

## ADVERSE INTERESTS AND ARTICLE III: A REPLY

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**ABSTRACT**—Scholars and jurists have long sought an explanation for why the Framers of Article III distinguished “Cases” from “Controversies.” In a previous article that cataloged the exercise of federal jurisdiction over uncontested matters, such as pension claims, warrant applications, and naturalization proceedings, we tried to provide an answer to this question. We suggested that, at least as to “cases” arising under federal law, the federal courts could exercise what Roman and civil lawyers called non-contentious jurisdiction or, in the words of Chief Justice Marshall, could hear uncontested claims of right in the form prescribed by law. As for “controversies,” by contrast, the federal courts were limited to the adjudication of disputes between parties aligned as Article III specifies. Much that seems strange about the practice of federal jurisdiction becomes clear when viewed in light of our proposed interpretation. Thus, our article accounts not only for the difference in Article III’s text, but also for the refusal of the federal courts to hear uncontested matters of state law, such as some probate and domestic relations proceedings.

Our account also calls into question the claim that Article III embeds inflexible “injury” and “adverse-party” requirements in the definition of judicial power. It was those claims that triggered the response from Professor Ann Woolhandler, to which this Article briefly replies. Woolhandler argues that Article III requires not adverse parties, so much, as adverse interests. In the course of doing so, she embraces a late nineteenth-century revisionism that twisted the meaning of Article III. In the end, however, she fails to offer a coherent theory of the text of Article III or to explain why her newfangled adverse-interest construct better explains the history of judicial practice than the eighteenth-century construct of non-contentious jurisdiction with which the Framers were familiar.

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INTRODUCTION

Article III extends “the judicial Power of the United States” to “all Cases” arising under federal law, and to “Controversies” between specified parties (for example, states against other states or their citizens).<sup>1</sup> Over the past century, the Supreme Court has asserted that Article III requires a dispute between adverse parties before a federal court can assert jurisdiction, and scholars have generally accepted that assertion. In a lengthy article, we challenged the conventional wisdom on textual and historical grounds.<sup>2</sup> We acknowledged that Article III “Controversies” have been thought to require a dispute between adverse parties, but that several categories of federal law “Cases” require no such dispute. Instead, continuing a practice derived from Roman law, federal courts frequently exercise “non-contentious jurisdiction” over the registration or recognition of *ex parte* claims of right based on federal law.

Responding to our article on non-contentious jurisdiction, Professor Ann Woolhandler has offered a qualified defense of the conventional wisdom.<sup>3</sup> In arguing that Article III may incorporate an adverse-interest

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<sup>1</sup> U.S. CONST. art. III, §§ 1–2.

<sup>2</sup> James E. Pfander & Daniel D. Birk, *Article III Judicial Power, the Adverse-Party Requirement, and Non-Contentious Jurisdiction*, 124 *YALE L.J.* 1346 (2015).

<sup>3</sup> Ann Woolhandler, *Adverse Interests and Article III*, 111 *NW. U. L. REV.* 1025 (2017).

requirement, even if it does not strictly mandate adverse parties,<sup>4</sup> Woolhandler refines some of our claims and contests others on a qualified basis. Woolhandler, however, does not directly address many key elements of our article, notably the textual and historical case we made for arguing that the “judicial power of the United States” includes both contentious and non-contentious forms of jurisdiction and for distinguishing between “Cases” and “Controversies” in Article III.<sup>5</sup> Nor does she set out to refute the historical argument that non-contentious jurisdiction was an important category of judicial business in the Roman and civil law traditions and a likely feature of the conception of judicial power in the early Republic.<sup>6</sup> She agrees that the exercise of federal judicial power in non-contentious applications for naturalized citizenship offers strong support for our claim.<sup>7</sup> In the end, she concludes not that the evidence affirmatively *supports* an adverseness requirement, but that the evidence we presented does not quite carry the *burden of proof* (which she seems to have assigned to us).<sup>8</sup>

Professor Woolhandler has presented her case with customary skill, using the familiar tools of lawyerly discourse. When lawyers dispute, we frame the problem to our own advantage, draw lines, create categories, reason analogically, and assign burdens of proof.<sup>9</sup> Woolhandler highlights not the practice of the courts of the early Republic, which included a cluster of non-contentious proceedings, but what people said about the work of the federal courts one hundred years later, at a time when certain jurists were developing revisionist accounts of the Article III reference to “Cases” and “Controversies.”<sup>10</sup> She thus emphasizes judicial statements from the late nineteenth and early twentieth century (and an earlier statement that *Representative* John Marshall made on the House floor in a political

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<sup>4</sup> See *id.* at 1108–09.

<sup>5</sup> See Pfander & Birk, *supra* note 2, at 1417–23.

<sup>6</sup> See *id.* at 1403–16.

<sup>7</sup> See Woolhandler, *supra* note 3, at 1065.

<sup>8</sup> See, e.g., *id.* at 1107 (arguing that we “have not made the case for reconsidering adversity requirements for Article III cases”). One might argue that the burden of proof rests with those who would seek to refute the understanding of cases and controversies put forward by the leading jurists of the Founding Era and consistent with early federal court practice, rather than with the revisionist work of the last few decades. See discussion *infra* Part II.

<sup>9</sup> Cf. DOUGLAS WALTON, LEGAL ARGUMENTATION AND EVIDENCE 1–33 (2002).

<sup>10</sup> Thus, Professor Woolhandler emphasizes the early twentieth-century decision in *Muskrat v. United States*, see Woolhandler, *supra* note 3, at 1027 n.4, 1053–54, which itself drew on the revisionist late nineteenth-century efforts of Justice Stephen Field to redefine the case-and-controversy requirement to include an across-the-board requirement of party adverseness applicable to all proceedings brought before Article III courts. See Pfander & Birk, *supra* note 2, at 1421–22 (tracing the genealogy of Justice Field’s conflation of “cases” and “controversies”).

speech).<sup>11</sup> Such an approach to history enables Woolhandler to privilege statements that appeared long after Article III was implemented and long after such leading figures as *Chief Justice* John Marshall (speaking as a judge rather than as a politician) and Justice Joseph Story (speaking as a judge and as a law professor) defined cases in Article III broadly enough to encompass both adverse-party claims and claims to register an interest through an original invocation of non-contentious jurisdiction (as in the naturalization cases over which they both presided).<sup>12</sup> Woolhandler does not explain why we should prefer the revisions of the Gilded Age to the choices of the Framers.

In Part I of this reply, we express appreciation for Professor Woolhandler's work and identify points of unstated agreement that emerge from a careful review of her Article. Part II identifies the areas on which we join issue. In our view, the civil law concept of non-contentious jurisdiction—a feature of Roman law, the legal systems of continental Europe and Scotland, and the civilian courts of England—provides a more coherent and workable explanation for the willingness of early federal courts to entertain proceedings lacking adverse parties than Woolhandler's explanation that some of these proceedings included or could have included

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<sup>11</sup> See Woolhandler, *supra* note 3, at 1026 (quoting Marshall's speech on the House floor in connection with the Jonathan Robbins extradition debate). Woolhandler does quote Blackstone's *Commentaries* for the proposition that every court must contain a plaintiff, a defendant, and the judicial power, *see id.* (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES \*25), but Blackstone himself later acknowledges that his discussions of courts and court proceedings in England deliberately omit unopposed voluntary jurisdiction proceedings in ecclesiastical courts:

I pass by such ecclesiastical courts, as have only what is called a *voluntary* and not a *contentious* jurisdiction; which are merely concerned in doing or selling what no one opposes, and which keep an open office for that purpose, (as granting dispensations, licences [sic], faculties, and other remnants of the papal extortions) but do not concern themselves with administering redress to any injury . . . .

BLACKSTONE, *supra*, at \*66. We conjecture in our Article that an excessive focus by American scholars on the modes of proceeding in common law English courts has obscured the broader experience of the lawyers of the founding generation with civil and continental law proceedings, such as the voluntary jurisdiction exercised by ecclesiastical and local colonial courts. See Pfander & Birk, *supra* note 2, at 1350–53, 1410–16.

<sup>12</sup> In their judicial and academic writings, Marshall and Story agreed that a case arises when a party “asserts his rights in the form prescribed by law.” *Osborn v. Bank of the U.S.*, 22 U.S. (9 Wheat.) 738, 819 (1824) (Marshall, C.J.); 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1646, at 424 (photo. reprint 2005) (2d ed. 1851). We think for obvious reasons that the comments of Chief Justice Marshall, delivered after years of experience in the federal judiciary, have greater probative value than those he made before he joined the bench in the political context of the Robbins debate. In the course of a lengthy judicial career, Chief Justice Marshall had concrete experience with naturalization petitions and would confirm the legality and finality of such decrees against challenges that they were improperly *ex parte*. See *Spratt v. Spratt*, 29 U.S. (4 Pet.) 393, 408 (1830).

parties with adverse legal interests. Part III focuses on what we see as Woolhandler’s failure to offer a workable alternative to the model we set forth for evaluating the legitimacy of congressional decisions to assign non-contentious jurisdiction to the federal courts.

## I. POINTS OF AGREEMENT

### A. Adverse Parties

In our earlier work, we set out to criticize a particular construct that had emerged in decisions over the last few decades: the notion that Article III incorporates an “adverse-party” requirement.<sup>13</sup> That was the claim Justice Antonin Scalia put forward in his dissenting opinion in *United States v. Windsor*; in arguing that the basis for federal court jurisdiction over that case disappeared once the United States announced that it agreed with the legal position of its party opponent, Justice Scalia repeatedly spoke of “the requirement of party-adverseness,” the idea that an Article III case or controversy requires “disagreement between the parties.”<sup>14</sup> Many others, both scholars and jurists, have similarly challenged the capacity of the federal courts to perform various kinds of non-contentious work on the view that the work fails to comply with a party-adverseness requirement. For instance, criticisms of practices such as federal judicial engagement with warrants,<sup>15</sup> with bankruptcy administration,<sup>16</sup> and with the oversight of

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<sup>13</sup> See, e.g., *Richardson v. Ramirez*, 418 U.S. 24, 36 (1974) (“While the Supreme Court of California may choose to adjudicate a controversy simply because of its public importance, and the desirability of a statewide decision, we are limited by the case-or-controversy requirement of Art. III to adjudication of actual disputes between adverse parties.”); *Flast v. Cohen*, 392 U.S. 83, 95 (1968) (“In part [the] words [‘cases’ and ‘controversies’] 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.”); *Williams v. Shaffer*, 385 U.S. 1037, 1039 (1967) (Douglas, J., dissenting from denial of certiorari) (“The mootness doctrine is a beneficial one, expressive of the need for adverse parties who will vigorously argue the conflicting contentions to the Court and a necessary one in light of the requirements of Article III.”); *Cooper v. Tex. Alcoholic Beverage Comm’n*, 820 F.3d 730, 736 (5th Cir. 2016) (“An Article III case or controversy requires at least two adverse parties.”), *cert. denied*, 137 S. Ct. 494 (2016); *Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1160 (10th Cir. 2005) (“Article III sensibly requires the federal courts to refrain from determining the validity of . . . legislation until the issue reaches us as part of a genuine case or controversy between adverse parties—i.e., in a case presenting a claim of concrete and actual or imminent injury traceable to the named defendants which is redressable by the authority of a judgment against those defendants.”).

<sup>14</sup> *United States v. Windsor*, 133 S. Ct. 2675, 2701 (2013) (Scalia, J., dissenting).

<sup>15</sup> See Pfander & Birk, *supra* note 2, at 1379 (discussing testimony in which Lawrence Silberman argued that federal courts could not constitutionally oversee ex parte applications for foreign surveillance warrants because of the nonadversarial character of such proceedings).

<sup>16</sup> See Ralph E. Avery, *Article III and Title 11: A Constitutional Collision*, 12 BANKR. DEV. J. 397 (1996) (arguing that certain non-contentious features of bankruptcy administration may violate Article III).

settlements<sup>17</sup> and consent decrees<sup>18</sup> have all been predicated on a claim that these practices fail the requirement of party adverseness.

We demonstrated that the text and history of Article III, as confirmed by longstanding practice, do not incorporate a thoroughgoing requirement of adverse parties.<sup>19</sup> We showed, for example, that federal courts have long been permitted to entertain naturalization and voluntary bankruptcy petitions, to award title to property in admiralty proceedings, and to preside over the entry of default judgments—all situations in which no adverse party necessarily appears before the court.<sup>20</sup> We also showed that such proceedings were part of a well-established tradition of using courts to ratify or authorize an adjustment or declaration of legal rights or status: a concept called voluntary, or non-contentious, jurisdiction in the Roman and civil law. We accordingly rejected the familiar claim that non-contentious matters necessarily lie beyond the power of the federal judiciary, urging instead that insistence on adverseness has a more limited, prudential role to play.

Happily, although Professor Woolhandler defends a place for an adverseness requirement of sorts, she agrees with us that many of these proceedings pose no Article III difficulty.<sup>21</sup> She does so by reformulating the requirement as one of “adverse interests.”<sup>22</sup> As Woolhandler notes, echoing what we said in our initial piece,<sup>23</sup> the parties may not always advocate adverse positions before the court. In that sense, the parties do not *appear* as formal adversaries, or may not take actually adverse positions. But so long as the invocation of judicial power takes place in the context of opposing or *adverse interests*, she agrees that the court can proceed to enter a binding judgment.<sup>24</sup>

In one sense, Professor Woolhandler’s account shares something in common with that of scholars who have tried to explain instances of non-contentious jurisdiction by invoking the “potential adversary,” an idea that

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<sup>17</sup> 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 (2006) (arguing that the adverse-party rule, a constitutional entailment of Article III, forecloses federal judicial oversight of so-called settlement class actions).

<sup>18</sup> See 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) (contending that consent decrees lack the adverseness necessary to warrant judicial involvement).

<sup>19</sup> Pfander & Birk, *supra* note 2, at 1355–58.

<sup>20</sup> See *id.* at 1361–63, 1365–67, 1371–74, 1384–85.

<sup>21</sup> See Woolhandler, *supra* note 3, at 1032–40.

<sup>22</sup> *Id.* at 1032–33.

<sup>23</sup> Pfander & Birk, *supra* note 2, at 1384–87 (discussing default judgments and consent decrees).

<sup>24</sup> Woolhandler, *supra* note 3, at 1033–35.

Justice Stephen Field seems to have invented in the Gilded Age.<sup>25</sup> But the potential adversary theory cannot supply a concrete adverse party in the here and now, as we observed in our prior work.<sup>26</sup> If Article III inflexibly demands adverse parties, as some have suggested,<sup>27</sup> then the potential adversary hardly fills the bill.<sup>28</sup> Woolhandler deals with that problem by recharacterizing the Article III requirement as one of adverse interests.<sup>29</sup> That allows her to explain how individuals who completely agree as to the resolution of a particular legal problem can nonetheless secure a judicial decree confirming their conception of the problem's resolution. What matters, for Woolhandler, is not whether the parties contest claims in court but whether they have possibly adverse interests that can be adjusted either through litigation or through settlement. Adverse interests, then, allow Woolhandler to bring practices that we treated as non-contentious within the framework of adverseness that she seeks to defend. She thus accounts for some non-contentious work by suggesting that adverse interests lurk beneath. For example, and as we observed in explaining the power of a federal court to enter a default judgment, it would make no sense to allow a debtor to disable a court from entering a judgment by agreeing that the obligation was due and owing.<sup>30</sup>

Professor Woolhandler's adverse-interest construct, we think, represents substantial movement towards our position that the adverse-party requirement is not a constitutional limit on federal court jurisdiction. For one thing, Woolhandler agrees with our position (in contrast to the many scholars who have defended more demanding adverse-party requirements) that federal courts can proceed to decree in the absence of active party contestation.<sup>31</sup> For another, use of the construct of adverse interests usefully explains why some matters can be regarded as proper grist for an Article III judiciary accustomed to overseeing adversary disputes. Finally, the adverse-interest construct helps to confirm, as we showed,<sup>32</sup> that Justice Scalia began from an incorrect premise in *United*

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<sup>25</sup> See *In re Pac. Ry. Comm'n*, 32 F. 241, 255 (C.C.N.D. Cal. 1887).

<sup>26</sup> Pfander & Birk, *supra* note 2, at 1395–96.

<sup>27</sup> See, e.g., Redish & Kastanek, *supra* note 17, at 567 & n.80, 570.

<sup>28</sup> See Pfander & Birk, *supra* note 2, at 1396.

<sup>29</sup> See Woolhandler, *supra* note 3, at 1032–35.

<sup>30</sup> See Pfander & Birk, *supra* note 2, at 1441.

<sup>31</sup> Thus, Professor Woolhandler would apparently agree with us in rejecting Morley's challenge to the exercise of federal judicial power over consent decrees and Redish and Kastanek's argument against the entry of judgment in settlement class actions. In both instances, adverse interests would be at stake.

<sup>32</sup> See Pfander & Birk, *supra* note 2, at 1350–51.

*States v. Windsor*.<sup>33</sup> Windsor and the United States did have adverse interests, as signified by the government's refusal to grant Windsor a tax credit.<sup>34</sup> Although Woolhandler does not address the question in specific terms, we take her position to be that the adverseness on display was sufficient to ground the jurisdiction of the Article III judiciary. By defending a less categorical version of adverseness, rooted in an ability to identify *adverse interests* among actual or potential parties, Woolhandler abandons as indefensible much of the lore that has grown up around the view that there must be actual (and actively) *adverse parties* to every federal court action.

### B. Admiralty Practice

We also applaud the careful work Professor Woolhandler has done to better understand some in rem features of admiralty practice.<sup>35</sup> She shows that potential adverse interests doubtless underlay much in rem litigation, even though the suit proceeded against the property before the court and did not require the identification of and notice to particular adversaries as a condition of adjudication.<sup>36</sup> Woolhandler shows that, in many instances, adverse parties learned of the pendency of suit and could come forward or not as they saw fit to dispute the claims being made.<sup>37</sup> We agree with all of that (and did not argue to the contrary in our earlier work). We would add that, in a good many cases, as Justice Story recognized, the prize claim went forward without the slightest contestation whatsoever.<sup>38</sup> In such cases, the federal admiralty courts proceeded on an inquisitorial basis, collected evidence through depositions, and registered claims of right against property.<sup>39</sup> Therefore, party contestation was not essential to ground jurisdiction. Moreover, in the many cases where no adverse party appeared

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<sup>33</sup> See 133 S. Ct. 2675, 2701–02 (2013) (Scalia, J., dissenting). Justice Scalia previewed his *Windsor* dissent in *Hohn v. United States*, 524 U.S. 236, 256–57 (1998) (Scalia, J., dissenting), urging that petitions for a certificate of appealability did not assert a claim against any adverse party and thus fell beyond the judicial power.

<sup>34</sup> *Windsor*, 133 S. Ct. at 2682 (majority opinion).

<sup>35</sup> See Woolhandler, *supra* note 3, at 1036–40.

<sup>36</sup> See *id.* Indeed, the eventual demise of in rem jurisdiction reflects the Supreme Court's acceptance of the idea that a suit against property effectively operates as "a proceeding against the owners of that property." *Shaffer v. Heitner*, 433 U.S. 186, 205 (1977).

<sup>37</sup> See Woolhandler, *supra* note 3, at 1037–40.

<sup>38</sup> See Pfander & Birk, *supra* note 2, at 1420 n.349; Kevin Arlyck, *Forged by War: The Federal Courts and Foreign Affairs in the Age of Revolution 264–65* (Sept. 2014) (unpublished Ph.D. dissertation, New York University) (on file with the *Northwestern University Law Review*).

<sup>39</sup> See Pfander & Birk, *supra* note 2, at 1420 n.349 (quoting Justice Story's recognition that adverse parties need not appear to ground Article III jurisdiction because the court acts as the "general guardian" of all interests brought to its attention); Arlyck, *supra* note 38, at 264–65.

or mounted a contest, the existence of adverse interests did nothing to change the fact that the actual adjudication was non-contentious. Such suits might mimic the form of an adversary proceeding through the fiction of the ship as defendant, but they lacked the “concrete adversity” and the vigorous opposing submissions that provide the rationale for an adverseness requirement.<sup>40</sup>

The same was still more true in a category of litigation which Professor Woolhandler does not address: the admiralty claim to establish title to seagoing property.<sup>41</sup> In claims to driftwood or other valuable items afloat on the briny sea, there might not have been any adverse interest at all, much less a concrete one that could be identified for even potential appearance.<sup>42</sup>

### C. Feigned Cases

Professor Woolhandler agrees with much of what we said about feigned cases. We argued that they were not, contrary to widespread assumptions, invariably problematic from an Article III perspective.<sup>43</sup> Indeed, when the parties genuinely differed on a legal point, the feigned case could provide them with a mechanism for securing what we would today characterize as a declaratory judgment.<sup>44</sup> As we acknowledged, feigned cases do present potential problems, particularly when the parties contrive a dispute in order to injure a third party or to procure a constitutional declamation on the basis of an incomplete record.<sup>45</sup> Woolhandler usefully extends our critique of the conventional feigned-case wisdom and offers a new set of categories—merits collusion and

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<sup>40</sup> See CHARLES ALAN WRIGHT & MARY KAY KANE, *LAW OF FEDERAL COURTS* § 12, at 60 (8th ed. 2017) (noting the “risk that comes from passing on abstract questions rather than limiting decisions to concrete cases in which a question is precisely framed by a clash of genuine adversary argument exploring every aspect of the issue” (first citing *United States v. Fruehauf*, 365 U.S. 146 (1961); and then citing *Golden v. Zwickler*, 394 U.S. 103 (1969))).

<sup>41</sup> See Pfander & Birk, *supra* note 2, at 1368–70.

<sup>42</sup> According to ancient maritime law, “[p]roperty found in the sea, ‘in floods or in rivers, if it be precious stones, fishes or any treasure of the sea, which never belonged to any man in point of property,’ was adjudged to the first finder.” Lawrence J. Lipka, Note, *Abandoned Property at Sea: Who Owns the Salvage “Finds”?*, 12 WM. & MARY L. REV. 97, 98 (1970) (quoting *The Laws of Oleron*, Art. XXXIV (Eng.), reprinted in 30 F. Cas. 1171, 1184 (1897)). Admiralty courts might decree a good find without contestation, and indeed, without any adverse interest.

<sup>43</sup> See Pfander & Birk, *supra* note 2, at 1433–40.

<sup>44</sup> *Id.* at 1434–35.

<sup>45</sup> *Id.* at 1435–38.

jurisdictional collusion—to help readers keep separate the various forms of collusive litigation.<sup>46</sup>

We have no quarrel with Professor Woolhandler’s new, more refined categories, and we view her work as an extension of our own. Our ultimate conclusion was that the eventual rejection of feigned cases by federal courts should be read as hostility to what Woolhandler calls collusion on the merits by parties who agree as to the result and simply want to use a feigned action to obtain some external advantage, rather than as support for an adverse-party requirement rooted in the Constitution. Woolhandler’s careful parsing of Gilded Age precedent for genuine adverse legal interests is not inconsistent with this conclusion. Indeed, by showing the Court’s gradual evolution on feigned cases, her discussion might be read to support our view that the adverse-party requirement was a later innovation designed to regulate collusion more actively rather than an inherent feature of Article III.

## II. CONTESTED MATTERS

As it turns out, then, we agree with Professor Woolhandler about many things and we have reason to hope that she will acknowledge her agreement with us. And yet we remain divided on some points of emphasis and perhaps on issues of ultimate judicial power.

### A. *Naturalization*

Consider, for example, the history of non-contentious adjudication of petitions for naturalized citizenship. To us, the naturalization example offers strong support for the claim that federal courts can adjudicate without contestation or adverse interests.<sup>47</sup> Professor Woolhandler agrees that the petitions themselves do not appear to present adverse interests, and she admits that they count as our “best example.”<sup>48</sup>

But she then works to downplay the significance of naturalization petitions by contending that they had never been formally upheld in the face of an explicit jurisdictional challenge until 1926, at which time the United States had been installed as a potential adverse contestant.<sup>49</sup> While this might work as a lawyer’s argument, it does not make good sense as history. The historical fact is that the First Congress assigned this uncontested work to the federal courts and that such federal judges as John

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<sup>46</sup> See Woolhandler, *supra* note 3, at 1047–54 (distinguishing jurisdictional collusion aimed at procuring the resolution of a genuine dispute from the more problematic form of merits collusion).

<sup>47</sup> See Pfander & Birk, *supra* note 2, at 1361–63, 1393–1402.

<sup>48</sup> Woolhandler, *supra* note 3, at 1056.

<sup>49</sup> *Id.* at 1061–65.

Marshall and Joseph Story (and everyone else, of course) performed it without raising a doubt as to its legitimacy for over one hundred years.<sup>50</sup> They treated their decisions, moreover, as binding adjudications of a claim of right and adjusted their definitions of the construct of an Article III “Case” to take account of their docket of uncontested work.<sup>51</sup> Only after Justice Field introduced the idea of required contestation in the Gilded Age (abandoning the Marshall–Story definition of a case to propose an alternative) did it suddenly occur to parties and jurists that Article III might disable the federal courts from hearing naturalization petitions in the absence of an adverse party.<sup>52</sup> It was this latter-day revisionism—revisionism that Professor Woolhandler continues to press—that led to the Supreme Court’s 1926 decision in *Tutun v. United States*.<sup>53</sup> There, an opinion by Justice Louis Brandeis offered a resounding reaffirmation of non-contentious judicial power over naturalization and explicitly validated the exercise of such power in its purest form as practiced since the 1790s.<sup>54</sup>

What, then, should one make of the naturalization example? Much depends on how one frames the question. If one frames the question as how the naturalization example might fit into a system committed to and based on adversary proceedings, then one might, as Professor Woolhandler does, conjecture that Justice Brandeis was merely attempting to avoid disturbing a longstanding, but mostly harmless, anomaly of district court practice by gesturing towards the presence of the United States as a possible adversary. It was only in the Gilded Age, however, that Justice Field reframed the requirement of a “case” to include real or possible adversaries, and it was not until the early twentieth century that Congress even made provision for the United States to appear as a party to oppose petitions for naturalization.<sup>55</sup>

To us, by contrast, the congressional assignment and judicial acceptance of naturalization work refute any claim that uncontested proceedings to register a claim of right lie beyond the judicial power as it was practiced and understood during the early Republic. We couple that argument from historical practice with an extensive catalog of uncontested proceedings that, we contend, reveal the practice to be alive and well in the federal courts.<sup>56</sup> We use past and continuing practice to explain and defend

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<sup>50</sup> See Act of Mar. 26, 1790, ch. 3, 1 Stat. 103.

<sup>51</sup> See Pfander & Birk, *supra* note 2, at 1414–21.

<sup>52</sup> *Id.* at 1421–24.

<sup>53</sup> 270 U.S. 568 (1926).

<sup>54</sup> See *id.* at 576–78.

<sup>55</sup> See Pfander & Birk, *supra* note 2, at 1401, 1421–24.

<sup>56</sup> *Id.* at 1359–91.

a textual and historical argument about the important distinction between “Cases” and “Controversies” in Article III.<sup>57</sup> While parties seeking to invoke federal jurisdiction over controversies must join an adverse party aligned in the way Article III demands, parties invoking jurisdiction over cases need not invariably align an adversary. They need only assert their rights “in the form prescribed by law,” as Chief Justice Marshall explained using language tailored to accommodate the brute fact that Congress sometimes called upon the federal courts to administer the law in the absence of party contestation.<sup>58</sup>

Professor Woolhandler disagrees. Having distinguished away cousins such as pension applications, petitions for remission or mitigation of forfeitures, and prize proceedings, she frames naturalization as an “outlier,”<sup>59</sup> an aberration that does not, alone, suffice to carry the burden of disproving her refashioned adverse-interest requirement. Woolhandler, in short, accepts the early twentieth century as her baseline and treats the judicial rhetoric of that period as the key to understanding the nature of party adverseness. But she does not grapple with our textual and historical counterarguments or with the history of non-contentious jurisdiction as a familiar element of the learned eighteenth-century lawyer’s lived experience. Nor does she set out to defend the adverse-interest requirement on policy grounds as a useful adaptation that focuses the energies of the federal judiciary on its important work as a forum for the resolution of disputes and explication of law. (This omission strikes us as odd in part because we expressed agreement with some policy-based arguments against too broad a modern-day reliance on forms of non-contentious jurisdiction.) Her account thus offers a form of living constitutionalism, drawn not from text or history but from the doctrinal changes that emerged in the latter part of the nineteenth and early part of the twentieth centuries.<sup>60</sup> These changes also underlie her related argument in prior scholarship that

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<sup>57</sup> See *id.* at 1417–24.

<sup>58</sup> *Osborn v. Bank of the U.S.*, 22 U.S. (9 Wheat.) 738, 819 (1824); see also Pfander & Birk, *supra* note 2, at 1419 & n.345 (discussing and providing additional examples of Marshall’s use of similar language). Professor Woolhandler contends that the formulations provided by Marshall and Story are “not inconsistent” with an adverseness requirement. Woolhandler, *supra* note 3, at 1029 n.10. If, by this, Woolhandler means that the statements do not definitively state that no such requirement exists, then she is correct, though the statements certainly suggest that there was no need for an adverse party to controvert the submission of the party appearing to assert his rights. As noted previously, Woolhandler does not address the abundant evidence, discussed in our original article, that the courts of England, Europe, and the American colonies, as well as legal scholars such as Blackstone and Thomas Wood, recognized cases brought under the starkly nonadverse form of voluntary jurisdiction.

<sup>59</sup> Woolhandler, *supra* note 3, at 1065.

<sup>60</sup> Cf. David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996) (advocating a common law understanding of the development of constitutional doctrine).

historical evidence and practice support (or at least do not disprove) the standing requirement of Article III.<sup>61</sup>

### B. Pensions

One can see the difference in approach most sharply revealed in our competing discussions of *Hayburn's Case*.<sup>62</sup> We acknowledged that the conventional wisdom treats the refusal of some circuit justices and district judges to hear uncontested applications for veterans' pension benefits as a reflection of dual concerns with the absence of finality (executive revision) and, based entirely on speculation, with the absence of properly aligned parties.<sup>63</sup> Some of the letters judges wrote in explaining their refusal to do the work described the task at hand as work not of a "judicial nature."<sup>64</sup> Evaluating that language from a latter-day perspective informed by conventional statements of the adverse-party requirement, many modern scholars have assumed (without careful analysis) that the circuit judges were articulating a requirement of party adverseness.<sup>65</sup> We showed that there was a competing, and superior, explanation of the language. We think the judges were expressing concern that it was improper (and perhaps undignified) to view the wounds of a veteran in the course of adjudicating benefit claims.<sup>66</sup> We also showed that at oral argument Attorney General Edmund Randolph met the judges' complaint with a seemingly persuasive argument that judges at common law were called upon to view wounds in the course of adjudicating mayhem claims.<sup>67</sup> Randolph's apparent invocation of the precedent of mayhem claims, as recorded in Justice James Iredell's notes, particularly when coupled with a notable lack of argument about the absence of an adverse party, strongly implies that the "not of a judicial nature" objection was rooted in concerns about an offense to judicial dignity rather than an unarticulated concern about adverseness.

Moreover, one supposes that, if circuit court judges and justices considered uncontested applications for government pensions as work of a nonjudicial nature, they would have considered uncontested naturalization

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<sup>61</sup> See Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689 (2004) (contending that historical evidence is not inconsistent with standing doctrine as currently described).

<sup>62</sup> 2 U.S. (2 Dall.) 409 (1792); see Pfander & Birk, *supra* note 2, at 1425–32; Woolhandler, *supra* note 3, at 1056–58.

<sup>63</sup> Pfander & Birk, *supra* note 2, at 1426–27, 1427 n.377.

<sup>64</sup> *Hayburn*, 2 U.S. (2 Dall.) at 410 n.†; see Pfander & Birk, *supra* note 2, at 1426.

<sup>65</sup> See Woolhandler, *supra* note 3, at 1057 & n.154 (citing the work of Russell Wheeler and Susan Low Bloch in support).

<sup>66</sup> Pfander & Birk, *supra* note 2, at 1428–29.

<sup>67</sup> *Id.* at 1431.

petitions equally problematic. We therefore questioned the coherence of the party adverseness interpretation given the absence of any clear reference to concerns about adverseness and the willingness of the same judges and justices to hear entirely nonadverse naturalization petitions.<sup>68</sup> Finally, we argued that the litigation in the Court itself entailed an *ex parte* submission on behalf of Hayburn that did not feature the joinder of any opposing party. (Edmund Randolph's appearance for Hayburn in a proceeding to compel the lower court to proceed to judgment on his pension application has been shown to have addressed earlier doubts not as to the presence of party adversaries but as to Randolph's authority to proceed without a client and without specific presidential authority in his capacity as the Attorney General.)<sup>69</sup> No Justice was recorded as having questioned this configuration of litigants.

Instead of coming to grips with the evidence that underlies our proposed reading of the events surrounding *Hayburn's Case*, Professor Woolhandler restates the standard assumption that the Supreme Court was concerned with the lack of party adverseness in pension proceedings.<sup>70</sup> But as we have shown, the fact that the Supreme Court later invalidated the work of judges as "commissioners" does not, as Woolhandler contends, help to establish an adverse-party reading of this series of events.<sup>71</sup> The Court's refusal to validate the decisions of circuit judges serving as self-styled judicial commissioners could have reflected a variety of considerations: the fact that the statute assigned the task of reviewing pension claims to the "courts" rather than to the judges themselves; the fact that the decisions of the judges were still subject to improper executive revision; the fact that Congress lacks power to appoint commissioners by legislative act (an interpretation that gains support from Congress's later adoption of curative legislation that empowered district judges either to do the work themselves or to appoint commissioners).<sup>72</sup> While modern scholars have instinctively embraced the interpretation, one cannot treat an unelaborated concern about the "judicial nature" of pension work as driven

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<sup>68</sup> *Id.* at 1427–28, 1449.

<sup>69</sup> See Maeva Marcus & Robert Teir, *Hayburn's Case: A Misinterpretation of Precedent*, 1988 WIS. L. REV. 527.

<sup>70</sup> Woolhandler, *supra* note 3, at 1058–59.

<sup>71</sup> See Pfander & Birk, *supra* note 2, at 1432.

<sup>72</sup> See Woolhandler, *supra* note 3, at 1059–60 (quoting terms of curative legislation). In a portion of Chief Justice Taney's opinion in *United States v. Ferreira*, 54 U.S. (13 How.) 40, 45 (1852), the Court identified problems with the legislative appointment of federal judges to serve as commissioners as a potential argument against the viability of the assignment by statute of nonjudicial work to the federal judiciary.

by the absence of adverse parties unless one weighs competing evidence in the record.

Professor Woolhandler treats Chief Justice Roger Taney’s decision in *United States v. Ferreira* as rejecting non-contentious proceedings and as confirming her interpretation of the events reported in *Hayburn’s Case*.<sup>73</sup> Both assertions are hard to square with the *Ferreira* decision itself, which, like the circuit court opinions collected in *Hayburn’s Case*, viewed the absence of finality as the master objection to the exercise of federal judicial power.<sup>74</sup> Indeed, in a most revealing aside, *Ferreira* appears to have subtly acknowledged the propriety of judicial power to “administ[er] the law” in uncontested ex parte benefit applications.<sup>75</sup>

*Ferreira* grew out of a claims-processing treaty, in which the United States agreed to establish a tribunal to hear claims by civilians seeking compensation for U.S. military operations in what was then Spanish Florida.<sup>76</sup> (After statehood, the claims were handled by the federal judge in Florida.) Questions arose as to the nature of the tribunal and as to whether the United States could appeal as a party from a decision awarding money to a claimant. According to the Court, the statute implementing the treaty called for initial review of the claimant’s submission, the issuance of an award, and the transmittal of the evidence and the award to the Secretary of the Treasury, who was to pay the amount specified if satisfied that the award was “just and equitable.”<sup>77</sup>

The Court was certainly aware that the typical claim would arrive at the district court’s chambers as an ex parte submission, rather than an *inter partes* dispute. Counsel for one of the parties highlighted the point, contending that whether or not the United States appeared as a formal party on the record, these claims were “‘cases,’ within the legal meaning of the term.”<sup>78</sup> What blocked the right of appeal, according to counsel, was the provision for review by the Secretary of the Treasury.<sup>79</sup> The Court took precisely that position, acknowledging the ex parte character of the proceedings in the language Professor Woolhandler quotes, but focusing on the absence of judicial finality in refusing to entertain the appeal. Thus, the

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<sup>73</sup> See Woolhandler, *supra* note 3, at 1027 n.4, 1058 (asserting that their ex parte character was a factor in the Court’s conclusion that treaty claims were not Article III cases).

<sup>74</sup> See *Ferreira*, 54 U.S. at 51–52.

<sup>75</sup> See *id.* at 51.

<sup>76</sup> *Id.* at 45.

<sup>77</sup> See *id.* at 47.

<sup>78</sup> *Id.* at 44. Counsel made the point in an effort to show that ex parte proceedings were proper subjects of the judicial power. On counsel’s view, appeals would lie from decisions adverse to claimants, but not from those adverse to the government.

<sup>79</sup> *Id.*

Court explained that the evidence and award were not filed or “recorded” in the district court, but were to be transmitted to the Executive to take effect only upon decision of the Secretary.<sup>80</sup> The claims process thus differed from naturalization proceedings, in which decisions of the federal court were final and binding, were entered into the record of the federal court, and were to control future judicial proceedings.<sup>81</sup>

The Court’s acknowledgement that *ex parte* proceedings lay well within federal judicial power came after a lengthy discussion of the similarities between the Florida procedure and the problematic procedure in *Hayburn’s Case*.<sup>82</sup> For the Court, the problem with both proceedings was clear: their nonfinal character made them “entirely alien to the legitimate functions of a judge or court of justice.”<sup>83</sup> The proceedings thus had “no analogy to the general or special powers ordinarily and legally conferred on judges or courts to secure the due administration of the law.”<sup>84</sup> In this revealing passage, the Court acknowledged counsel’s suggestion that *ex parte* claims were proper “cases” for judicial determination; the Court was saying that federal courts can administer the law in *ex parte* proceedings, but only when the proceeding yields a final judgment. In the end, then, the Court said nothing to support Professor Woolhandler’s interpretation, and much to confirm our view that *ex parte* proceedings (like naturalization petitions) can appear as cases proper for adjudication in Article III courts.<sup>85</sup>

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<sup>80</sup> *Id.* at 46–47.

<sup>81</sup> For this account of the naturalization process, see Pfander & Birk, *supra* note 2, at 1361–63.

<sup>82</sup> See *Ferreira*, 54 U.S. at 49–51.

<sup>83</sup> *Id.* at 51.

<sup>84</sup> *Id.*

<sup>85</sup> Professor Woolhandler treats the *Ferreira* Court’s appendix, containing information on the unpublished decision in *United States v. Todd*, as support for interpreting *Hayburn’s Case* to express concern with the absence of adverse parties. See Woolhandler, *supra* note 3, at 1059. To be sure, the *Todd* decision invalidated a pension award under the 1792 legislation, holding that the decisions of judges as self-styled commissioners were not lawful adjudications. See *Ferreira*, 54 U.S. at 53. There were, as we have noted elsewhere, at least two reasons for that conclusion: that the Act assigned the power to the “court” rather than to the judges as such (and thus ruled out action by the judges out of court) and that the appointment of commissioners requires action by the President, rather than legislation by Congress. Chief Justice Taney invoked *Todd* to highlight his concern with legislative appointment of judges as commissioners. Nothing in his opinion, or in his account of *Todd*, expresses doubts about the power of federal courts to enter judgments in *ex parte* proceedings, so long as the proceedings comply with the requirement of judicial finality. Woolhandler has much to say about commissioners and judicial power, but fails to adduce a single case in which the Court has condemned as improperly *ex parte* a procedure in which the lower courts were empowered to enter a final judgment.

C. *Additional Instances of Non-Contentious Jurisdiction*

Other aspects of Professor Woolhandler's article strike us as similarly selective. We of course acknowledge that a paper as long and dense as ours (a consistent failing it seems)<sup>86</sup> contains too much detail to address comprehensively in Woolhandler's compressed and eminently readable account. But, without addressing our argument that the sheer number of non-contentious practices itself offers systemic support for our thesis, she picks out a small slice of our catalog of non-contentious jurisdiction, disagrees with some matters of degree on varying but not consistent grounds, and leaves aside many of the other exemplars. That leaves a whole range of practices that pass without discussion. Among those, we would highlight the practices of certifying decisions by the government to immunize testimony and ordering the seizure of trademark-infringing goods upon *ex parte* application of the trademark holder.<sup>87</sup>

Even the practices Professor Woolhandler discusses emerge relatively unscathed as illustrations of non-contentious jurisdiction.

1. *Warrants*.—Consider, for example, our treatment of warrant applications as an instance of the exercise of non-contentious jurisdiction.<sup>88</sup> Our claim was that the federal courts issued legally meaningful decrees on the basis of *ex parte* submissions that did not involve any party contestation.<sup>89</sup> Professor Woolhandler admits the truth of the assertion, but argues that warrants were not dispositive of all issues and did not necessarily foreclose subsequent contestation.<sup>90</sup> True enough. For example, as Woolhandler notes, if execution of the warrant failed to turn up evidence, the target might contest some of the warrant's features in a subsequent proceeding or might bring suit against the *complainant* (or informant) for having provided false evidence in support of the warrant's issuance. While certainly conceivable, these possible spin-off claims do not alter the fact that the *constable* could claim legal protection from a trespass action when acting pursuant to lawful warrant. Moreover, the possibility that the target might later institute an adverse proceeding does nothing to imbue the warrant application proceeding with the benefits of adversarial litigation, or even to mimic the form of an adversary proceeding. Any

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<sup>86</sup> See James E. Pfander & Daniel D. Birk, *Article III and the Scottish Judiciary*, 124 HARV. L. REV. 1613 (2011) (75 pages).

<sup>87</sup> See Pfander & Birk, *supra* note 2, at 1370–71, 1380–81.

<sup>88</sup> See *id.* at 1375–78.

<sup>89</sup> See *id.*

<sup>90</sup> Woolhandler, *supra* note 3, at 1043–46.

lurking interests would not find expression in submissions to the court or magistrate.

2. *Proceedings in State Courts.*—Nor does Professor Woolhandler grapple with the implications of our evidence regarding the wide variety of non-contentious proceedings in American state courts, whose general jurisdiction embraces a wider variety of subject matters than those encompassed by the federal courts. In the eighteenth century, state courts regularly entertained non-contentious petitions for adjustment of status and judicial certification of transactions such as probate proceedings in the common, or uncontested, form.<sup>91</sup> Today, state courts continue to preside over such matters, as well as over petitions for name changes, adoptions, and other uncontested matters of family law.<sup>92</sup> To be sure, the Court-created justiciability doctrines have come to be viewed as more demanding in certain respects than the judicial limits that may apply to some state courts, and state precedents have no binding force in federal court.<sup>93</sup> Nonetheless, state practice illuminates the way lawyers in the early Republic understood the nature of judicial power generally and helps to explain why assignments of non-contentious work to the federal judiciary did not raise any eyebrows in antebellum America. Given the limited nature of federal power, occasions for federal courts to adjudicate a change of status or the certification of transactions were not as widespread as they were for state courts, which heard—and still hear—such matters regularly in probate and adoption proceedings. But where such occasions did arise, as in the naturalization context, the early federal courts seemed quite willing to exercise a non-contentious function.

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<sup>91</sup> So-called common form probate applications by the administrator of the probate estate were legally effective in clothing the administrator with the power to act and did not require party contestation to take effect. In separate work, one of us has proposed that the roots of the Article III probate exception lie in the inability of the federal courts to hear uncontested applications to register interests based on state law. See James E. Pfander & Michael J.T. Downey, *In Search of the Probate Exception*, 67 VAND. L. REV. 1533 (2014). Matters of state law have a place on Article III dockets only if they satisfy the controversy requirement (or qualify for the exercise of supplemental jurisdiction), something uncontested probate applications fail to do.

<sup>92</sup> On the exercise of non-contentious jurisdiction in family law matters and the origins of the so-called domestic relations exception to Article III, see James E. Pfander & Emily K. Damrau, *A Non-Contentious Account of Article III's Domestic Relations Exception*, 92 NOTRE DAME L. REV. 117 (2017).

<sup>93</sup> See *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2667–68 (2013).

### III. THE THEORY OF ADVERSE INTERESTS

#### A. *The Need for a Theory*

As much as we applaud Professor Woolhandler for undertaking the proposed recharacterization of the adverse-party requirement (and as much as we value some aspects of her discussion), she fails to supply the kind of detailed framework that would enable us to evaluate her proposed recharacterization. Here we borrow Professor Akhil Amar's idea that it takes a theory to beat a theory.<sup>94</sup> To be plausible and fairly comparable to its competitors, a theory should offer an account of the text and history of Article III, an account of judicial and legislative practice under that Article, and perhaps a normative justification for the lines drawn. Woolhandler does none of these things, aside from offering a rich and very useful discussion of federal judicial practice. We cannot say with confidence, after reading her paper, what limits her theory would impose, where they come from, or what sorts of practices would succeed and fail under her assessment. As a consequence, we cannot conduct a comparative evaluation of how well our two competing theories "fit" with surrounding judicial practices and longstanding institutional commitments.

One possible vision of adverse interests would essentially read the requirement out of Article III altogether. Thus, one could reinterpret the naturalization (and veterans' pension) proceedings of the early Republic as cases in which the United States government (as the possible adversary) has consented in advance to the entry of a default judgment as to any finding of citizenship (or award of pension benefits) that the judge agrees to enter upon an *ex parte* application. Though not a formal party, the government, on this view, might be seen as revoking its consent in the small set of cases in which it learns of an award that was entered in error. Such revocation could then set the stage for an action to recover the pension or a proceeding to vacate the naturalization decree. The government has a potential interest adverse to all claimants on its largesse and poses a threat to institute adverse litigation. Professor Caleb Nelson (a generous commentator on a version of our thesis, an inspiration behind the adverse-interests theory, and a close student of judicial power) reportedly supports such a theory of possible adverseness.<sup>95</sup> Professor Woolhandler, for her part, indicates that she would not embrace so far-reaching a view, apparently due to concerns with the lack of formal notice to the adversary.

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<sup>94</sup> See Akhil Reed Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499, 1566 (1990) (suggesting that one should conduct a comparison of competing Article III theories under a preponderance of the evidence standard to determine which theory is more plausible).

<sup>95</sup> See Woolhandler, *supra* note 3, at 1055 & n.145.

But Professor Woolhandler would not apparently require formal notice to the possible adversary party in every instance. For example, she rationalizes the practice of issuing warrants on ex parte application by observing that the targets of such warrants frequently learn of them upon execution and can contest their entry at that later stage.<sup>96</sup> Where no such notice through execution occurs (as with the issuance of FISA warrants),<sup>97</sup> Woolhandler refrains from endorsing the practice as permissible.<sup>98</sup> Hence, post hoc notice and the prospect of contestation can save a proceeding that might otherwise be problematic. What then does she make of prize and capture proceedings in admiralty, which made no pretense of specifically notifying the possibly adverse claimants in advance and offered no mechanism by which an unlucky former owner could contest an erroneous declaration of good prize upon later learning of the seizure? Woolhandler tells us that potentially interested parties were theoretically notified by seizure of the vessel in keeping with the (in rem) procedural due process rules of the day, even if many potentially interested parties did not receive notice as a practical matter.<sup>99</sup> But she does not explain how the un-notified potential adversary in a prize proceeding can represent an adverse interest more effectively than the unnotified potential adversaries who have been targeted for foreign intelligence surveillance.

By the same token, Professor Woolhandler does not consider whether the type of forum in which the potential contest might unfold should be weighed as a factor in her analysis of potential adverse interests. Justice Field took the position that an investigative proceeding before an administrative agency did not provide for contestation of the kind that would support a federal judicial role in the issuance of subpoenas;<sup>100</sup> on this view, one might limit federal courts to the issuance of subpoenas only in support of their own contested proceedings rather than as an adjunct to proceedings elsewhere. Woolhandler does not say whether Justice Field was right to dismiss such potential adverseness on the basis that it would unfold outside the Article III judiciary. Nor does she take a position as to whether the adverse proceedings of foreign courts might provide an adverse-interest basis for an original petition to a federal court for the

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<sup>96</sup> *Id.* at 1119–20.

<sup>97</sup> Pfander & Birk, *supra* note 2, at 1462–63 (noting that “unlike the targets of other warrant proceedings, most FISA targets will never learn that the surveillance has been carried out” because the surveillance is carried out covertly and the warrant proceedings are classified).

<sup>98</sup> Woolhandler, *supra* note 3, at 1046.

<sup>99</sup> *Id.* at 1039–40.

<sup>100</sup> See *In re Pac. Ry. Comm’n*, 32 F. 241, 257–59, 257 n.1 (C.C.N.D. Cal. 1887); see also Pfander & Birk, *supra* note 2, at 1379–80 (discussing Justice Field’s opinion).

issuance of letters rogatory (essentially subpoenas to collect evidence in the United States for use before foreign tribunals).

In essence, then, Professor Woolhandler presents a more elegant version of the work we criticized in our earlier piece.<sup>101</sup> Many scholars have considered only a piece of the available evidence, criticizing the exercise of non-contentious jurisdiction as a violation of Article III and treating counterexamples as anomalies. That was the approach taken by Ralph Avery, for example, in highlighting certain uncontested features of bankruptcy administration.<sup>102</sup> Woolhandler, like us, embraces bankruptcy administration and equity receiverships as appropriate exercises of judicial power even in the absence of contestation, and would apparently reject Avery's view of Article III limits.<sup>103</sup> But like other scholars,<sup>104</sup> she continues to dismiss naturalization (and other examples we adduce) as anomalous because her theory cannot account for or explain it.<sup>105</sup>

In contrast, we attempted to construct a framework for the exercise of non-contentious jurisdiction that could apply to a range of situations.<sup>106</sup> So long as Congress acts pursuant to its enumerated powers in creating a right and assigns the federal courts final authority over applications by parties to claim such a right, we think federal courts can entertain uncontested applications to register claims to the right in question.<sup>107</sup> Procedural due process will ensure notice to interested parties and will invalidate any scheme (such as feigned or collusive litigation) that threatens to injure the rights of nonparties.<sup>108</sup> By assigning the question to Congress to resolve as a matter of policy, we would rationalize the cases in terms of congressional, rather than judicial, power. To be sure, we would support efforts to limit the non-contentious role of the federal courts, especially when federal agencies can readily perform the work.<sup>109</sup> And we would encourage the courts to refrain from making far-reaching legal pronouncements in the context of uncontested adjudication.<sup>110</sup> As these suggested prudential

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<sup>101</sup> See Pfänder & Birk, *supra* note 2, at 1391–402.

<sup>102</sup> See Avery, *supra* note 16, at 418 n.137.

<sup>103</sup> See Woolhandler, *supra* note 3, at 1033–35.

<sup>104</sup> See, e.g., RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 85–86 (7th ed. 2015); Morley, *supra* note 18, at 668–70.

<sup>105</sup> Woolhandler, *supra* note 3, at 1065.

<sup>106</sup> See Pfänder & Birk, *supra* note 2, at 1440–55 (describing framework); *id.* at 1455–71 (applying framework to applications for certificates of appealability by habeas corpus petitioners, the “probate exception” to federal court jurisdiction, extradition proceedings, FISA courts, and more).

<sup>107</sup> *Id.* at 1440–45.

<sup>108</sup> See *id.* at 1450.

<sup>109</sup> See *id.* at 1443.

<sup>110</sup> See *id.* at 1453–55.

limitations illustrate, we seek not to encourage Congress to make wide-ranging use of non-contentious jurisdiction, but instead to make sense of Article III.

*B. The Need for a Textual Account*

Professor Woolhandler similarly fails to come to grips with the text of Article III either to defend her adverse-interests account or to refute our suggested distinction between contentious and non-contentious jurisdiction. We showed that the early interpretation of the word “Case” in Article III, as a claim of right in the forms prescribed by law, was capacious enough to authorize both forms of adjudication.<sup>111</sup> By contrast, the word “Controversy” connotes a dispute between party opponents identified in Article III and seems to rule out non-contentious jurisdiction.<sup>112</sup> We coupled this textual claim with evidence from practice: federal courts consistently took up non-contentious chores in federal question “cases,” and refused to do such work in connection with state law “controversies.”<sup>113</sup> Indeed, we cited evidence that the probate exception derived from the requirements of contestation embedded in the term “Controversies.”<sup>114</sup> We also showed that the conflation of the terms cases and controversies first occurred in the late nineteenth century, in an apparent effort to impose a new requirement of contestation in federal question cases.<sup>115</sup>

Professor Woolhandler does not dispute any of this head on and thus fails to address the possibility that Article III requires contestation only as to controversies and not as to cases. She does observe that scholars have proposed alternative distinctions, including the suggestion (which one of us endorses) that the term “Controversies” includes only matters of a civil nature and thus differs from the more inclusive reference to “Cases” of both a criminal and civil nature.<sup>116</sup> But one can accept that suggested distinction without rejecting our claim that the judicial power in cases, but not in controversies, extends to both contested and uncontested proceedings. Both distinctions may well be true. In any case, the work by earlier scholars on the case–controversy distinction was published long before our non-contentious account appeared in print. We think it misses

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<sup>111</sup> *Id.* at 1417–21.

<sup>112</sup> *Id.* at 1423–24.

<sup>113</sup> Pfander & Damrau, *supra* note 92, at 119; Pfander & Downey, *supra* note 91, at 1556–57.

<sup>114</sup> Pfander & Birk, *supra* note 2, at 1457–58.

<sup>115</sup> *Id.* at 1421–22.

<sup>116</sup> Woolhandler, *supra* note 3, at 1028 n.9 (listing John Harrison and Daniel Meltzer as scholars who endorse this view). See generally James E. Pfander, *Rethinking the Supreme Court’s Original Jurisdiction in State-Party Cases*, 82 CALIF. L. REV. 555, 604–12 (1994) (distinguishing cases from controversies).

the point to treat earlier scholarship (which failed to anticipate and evaluate our non-contentious account of Article III), as having rejected a theory that was unavailable at the time the scholars in question did their work.<sup>117</sup>

We find an intriguing echo of our proposed distinction between cases and controversies in the suggestive work of Dean Christopher Columbus Langdell. In contrasting the practice in courts of common law with that in courts of equity, Langdell recognized the existence of non-contentious jurisdiction. He thus explained that the “jurisdiction of a court of [common] law is contentious only, that is, it is strictly limited to deciding controversies.”<sup>118</sup> By contrast, Langdell explained, the power of the chancellor in a court of equity is not “limited to deciding controversies.”<sup>119</sup> To illustrate non-contentious jurisdiction in equity, Langdell invoked the power of the trustee to apply to the chancellor for instructions. Such bills did not, in Langdell’s telling, seek to resolve a contest over the trustee’s “misconduct” but instead sought to clarify the nature of the trustee’s duty and to secure “the assistance and protection of the court.”<sup>120</sup> In confirming the viability of non-contentious jurisdiction, Langdell did not point to any hypothetical adverse interests as the key to the trustee’s ability to invoke equity’s power, but instead viewed the chancellor’s power as a reflection of equity’s role in administering the law of trusts.

By failing to attend to the distinction between cases and controversies, and between contentious and non-contentious jurisdiction, Professor Woolhandler focuses in the main on matters that began—and thus came to the Supreme Court—as contested disputes.<sup>121</sup> These matters might arrive either as federal question cases or as diverse-party controversies, but they both represent exercises of contentious jurisdiction. Needless to say, in considering such forms of litigation, the Court’s statements will tend to emphasize the need for contestation and to question its absence. Some of what the Court has said about feigned and collusive suits, for example, can be understood as seeking to maintain the forms of contestation for

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<sup>117</sup> Of course, some scholars did anticipate our conclusions in suggesting that cases and controversies meant different things in Article III. See Robert J. Pushaw, Jr., *Article III’s Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447, 450 (1994).

<sup>118</sup> C.C. LANGDELL, A SUMMARY OF EQUITY PLEADING 34 (2d ed. 1883).

<sup>119</sup> *Id.* at 40.

<sup>120</sup> *Id.*

<sup>121</sup> Woolhandler, *supra* note 3, at 1039 n.58 (citing *McVeigh v. United States*, 78 U.S. (11 Wall.) 259 (1870), a contested forfeiture action, but acknowledging that a court order was needed even where no contestants appeared); *id.* at 1115–16 nn.59–63 (detailing more contested cases).

contentious jurisdiction.<sup>122</sup> To understand non-contentious jurisdiction (particularly in its original form), one must attend to what the Court has said and done with uncontested applications to the *lower* federal courts, where such matters originate. We showed that, in a variety of different settings, the Court has upheld the exercise of non-contentious jurisdiction by lower federal courts.<sup>123</sup> The fact that the Court had no occasion to confirm the validity of naturalization as consistent with Gilded-Age pronouncements about Article III until its 1926 decision in *Tutun*, after Congress had switched to a somewhat more adversarial model, offers no proof against the probative value of the prior experience of the lower courts, which the Court took pains to reaffirm.<sup>124</sup>

### C. *The Lessons of History*

Our theory of non-contentious jurisdiction is explicitly grounded in a widely-known feature of court practice and legal treatises in the eighteenth century. Professor Woolhandler, by contrast, does not explicitly ground her construct in historical sources, preferring instead to offer her adverse-interest theory as a way to bring some anomalous federal court proceedings into alignment with contemporary conceptions of the judicial power.<sup>125</sup> Woolhandler does not, however, point to any historical sources supporting the creation of an “adverse interest” subspecies. Even if both conventional federal controversies and certain of the *ex parte* cases on which she focuses could be reconceptualized as involving adverse interests, there is no indication that observers from the eighteenth century considered the existence of adverse interests as central to the judicial cognizability of those cases. We have seen no source from the eighteenth or early nineteenth century that seeks to defend naturalization or other early forms as proper instances of adverse-interest contestation.

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<sup>122</sup> See, e.g., *Chi. & Grand Trunk Ry. Co. v. Wellman*, 143 U.S. 339, 345 (1892) (rejecting “friendly” challenges to legislation absent an “honest and actual antagonistic” relationship between the parties). See generally Pfänder & Birk, *supra* note 2, at 1433–38 (discussing and providing examples).

<sup>123</sup> See, e.g., Pfänder & Birk, *supra* note 2, at 1393–401 (citing *Tutun v. United States*, 270 U.S. 568 (1926)); *id.* at 1380 & n.149 (citing *Interstate Commerce Comm’n v. Brimson*, 154 U.S. 447, 489 (1894)); *id.* at 1381 (citing *Ullmann v. United States*, 350 U.S. 422, 434 (1956)); *id.* at 1382–84 (citing *Hohn v. United States*, 524 U.S. 236 (1998)); *id.* at 1386 & n.181 (citing *In re Metro. Ry. Receivership*, 208 U.S. 90, 107 (1908)); *id.* at 1387 & n.184 (citing *Swift & Co. v. United States*, 276 U.S. 311 (1928)); *cf. id.* at 1367 & n.78 (citing Justice Story’s circuit court decision in *The Margareta*, 16 F. Cas. 719, 721 (C.C.D. Mass. 1815) (No. 9,027), which treated petitions for remission or mitigation as within the judicial power).

<sup>124</sup> See Pfänder & Birk, *supra* note 2, at 1397–99; *Tutun*, 270 U.S. at 576.

<sup>125</sup> See, e.g., Woolhandler, *supra* note 3, at 1036–40 (conceptualizing prize cases as default judgments in an *in rem* suit as consistent with procedural due process requirements of the time).

To the contrary, the historical evidence we collected suggests that many of the practices Professor Woolhandler now defines as supported by adverse interests were explained in the eighteenth century as instances of non-contentious jurisdiction. For example, even though potential adversaries presumably lurk in the background of any uncontested application for probate of a will, Blackstone's *Commentaries* recognizes the category of non-contentious jurisdiction in a brief discussion of probate practice.<sup>126</sup> Discussing the matter of non-contentious jurisdiction at somewhat greater length, Thomas Wood's eighteenth-century treatise described consent as the key to distinguishing contentious and non-contentious jurisdiction.<sup>127</sup> Wood treats emancipation, manumission, and adoption as instances of non-contentious jurisdiction and then refers to "several other legal Acts granted by the Judge upon request, and by consent of all Parties."<sup>128</sup> Woolhandler regards these matters of consensual adjustment as reflecting the resolution of a conflict between parties holding adverse interests. But that's not the way eighteenth-century thinkers explained the judicial role in overseeing consensual adjustment. It seems to us far more likely that the Framers shared the eighteenth-century understanding rather than the revisionist understanding put forth one or two centuries later.

#### D. Normative and Methodological Considerations

Professor Woolhandler does not advance any explicit normative arguments in the course of defending her suggested adverse-interest requirement. Nor does she explain the methodological basis on which she would regard such a requirement as constitutionally compelled by Article III. Indeed, the absence of normative or policy-based justifications for such a requirement, or for its selective relaxation in particular cases involving relatively remote adverse interests, suggests that Woolhandler writes with a view toward defending a particular conception of Article III adjudication. We welcome such terms of engagement, having attempted ourselves to offer a more satisfying account of certain non-contentious features of judicial practice. As we explained, we do not mean to advance a normative case for the proposition that federal courts should devote more time to their non-contentious activities. To the contrary, we urged congressional restraint in making non-contentious assignments.<sup>129</sup>

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<sup>126</sup> BLACKSTONE, *supra* note 11, at \*98.

<sup>127</sup> See THOMAS WOOD, A NEW INSTITUTE OF THE IMPERIAL OR CIVIL LAW 293 (4th ed. 1730).

<sup>128</sup> See *id.*; Pfander & Birk, *supra* note 2, at 1406.

<sup>129</sup> See Pfander & Birk, *supra* note 2, at 1449–50, 1473.

We nonetheless appear to have touched a nerve. On our view of the Article III case, parties do not need an injury in fact to pursue a claim in federal court.<sup>130</sup> Rather, as Chief Justice Marshall explained, they need only assert their rights “in the form prescribed by law.”<sup>131</sup> That could mean that Congress has the power to assign a broader array of both contentious and non-contentious matters to the federal courts. Or, if the Supreme Court were inclined to maintain its standing rules, a thoroughgoing acceptance of non-contentious jurisdiction might require the Court to provide justifications for its doctrine apart from its familiar claim that the history of legal practice at the time of the framing inflexibly called for the assertion of claims by plaintiffs who were seeking redress for injuries inflicted by defendants.<sup>132</sup> Redress of injuries was certainly one form of adjudication known to the Framers, but it did not exhaust the category.

Professor Woolhandler previously defended the Court’s standing jurisprudence on historical grounds. As in her response to our work on non-contentious jurisdiction, Woolhandler and Caleb Nelson offered a qualified defense of standing law against challenges based on evidence that historical practice was inconsistent with the notion that Article III adjudication has always been limited to those making claims for redress of injuries in fact.<sup>133</sup> As with her response to our work, the earlier paper accorded a good deal of weight to evolving judicial practice in the late nineteenth and early twentieth centuries and sought to distinguish counterexamples as uncommon or anomalous even as it sought to restate the conventional wisdom in more readily defensible terms.<sup>134</sup> Perhaps we can understand the

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<sup>130</sup> *Id.* at 1452 (“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.”); *see also* Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 485–90 (1996) (refuting the claim that standing requires an injury in fact).

<sup>131</sup> Pfander & Birk, *supra* note 2, at 1453 (quoting *Osborn v. Bank of the U.S.*, 22 U.S. (9 Wheat.) 738, 819 (1824)).

<sup>132</sup> Thus, some eighty years ago, Justice Felix Frankfurter explained that the federal “[j]udicial power could come into play only in matters that were the traditional concern of the courts at Westminster and only if they arose in ways that to the expert feel of lawyers constituted ‘Cases’ or ‘Controversies.’” *Coleman v. Miller*, 307 U.S. 433, 460 (1939) (opinion of Frankfurter, J.).

<sup>133</sup> *See* Woolhandler & Nelson, *supra* note 61. *But cf.* Raoul Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 YALE L.J. 816 (1969) (showing that the personal interest requirement of modern standing doctrine lacks historical support in both early English and American legal tradition); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1406–09 (1988) (arguing that standing law’s injury-in-fact requirement was at odds with the early willingness of federal courts to hear suits brought by informers who sought bounties rather than redress of injuries personal to themselves).

<sup>134</sup> *See* Woolhandler & Nelson, *supra* note 61.

current paper as a reflection of Woolhandler’s continuing commitment to the view that history does not defeat modern standing doctrine. After all, one of the implications we drew from our invocation of non-contentious jurisdiction was that the “injury” requirement central to modern standing doctrine does not accurately describe the non-contentious cases common in early federal, state, and European courts.<sup>135</sup>

But such an approach to scholarship on the meaning of Article III leaves us uncertain about the normative justification and workability of the regime the author seeks to defend. Consider, for example, the problem of deciding when the interest of a potential adversary achieves the degree of concreteness needed to satisfy the demands of Article III. As we have seen, many authors have invoked the construct of the potential adversary as a way to square seemingly anomalous practices with the presumed applicability of an adverse-party requirement.<sup>136</sup> But these authors, like Professor Woolhandler, rarely explain how concrete or specific a possible adverse interest must be to satisfy the supposed Article III standard. Does litigation yielding a consent decree qualify? How about a settlement class action? Must the holder of an adversarial interest be notified of the proceeding and invited to participate? Or do more remote prospects of adversarial participation suffice?

One might begin to answer such questions with a normative account of the purposes served by an adverse-interest or adverse-party requirement. But Professor Woolhandler does not offer such an account. We thus lack any set of tools with which to draw a line between the sufficiently and insufficiently adverse interest. Should we align ourselves with Justice Anthony Kennedy’s *Windsor* opinion in viewing the adverse-party requirement as one the Court might dispense with on the basis of prudential considerations, or should we follow Justice Scalia’s lead in viewing the requirement as a crucial element of Article III?<sup>137</sup> Neither the practices that Woolhandler catalogs nor the reasons they arose help to resolve that puzzle.

Nor does Professor Woolhandler evaluate the application of her construct of adverse interests to other matters within Article III such as the provision for jurisdiction over controversies between citizens of different states. Our paper takes up controversies, arguing that they require a dispute between opponents and differ from cases on this score. Extending that idea

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<sup>135</sup> See Pfander & Birk, *supra* note 2, at 1451–54.

<sup>136</sup> *Id.* at 1393–96.

<sup>137</sup> Compare *United States v. Windsor*, 133 S. Ct. 2675, 2685–88 (2013) (Kennedy, J.) (describing adverse-party requirement as prudential), with *id.* at 2701 (Scalia, J., dissenting) (portraying adverse-party requirement as an element of Article III).

in related work, one of us has argued that the distinction between “Cases” and “Controversies” may help to explain such venerable Article III puzzles as the inability of the federal courts to entertain matters falling within the so-called probate and domestic relations exceptions.<sup>138</sup> Because state law typically provides the rule of decision for such matters, they come to federal diversity dockets as “Controversies” between citizens of different states.<sup>139</sup> But some of the state court proceedings within the categories in question, such as common-form probate proceedings and certain domestic relations matters (for example, marriage; adoption; custody and guardianship appointments) proceed on the basis of non-contentious jurisdiction.<sup>140</sup> Either no contest has emerged (as in common-form probate proceedings) or the parties come to court to register an agreed-upon change in legal status, as with adoption proceedings. The absence of any “Controversy” between disputing parties helps to explain, we argued, why these non-contentious matters do not qualify for adjudication under Article III (at least so long as they remain governed by state law). We also observed that if Congress were to federalize the substantive law, then such matters could be brought to federal courts as “Cases.”<sup>141</sup>

Adverse interests, however, doubtless lurk beneath the surface of these nominally uncontested matters of probate and family law. Sometimes, a dispute breaks into the open, necessitating the transformation of a common-form probate proceeding into a formal will contest.<sup>142</sup> But often the adverse interests (between the birth mother, say, and the adoptive parents or between the administrator of the estate who institutes probate in the common form and some of the estate’s potential beneficiaries) are submerged or compromised. We believe that the absence of an open controversy would foreclose the exercise of party-based jurisdiction, thus helping to explain why these matters fall outside Article III. How would Professor Woolhandler treat the potential presence of adverse interests in evaluating party-based jurisdiction? If the possibility of contestation creates

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<sup>138</sup> See Pfander & Damrau, *supra* note 92, at 118–19 (contending that uncontested domestic relations matters governed by state law are outside the Article III power, while such matters governed by federal law could be heard as “cases”); Pfander & Downey, *supra* note 91, at 1556–59 (distinguishing contested proceedings from ex parte “common form” probate applications that elude federal judicial power over controversies).

<sup>139</sup> See 28 U.S.C. § 1332(a) (2012) (conferring diversity jurisdiction); *id.* § 1652 (prescribing state law as the rule of decision, except where otherwise provided).

<sup>140</sup> Pfander & Damrau, *supra* note 92, at 151, 154; Pfander & Downey, *supra* note 91, at 1558.

<sup>141</sup> Pfander & Damrau, *supra* note 92, at 149; Pfander & Downey, *supra* note 91, at 1577.

<sup>142</sup> See Pfander & Downey, *supra* note 91, at 1553.

adverse interests sufficient to meet the Article III requirement,<sup>143</sup> then perhaps the Constitution would allow federal courts to exercise diversity jurisdiction over uncontested matters of state law on the theory that the potential for adversary litigation creates the sort of “controversy” necessary to satisfy the party-based heads of Article III jurisdiction. On that view, Congress could assign common-form probate matters or other uncontested matters of state law to the federal diversity docket, assuming the potential contestants were citizens of different states. Such a “case-or-controversy” requirement would apply the same adverse-interest construct across the Article III menu, but would produce unusual results.

#### CONCLUSION

In the end, we take heart that so accomplished a scholar as Ann Woolhandler has judged our work worthy of extended comment. We attempt to repay the compliment here, probing her ideas and defending our account of the exercise of non-contentious jurisdiction. Woolhandler has helped us to see the doctrine more clearly, but we at least remain persuaded that cases and controversies differ from one another. Cases, unlike controversies, encompass the exercise of jurisdiction over uncontested assertions of a claim of right. Uncontested proceedings—naturalization petitions, warrant applications, prize claims, and many others—peppered the dockets of the federal courts in the early Republic. Their appearance can best be explained as an outgrowth of the non-contentious jurisdiction that we Americans inherited from the English civilians. Reclaiming that civil law inheritance may unsettle the originalist case for standing and adverse-party doctrine, but we hope it will also improve our understanding of the old world the Framers inherited and the new world that they made.

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<sup>143</sup> See Woolhandler, *supra* note 3, at 1036–46 (describing the potential for adverse argument in prize, remission, and warrant cases to provide the necessary adverseness to satisfy Article III).

