD M. THOMPSON II & VIVIAN S. CHU, CONG. RESEARCH SERV., 7-5700, INTRODUCING A PUBLIC ADVOCATE INTO THE FOREIGN INTELLIGENCE SURVEILLANCE ACT'S COURTS: SELECT LEGAL ISSUES 2 (2013).

549. See generally *supra* note 510 and accompanying text (describing warrant practice under the nation's first excise tax on distilled spirits).
550. The 1978 statute provides for a subsequent challenge by an aggrieved person against whom FISA evidence is or is about to be used in a courtroom proceeding; the target may move to suppress on the ground that (1) the evidence was unlawfully obtained or (2) the electronic surveillance was not conducted according to the court order's conditions. See 50 U.S.C. § 1806(e) (2012).
551. See Note, *supra* note 3, at 2206.
552. On the jurisdiction of the Foreign Intelligence Surveillance Court of Review, see 50 U.S.C. § 1803(b) (2012). The review court's first decision, *In re Sealed Case*, 310 F.3d 717 (FISA Ct. Rev. 2002) attracted much attention. See Note, *supra* note 3, at 2202.
553. See Orin S. Kerr, *A Rule of Lenity for National Security Surveillance Law*, 100 VA. L. REV. 1513, 1513 (2014).
554. On the practical side, some critics worry that the courts rubber-stamp the government's surveillance policy and fail to provide a meaningful check. For example, the Electronic Privacy Information Center observes that the FISC has turned down only twelve of some 35,000 FISA applications. See *Foreign Intelligence Surveillance Act Court Orders 1979-2014*, ELECTRONIC PRIVACY INFO. CENTER (2014), http://epic.org/privacy/wiretap/stats/fisa_stats.html [<http://perma.cc/QWJ7-CWND>].
555. See Orin Kerr, *A Proposal To Reform FISA Court Decisionmaking*, VOLOKH CONSPIRACY (July 8, 2013, 1:12 AM), <http://www.volokh.com/2013/07/08/a-proposal-to-reform-fisa-court-decisionmaking> [<http://perma.cc/JHX9-PSMK>] (arguing that the Oversight Section

urged instead that “private security-cleared lawyers, not government employees . . . serve as adversaries in secret litigation commenced by the government.”⁵⁵⁶ Such proposals have gained traction in Congress; newly introduced bills would attempt to ensure adversarial presentations by requiring the appointment of public interest advocates in certain situations.⁵⁵⁷ One commentator has argued that private attorneys might be appointed to serve as consultants to the court in proceedings deemed to require some adversarial presentation.⁵⁵⁸

We do not claim expertise in matters of national security and have little to add to the policy debate over the wisdom of introducing an adversary process to improve decision making at the FISC. We simply suggest that the FISC’s role in hearing warrant applications on an *ex parte* basis seems to fit comfortably within the scope of federal judicial power over matters of non-contentious jurisdiction. The FISA process calls for the court to determine that the government has complied with various statutory elements that regulate access to intelligence surveillance.⁵⁵⁹ The resulting decisions by the FISC serve as final decisions on the issues at hand: the government’s compliance with the statute and entitlement to conduct the surveillance in question. While the targets of such surveillance can contest various aspects of the proceedings that yielded the evidence introduced at their trials, courts hearing those trials treat the FISC’s determination as conclusive on the issue of the legality of the surveillance.⁵⁶⁰ Even if the courts were to reopen the FISA decision and reevaluate the showings, such *judicial* revision would not raise doubts about the judicial finality of the initial decision. To be sure, federal officials may not always discharge their duties of candor to the FISC and may exceed the scope of the warrant’s author-

of the National Security Division at the Department of Justice should be assigned an adversary role in the process).

556. Steve Vladeck, *Making FISC More Adversarial: A Brief Response to Orin Kerr*, LAWFARE (July 8, 2013, 11:46 PM), <http://www.lawfareblog.com/2013/07/making-fisc-more-adversarial-a-brief-response-to-orin-kerr> [<http://perma.cc/Q28V-NB57>].

557. *See, e.g.*, Ensuring Adversarial Process in the FISA Court Act, H.R. 3159, 113th Cong. (2013) (granting authority to the Privacy and Civil Liberties Oversight Board to “appoint attorneys to serve as public interest advocates in proceedings before the Foreign Intelligence Surveillance Court, a judge of the petition review pool, the Foreign Intelligence Surveillance Court of Review, and the Supreme Court”).

558. *See* Kris, *supra* note 471, at 37 n.151.

559. 50 U.S.C. § 1805 (2012).

560. *See* United States v. Stewart, 590 F.3d 93, 126 (2d Cir. 2009) (upholding the district court’s conclusions that “all of the requirements of FISA were satisfied” and that “each of the FISA surveillances was authorized by a FISA Court order that complied with the statutory requirements for such orders and was supported by the statements and certifications required by the statute”).

ity in carrying out the surveillance in question. Remedies should be available in such cases (just as they were in the nineteenth century when officers exceeded the scope of their warrants). But the possibility of executive branch missteps, while legitimate matters of litigation and policy concern, do not deprive the judicial process of its character as such.

5. *Administrative and Judicial Classification*

The growth of the Article III judiciary has spawned remarkable growth in the administrative infrastructure supporting the judicial function.⁵⁶¹ Federal courts have faced nettlesome questions about the nature of specific proceedings, whether judges can participate, and whether, if they do, the proceedings qualify as cases subject to appellate review. For example, everyone agrees that the Administrative Office of the United States Courts (AO) does not exercise the “judicial power” of the United States within the meaning of Article III. But problems of characterization remain, as the Supreme Court’s decision in *Mistretta v. United States*⁵⁶² confirms. In the course of upholding the power of Congress to create the United States Sentencing Commission within the judicial branch, the Court allowed Congress to offer administrative and legislative chores to Article III judges.⁵⁶³ The *Mistretta* Court held that, so long as the federal judges remain free to refuse the work, and so long as the work does not interfere with or encroach upon their other judicial duties, no Article III violation occurs when federal judges take on administrative or legislative work.⁵⁶⁴

⁵⁶¹ The Administrative Office of the United States Courts (AO), headquartered in Washington, D.C., provides staff support to the third branch, succeeding to an administrative role that the Department of Justice had previously played. Thus, the AO prepares budgets for the federal judiciary; prepares reports and responds to congressional inquiries about judicial developments; oversees the collection of information about judicial dockets and dispositions; supports the magistrate, bankruptcy, probation, and federal defender functions; and provides staff support to the Judicial Conference of the United States. Committees of the Judicial Conference, including the Rules Advisory Committee, led by Article III judges, enjoy substantial staff support from the AO. See PETER G. FISH, *THE POLITICS OF FEDERAL JUDICIAL ADMINISTRATION* (1973); Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924 (2000).

⁵⁶² 488 U.S. 361 (1989).

⁵⁶³ *Id.* at 385. While the Court reaffirmed as a “general principle” that “executive or administrative duties of a non-judicial nature may not be imposed” on Article III judges, the Court nonetheless permitted federal judges to participate in the legislative/administrative task of developing sentencing guidelines for use in federal criminal cases. *Id.*

⁵⁶⁴ *Id.* at 386-89, 405-07. The Court viewed both the traditionally judicial quality of rulemaking and the individual judge’s power to refuse appointment to the Commission as crucial to the decision that no improper encroachments occurred. *Id.*

Mistretta works well enough when the administrative task at hand, such as rulemaking or the formulation of sentencing guidelines, does not call for appellate review in the Article III judiciary.⁵⁶⁵ But ambiguities arise when judges perform administrative work that directly and adversely affects the rights of individuals. In such cases, the individuals may seek review within the Article III hierarchy only to find that the administrative characterization of the initial decision casts doubt on the availability of appellate review. We explore three such situations in this section: Judge Stephen S. Chandler's effort to secure review of an adverse judicial council order; the often unsuccessful attempts of individuals to secure review of the denial of ex parte petitions addressed to a district judge; and the fascinating classification problem that divided the Justices in *Printz v. United States*.⁵⁶⁶ We think the construct of non-contentious jurisdiction helps to clarify the line between administrative work that lies outside of Article III, on the one hand, and that which forms part of the judicial power and can be reviewed in the ordinary course at the appropriate level in the appellate hierarchy, on the other.

a. *Circuit Judicial Councils and Docket Assignments*

In addition to creating the AO, Congress has established circuit judicial councils to oversee the judicial work in each regional judicial circuit. These councils, which are chaired by the Chief Judge of each circuit, perform a range of administrative chores in tandem with the circuit administrator.⁵⁶⁷ Among other tasks, the circuit judicial councils exercise control over charges of judicial misconduct and have the power to reassign cases among the district judges of

^{565.} *Mistretta* characterized such assignments as if they lay outside the scope of the judicial power, but were nonetheless permissible:

Congress may delegate to the Judicial Branch nonadjudicatory functions that do not trench upon the prerogatives of another Branch and that are appropriate to the central mission of the Judiciary. Following this approach, we specifically have upheld not only Congress' power to confer on the Judicial Branch the rulemaking authority contemplated in the various enabling Acts, but also to vest in judicial councils authority to "make 'all necessary orders for the effective and expeditious administration of the business of the courts.'"

Id. at 388 (quoting *Chandler v. Judicial Council of the Tenth Circuit*, 398 U.S. 74, 86 n.7 (1970)). Read literally, the Court's formulation does not necessarily present problems for the exercise of non-contentious jurisdiction. Ex parte and other non-contentious matters could be regarded as non-adjudicatory in the sense that they do not call for the adjudication of a dispute.

^{566.} 521 U.S. 898 (1997).

^{567.} See 28 U.S.C. § 332 (2012).

the circuit.⁵⁶⁸ One district judge subject to such a reassignment, Judge Chandler, challenged the action of the judicial council by filing a petition for mandamus and prohibition review in the Supreme Court.⁵⁶⁹ The majority essentially dodged the question, concluding that Judge Chandler had failed to make out a case for intervention on the merits.⁵⁷⁰ It therefore left undecided the nature of the proceeding below and the power of the Court itself to review such proceedings.⁵⁷¹

Concurring, Justice Harlan squarely confronted the character of the reassignment proceeding in the course of concluding that it was a proper task for the Article III judiciary.⁵⁷² He first analyzed the work of the councils, finding that Congress had intended them “to act as judicial bodies in supervising the district judges.”⁵⁷³ While Justice Harlan acknowledged that the constitutional separation of powers could block the placement of this authority in a nonjudicial body, he treated the councils as judicial tribunals made up of Article III judges with the power to conduct their oversight duties “as a judicial function.”⁵⁷⁴ Having concluded that the task at the council level was properly judicial, Justice Harlan had “little difficulty” in determining that the petition for mandamus and prohibition review should be regarded as a “case or controversy” within Article III judicial power.⁵⁷⁵ When “the purpose and effect of the order are to restrict the judge’s performance of judicial tasks, and he alleges illegal interference with the exercise of his office, his petition presents a cognizable case or controversy just as does a petition for review of the disbarment of an attorney.”⁵⁷⁶

Our conception of non-contentious jurisdiction confirms the wisdom of Justice Harlan’s approach. Although the initial decision at the council level may emerge from a process that does not resemble a traditional dispute, case man-

568. For an account, see Peter Graham Fish, *The Circuit Councils: Rusty Hinges of Federal Judicial Administration*, 37 U. CHI. L. REV. 203 (1970).

569. *Judicial Council*, 398 U.S. at 75-76.

570. *Id.* at 88-89.

571. *Id.* at 86.

572. *Id.* at 89-129 (Harlan, J., concurring).

573. *Id.* at 104.

574. *Id.* at 105.

575. *Id.* at 106 n.9.

576. *Id.* On disbarment proceedings, see *Ex parte Wall*, 107 U.S. 265 (1883); *Ex parte Robinson*, 86 U.S. (19 Wall.) 505 (1874); *Ex parte Bradley*, 74 U.S. (7 Wall.) 364 (1869). Justice Harlan also suggested that a litigant who considered himself “aggrieved” by a Council order could mount a justiciable challenge to the decision, although he recognized that the “manner” of review might raise questions. *Judicial Council*, 398 U.S. at 106 n.9 (Harlan, J., concurring).

agement certainly represents (as Justice Harlan observed⁵⁷⁷) a traditional judicial function that calls for the exercise of judicial judgment in the application of law to fact. What's more, the decree reassigning cases may have the finality necessary to support appellate review.⁵⁷⁸ By treating the matter as one appropriate for the exercise of judicial power, Justice Harlan's approach preserves the prospect of judicial review for substantial claims of right (even though he rejected Judge Chandler's claim on the merits). Far better, we think, to preserve the prospect of review through the exercise of non-contentious jurisdiction than to characterize the work as non-judicial and raise questions about the availability of review. Confronted with similar questions, the judiciary should follow Justice Harlan's lead, rather than the potentially confusing lead of *Mistretta*, which suggests that all administrative work falls outside of Article III.

b. Administrative Management of Fee Petitions

A series of recent decisions about appellate review of fee petitions offers a good illustration of the problems that arise from the improper characterization of judicial matters. The appellate courts have consistently taken the view that the *ex parte* fee decisions of the district courts should be regarded as merely administrative and thus beyond the scope of appellate jurisdiction.⁵⁷⁹ The question has arisen when individual lawyers seek review of the denial of an *ex parte* fee application under the Criminal Justice Act (CJA) and when members of the press seek review of the denial of applications to district courts for waiver of the fees otherwise associated with access to the database known as PACER (Public Access to Court Electronic Records).⁵⁸⁰ In both instances, federal law assigns the power to pass on the petition to the district court, but says nothing specifically about appellate review of the district court's decision.⁵⁸¹ Access to federal review thus turns on the meaning of the statute that generally confers appellate jurisdiction over the "final decisions" of the district courts.⁵⁸² Although the federal appellate courts correctly recognize that Congress's use of

577. *Judicial Council*, 398 U.S. at 105 (Harlan, J., concurring).

578. *See id.* at 100 (citing legislative history).

579. *See* 15A WRIGHT & MILLER, *supra* note 160, at § 3903.

580. *See, e.g., In re Application for Exemption from Elec. Pub. Access Fees* by Jennifer Gollan and Shane Shifflett, 728 F.3d 1033, 1035-36 (9th Cir. 2013).

581. *See* 18 U.S.C. § 3006A (2012); 28 U.S.C. § 1914 (2012); *In re Application for Exemption*, 728 F.3d at 1034 (discussing applicable federal law and guidelines set out by the Judicial Conference (citing Electronic Public Access Fee Schedule of Apr. 1, 2012)).

582. 28 U.S.C. § 1291 (2012).

the term “decisions” in 1948 encompassed all “cases” in the district courts,⁵⁸³ they nonetheless hold that the term does not apply to administrative matters.⁵⁸⁴ As a result, the district courts often exercise final and unreviewable authority, absent mandamus review by the Supreme Court, over PACER applications, CJA fee requests, and perhaps other *ex parte* applications.⁵⁸⁵

We have no quibble with the general principle that the appellate courts should not review the administrative chores of the district judges. An appellate court would, for example, rightly refuse to review the law clerk hiring decisions of the district court. But the appellate courts have defined the ambit of administrative work too broadly and have done so in good measure because they lack an appreciation of the role of non-contentious jurisdiction. In both the PACER and CJA decisions, the appellate courts relied on the *ex parte* character of the proceedings below, along with the fact that they began with an original submission and could not be characterized as ancillary to a pending proceeding.⁵⁸⁶ As a result, the courts found that the petitions lacked the adverse quality needed to make the proceeding a “case” within the meaning of the judicial power. (Such an approach assumes that federal courts lack “original” jurisdiction over non-contentious proceedings, an assumption with which we obviously disagree.)

A moment’s reflection reveals the error of these decisions. As we have seen, *ex parte* applications to district courts for final decisions on claims of federal right are “cases” within the original non-contentious jurisdiction of the federal judiciary and within the appellate jurisdiction of superior courts in the Article III hierarchy. That was the lasting lesson of *Tutun*. The key to accurate identification of matters within the non-contentious jurisdiction of the district court (and the appellate courts) lies not in the *ex parte* character of the proceeding, but in the functional quality of the judicial judgment being exercised. Both the PACER and CJA application processes call for the district court to apply established law to the facts revealed in the petition and in the court’s own investigation of the matter. Both situations differ from the clerkship application process, which turns on the judge’s personal conception of what sort of clerk will best

583. See, e.g., *In re Application for Exemption*, 728 F.3d at 1038-39.

584. See *In re Marcum L.L.P.*, 670 F.3d 636, 638 (5th Cir. 2012); see also *United States v. Stone*, 53 F.3d 141, 143 (6th Cir. 1995) (“We agree with the Federal, Seventh, Ninth, Tenth and Eleventh Circuits and hold that § 3006A fee determinations are not appealable orders.”).

585. See 15A WRIGHT & MILLER, *supra* note 160, at § 3903.

586. See *In re Application for Exemption*, 728 F.3d at 1039-41; see also *In re Carlyle*, 644 F.3d 694, 699 (8th Cir. 2011) (non-adversarial proceeding); *United States v. Walton (In re Baker)*, 693 F.2d 925, 927 (9th Cir. 1982) (same). For a description of the cases, see Matthew Heins, Note, *An Appeal to Common Sense: Why “Unappealable” District Court Decisions Should Be Subject to Appellate Review*, 109 NW. U. L. REV. (forthcoming 2015).

serve the judge's needs. One can easily conclude that the ministerial or administrative work of hiring a law clerk lies outside the scope of the judge's judicial jurisdiction and outside the scope of appellate review. But that need not imply that the district judge's exercise of non-contentious jurisdiction should similarly evade appellate review.

c. *The Classification Debate in Printz v. United States*

The conflicting views of the Justices in *Printz* present a slightly different perspective on the classification of judicial and administrative work, but one on which non-contentious jurisdiction may shed some light. Holding that Congress may not commandeer state officials to administer a federal law requiring background checks for firearm purchases,⁵⁸⁷ *Printz* was a decision about federalism. But it occasioned an exchange between Justice Scalia, writing for the majority, and Justice Stevens, in dissent, about the nature of functions previously assigned to state courts by the federal government.⁵⁸⁸ In refuting an argument by the government that the First Congress had assigned administrative tasks, such as the naturalization of citizens, to state courts, Justice Scalia characterized the task of “determining whether applicants for citizenship met the requisite qualifications” for naturalization under federal law as “quintessentially adjudicative,” though he added the unexplained caveat that “the line between [executive and judicial functions in the context of state judiciaries] is not necessarily identical with the line established by the Constitution for federal separation-of-power purposes.”⁵⁸⁹ In response, Justice Stevens argued that the “evaluation of applications for citizenship . . . [is] hard to characterize as the sort of adversarial proceedings to which common-law courts are accustomed” and that “[a]ctivities of this sort, although they may bear some resemblance to traditional common-law adjudication, are far afield from the classical model of adversarial litigation.”⁵⁹⁰ Although neither Justice attempted to connect his discussion of the distinction between administrative and judicial functions with the judicial power granted by Article III – Justice Scalia was, indeed, careful to avoid any such connection⁵⁹¹ – an animating feature of the arguments of both Justices was that such a distinction existed and was significant for defining the scope of judicial activity.⁵⁹²

587. *Printz v. United States*, 521 U.S. 898, 935 (1997).

588. *See id.* at 906-08 (majority opinion); *id.* at 948-54 (Stevens, J., dissenting).

589. *Id.* at 908 n.2 (majority opinion).

590. *Id.* at 952 n.11 (Stevens, J., dissenting).

591. *See id.* at 908 n.2 (majority opinion).

592. *See id.*; *id.* at 950-52 (Stevens, J., dissenting).

We do not believe that one can draw a sharp boundary line between the two functions. The example on which the Justices focused, naturalization proceedings,⁵⁹³ could rationally be assigned to judicial or administrative tribunals. From the perspective of a theory of non-contentious jurisdiction, the key lies in determining whether the court must exercise judicial judgment, or what Justice Scalia characterized as the “adjudicative” functions of “determining whether applicants for citizenship met the requisite qualifications.”⁵⁹⁴ As long as the determination calls for the exercise of such judgment and the other elements of non-contentious jurisdiction are present, federal courts can do the work, and the classification decision ultimately belongs to Congress.

CONCLUSION

History plays an important but contested role in debates over the justiciability rules derived from Article III. Many scholars, following the lead of Justice Felix Frankfurter,⁵⁹⁵ focus on judicial practice in the early Republic for insight into the Framers’ conception of the judicial power. The canonical treatment of federal justiciability law in Hart and Wechsler’s famous casebook, for example, prominently featured the lessons of such historical landmarks as *Hayburn’s Case*, the *Correspondence of the Justices*, and the practice of naturalization later validated in *Tutun*.⁵⁹⁶ Later scholars have continued to emphasize early practice, both because it sheds light on the original understanding of Article III and because it may represent an early liquidation of the meaning of the debatable terms of Article III.⁵⁹⁷ Even if one does not subscribe to the so-called First Congress canon of construction, which holds that practices adopted in the immediate aftermath of the ratification have special force as early explications of

593. *Id.* at 906-07 (majority opinion); *id.* at 950 (Stevens, J., dissenting).

594. *Id.* at 908 n.2 (majority opinion).

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

596. See HART & WECHSLER 6th, *supra* note 21, at 49-96 (discussing the judicial power problems of finality, proper parties, advisory opinions, and legislative and executive revision through the lens of early cases).

597. See, e.g., Raoul Berger, *Standing To Sue in Public Actions: Is It a Constitutional Requirement?*, 78 YALE L.J. 816 (1969) (questioning the standing rule on historical grounds); Pushaw, *supra* note 218 (same); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1374 (1988) (arguing that the Framers did not understand Article III to impose standing limits on the invocation of judicial power but that the limits emerged in the twentieth century and later hardened into constitutional dogma). For an argument for deference to congressional applications that liquidate or “fix” the meaning of the Constitution, see Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519 (2003).

constitutional meaning,⁵⁹⁸ a thorough knowledge of historical practice may have value. After all, history may help to explain how contested practices arose and why they remain a part of our constitutional tradition centuries later, long after their original justification has slipped from view.

Some scholars take the position that the early willingness of the federal courts to take on *ex parte* chores, such as naturalization petitions, does not deserve much weight in constitutional analysis.⁵⁹⁹ One form of the argument appears in the work of Michael Morley, who argues against the power of Article III courts to entertain uncontested applications for the entry of consent decrees.⁶⁰⁰ For Morley, early practice has little to offer a body of constitutional law that did not emerge in the decisional law of the Supreme Court until the twentieth century.⁶⁰¹ Many scholars take a similar view, dismissing early practice as isolated or anomalous, or suggesting that early practice was a pragmatic adaptation to conditions in the early Republic but has few lessons to teach us about justiciability law today.⁶⁰² A subtler version of the argument appears in the latest edition of the Hart and Wechsler casebook. After calling attention to the practice of naturalization upheld in *Tutun* and questioning its legitimacy, the authors ask, “When, if ever, should a deep historical pedigree sustain a practice if the Court would otherwise find it unconstitutional?”⁶⁰³ One can see this question as an effort to downplay the significance of early precedents on the grounds that they are unprincipled, anomalous, or products of a different age. On this view, case-or-controversy rules that the Court has promulgated in the last several decades respond to practical problems of administrative governance – problems that may not have been present in the early days.

598. See *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 412 (1928) (“This court has repeatedly laid down the principle that a contemporary legislative exposition of the Constitution when the founders of our government and framers of our Constitution were actively participating in public affairs long acquiesced in fixes the construction to be given its provisions.”); see also Michael Bhargava, *The First Congress Canon and the Supreme Court’s Use of History*, 94 CALIF. L. REV. 1745 (2006) (describing and analyzing the use of the First Congress Canon).

599. See Morley, *supra* note 18, at 669-70; Redish & Kastanek, *supra* note 16, at 587 n.157; Wheeler, *supra* note 17, at 132-36; cf. Avery, *supra* note 18, at 417-18 n.137; Richard Re, *Relative Standing*, 102 GEO. L.J. 1191 (2014) (arguing that modern standing law renders its “eighteenth century British pedigree (or lack thereof)” “largely beside the point”).

600. See Morley, *supra* note 18, at 669-70.

601. *Id.* at 674-75.

602. See, e.g., Wheeler, *supra* note 17, at 132-36 (describing early instances of non-contentious jurisdiction as anomalous “extrajudicial” activities that took place outside the context of cases and controversies).

603. HART & WECHSLER 6th, *supra* note 21, at 84-85.

We do not question the pragmatic instinct that underlies these arguments. The meaning of the Constitution *will* inevitably change, and a deep historical pedigree, standing alone, does *not* provide an airtight assurance of constitutional validity. We simply disagree on the point that *ex parte* practice should be consigned to the dustbin of history's anomalies. Non-contentious jurisdiction began in ancient Rome; was received into the civil- and canon-law procedure of Europe and England; took root in the courts of admiralty and equity; and made its way across the Atlantic to the new world. Early Congresses included non-contentious matters among those they assigned to the federal courts, and early definitions of the term "case" in Article III were phrased in terms sufficiently broad to encompass *ex parte* proceedings. The now-familiar linkage between "cases" and "controversies" was apparently proposed in the late nineteenth century as a way to introduce an adverse-party norm into language that had not been previously read to convey such a meaning. The Court has invariably upheld individual instances of non-contentious jurisdiction against challenges predicated on the absence of adverse parties. And the construct of non-contentious jurisdiction can help to solve a surprisingly broad range of puzzles in the management of the federal judicial power today. We think, in brief, that the practice of non-contentious jurisdiction remains a vital feature of the daily work of the Article III courts.

We do not mean to praise all of the practices outlined in this Article; indeed, we believe Congress should think twice before expanding non-contentious jurisdiction, and federal courts might improve the way they manage their non-contentious work. But we do suggest that the theory of non-contentious jurisdiction explains much that was previously inexplicable or anomalous. Non-contentious jurisdiction, properly understood, enables the federal courts to entertain a range of uncontested and *ex parte* applications for the grant of a legal right or the entry of a judgment or as a threshold requirement before the government may institute certain proceedings against an individual. Properly limited, non-contentious jurisdiction should not pose a threat to the dominant role of the federal courts in resolving contested disputes and explicating the meaning of federal law. Indeed, by calling for the recognition of both contentious and non-contentious jurisdiction, we have expressed a preference for the preservation of many of the adverse-party rules that emerged in the last century. We have also suggested that federal courts should proceed cautiously when asked to make bold pronouncements in the context of an *ex parte* submission. Still, the federal courts provide a unique institution among administrative bodies; their independent judges offer a more meaningful check on executive branch activities than courts created within and beholden to the administrative state. While Congress should not assign administrative matters to the Article III judiciary that the agencies can handle more efficiently, we think Congress retains broad power to define the sort of "cases" that will make

up the work of the lower federal courts. On accepting such non-contentious assignments as a legitimate part of the judicial power, moreover, federal courts may come to view their inquisitorial duties as an important complement to their role in dispute resolution on the contentious side of their dockets.