

In Search of the Probate Exception

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As a limit on the power of Article III courts, the probate exception has surely earned its place in the old curiosity shop of federal jurisdictional law. Dating from the early nineteenth century, the exception has been said to derive from various sources, including the lack of federal jurisdiction over ecclesiastical matters, the “law” and “equity” limits of Article III, and the structure of our federal government. The Supreme Court’s 2006 decision in Marshall v. Marshall sought to clarify matters, but lower courts continue to debate the breadth of the exception.

In this Article, we go in search of the probate exception. After concluding that some familiar arguments do not persuasively justify a gap in federal judicial power, we consider Article III’s case-or-controversy requirement. Understood as requiring live disputes between adverse parties, the case-or-controversy requirement might appear to rule out much of the unconstested ex parte or administrative work commonly conducted in the course of probate proceedings. Yet the federal courts have a long tradition of hearing administrative matters, from the naturalization petitions that arrived on federal dockets in 1790 to the bankruptcy proceedings that unfold each day in the Article III judiciary. Even today, Article III courts entertain applications for FISA warrants on an ex parte basis and conduct ex parte inquiries into applications for the entry of default judgments. Like many civil law tribunals, in short, the courts of the United States exercise what in Roman law was referred to as “contentious” and “noncontentious” jurisdiction.

Although the tradition of noncontentious federal jurisdiction cannot easily coexist with some broad statements of Article III’s supposedly inflexible adverse-party requirement, we think the best way to harmonize adversary rhetoric and noncontentious reality lies in the distinction between cases and

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controversies. We believe Article III permits the federal courts to administer the law only when the ex parte claim being asserted presents a “case” under federal law. At the same time, we think the Constitution requires full adverse-party disputes in all “controversies” governed by state law. On that view, federal courts lack the power to entertain stand-alone ex parte applications for probate so long as they remain creatures of state law. Federal involvement in state law matters requires a “controversy.” But, if Congress were to federalize the law of decedents’ trusts and estates with the exercise of an appropriate source of federal power, Article III courts could hear petitions for the probate of federal wills as “cases” within the judicial power.

I.	INTRODUCTION.....	1534
II.	EXPLORING CONSTITUTIONAL LIMITS ON FEDERAL PROBATE JURISDICTION.....	1541
	A. <i>Cases in Law and Equity</i>	1541
	B. <i>Federalism</i>	1550
	C. <i>Cases and Controversies</i>	1552
III.	EXPLORING THE ROOTS OF THE PROBATE EXCEPTION	1560
	A. <i>Lower Federal Courts and the Scope of Equitable Jurisdiction</i>	1561
	B. <i>A Sketch of the English Allocation of Jurisdiction over Probate Matters</i>	1563
	1. Medieval Origins	1563
	2. Early Modern England	1565
	3. Managing the Overlap of Law, Equity, and Probate.....	1567
	C. <i>The Federal Probate Exception in the Nineteenth Century</i>	1568
IV.	MAKING SENSE OF THE PROBATE EXCEPTION TODAY	1573
V.	CONCLUSION	1579

I. INTRODUCTION

Among the enigmas of federal jurisdiction, the probate exception surely ranks with the most arcane. In simple terms, the exception operates to deprive federal courts of jurisdiction over certain probate matters, even those that would otherwise qualify for federal jurisdiction. But the exception rarely stays so simple. No less knowledgeable a figure than Richard Posner has described the exception as “one of the most mysterious and esoteric branches of the

law of federal jurisdiction,”¹ and many scholars, jurists, and practitioners would agree. We hope to contribute to this Symposium’s exploration of the role of federal law and federal institutions in private wealth transfer by dispelling some of the uncertainty that surrounds the probate exception.

One kind of uncertainty surrounds the exception’s origins. Some scholars deny the very existence of the exception, portraying it as an outgrowth of a series of doctrines rather than a single coherent limit on federal judicial power.² Others treat the exception as a fairly modest restriction on the *statutory* grant of diversity jurisdiction to the lower federal courts.³ Still others regard the exception as one of *constitutional* dimension. On one such constitutional theory (espoused by Justice Holmes, among others), the omission of ecclesiastical jurisdiction from Article III debars the federal courts from performing the probate chores that the English church courts had performed.⁴ A second theory holds that the case-and-controversy requirement of Article III forbids the probate of wills, at least in the absence of a contest between adverse parties.⁵

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

2. See, e.g., John F. Winkler, *The Probate Jurisdiction of the Federal Courts*, 14 PROB. L.J. 77, 78 (1997):

[T]he existence of a ‘probate exception’ to federal jurisdiction is a myth of federal law. Actions to obtain decedents’ property or damages in lieu of such property should not be subject to any special principles of federal jurisdiction. Certain limits that apply generally to federal jurisdiction, however, often will restrict such actions.

3. See, e.g., Marshall v. Marshall, 547 U.S. 293, 306–08 (2006) (linking the probate exception to the Judiciary Act of 1789).

4. The probate exception shares something in common with the domestic relations exception, which has been said to forbid the federal courts from hearing suits for divorce and alimony. *Id.* (“Like the domestic relations exception, the probate exception has been linked to language contained in the Judiciary Act of 1789.”). For the Court’s latest narrowing restatement of the domestic relations exception, see Ankenbrandt v. Richards, 504 U.S. 689, 704 (1992) (reading the exception to block suits brought in diversity for divorce, alimony and child support). For a similar narrowing treatment of the probate exception, see *Marshall*, 547 U.S. at 306 (limiting the probate exception to the admission of wills to probate, and the administration of probate estates). Both exceptions have been linked to the omission of ecclesiastical matters from Article III, and it was to this omission that Justice Holmes adverted. See *Ohio ex rel. Popovici v. Agler*, 280 U.S. 379, 383–84 (1930) (Holmes, J.) (concluding that federal jurisdiction over disputes involving vice consuls appointed by a foreign nation did not include suits for divorce or alimony; consular suits “must be taken to refer to ordinary civil proceedings and not to include what formerly would have belonged to the ecclesiastical Courts”); see also *infra* text accompanying note 163 (quoting Justice Story’s view that the probate of wills was a matter of ecclesiastical jurisdiction).

5. See, e.g., *Ellis v. Davis*, 109 U.S. 485, 497 (1883) (contrasting *ex parte* and “merely administrative” probate proceedings that fall outside “the judicial power . . . of the United States” with probate disputes that properly invoke federal jurisdiction “to settle a controversy”); *Struck v. Cook Cnty. Pub. Guardian*, 508 F.3d 858, 859 (7th Cir. 2007) (Posner, J.) (observing

A second source of uncertainty grows out of the Supreme Court's efforts, diligent if not always elegant, to cabin the probate exception (and its fraternal twin, the domestic relations exception).⁶ The Court has done so in a series of decisions that treat the exception as having grown out of the narrow language of the Judiciary Act of 1789, which conferred jurisdiction over "suits" in "law or in equity" between diverse parties.⁷ English courts of "equity" were thought to have stayed out of ecclesiastical matters: they did not admit wills to probate, did not appoint personal representatives or executors to manage the assets of the estate, and did not oversee and approve the formal distribution of the probate estate.⁸ As a consequence, nineteenth century federal courts clothed with the powers of English courts of equity traditionally declined to perform these chores as well when exercising their diversity jurisdiction.⁹ While federal courts were free to entertain *inter partes* claims by heirs, creditors, and legatees, they lacked authority to hear in rem probate proceedings.¹⁰

that the "uncontested probate of a will" and "uncontested appointment of a guardian" are not "cases or controversies within the meaning of Article III").

6. See, e.g., RICHARD H. FALLON, JR. ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 173 (6th ed. 2009) (addressing both exceptions in a single short section of the casebook). Ecclesiastical courts in England handled both probate and domestic relations proceedings.

7. Judiciary Act of 1789 ch. 20, § 11, 1 Stat. 73; see *Marshall*, 547 U.S. at 306–08 (citing *Markham v. Allen*, 326 U.S. 490, 494 (1946)). The Court used a similar interpretive move to restrict the scope of the domestic relations exception. See *Ankenbrandt*, 504 U.S. at 695–97 (declaring the domestic relations exception a product of statutory interpretation, rather than constitutional compulsion).

8. Although the High Court of Chancery in England lacked formal power to admit wills to probate or to appoint administrators and executors, Chancery exercised broad authority over decedents' trusts and estates. See 1 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 625–29 (A.L. Goodhart & H.G. Hanbury eds., 7th ed., rev. 1956) ("The ecclesiastical courts obtained jurisdiction over grants of Probate and Administration, and, to a certain degree, over the conduct of the executor and the administrator. All these branches of their jurisdiction could be exercised only over personal estate."); 2 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE AS ADMINISTERED IN ENGLAND AND AMERICA §§ 802, 809 (W.H. Lyon, Jr. ed., 14th ed. 1918). See generally Peter Nicolas, *Fighting the Probate Mafia: A Dissection of the Probate Exception to Federal Court Jurisdiction*, 74 S. CAL. L. REV. 1479, 1503–14 (2001) (chronicling Chancery's power over decedents' trusts, fraud claims, suits seeking discovery, and the administration of estates to protect heirs, creditors, and legatees).

9. Compare *Trs. of Phila. Baptist Ass'n v. Hart's Ex'rs*, 17 U.S. 1, 43–50 (1819) (basing a narrow view of federal equity power on perceived historical limits on equity power in England), with *Vidal v. Girard's Ex'rs*, 43 U.S. 127, 194–96 (1844) (concluding that broader powers were available in England and should thus be available to federal courts of equity as well). The Court's decision to treat the exception as a matter of interpreting the diversity statute nicely avoids making the scope of the exception dependent on research into the eighteenth century practice of the High Court of Chancery in England.

10. See, e.g., *Gaines v. Fuentes*, 92 U.S. 10, 10 (1875):

Federal courts have no probate jurisdiction, referring particularly to the establishment of wills; and such is undoubtedly the case under the existing legislation

The Court's most recent decision, *Marshall v. Marshall*, nicely illustrates its ongoing struggle to narrow the probate exception.¹¹ Although the dispute in question grew out of the estate plans of a wealthy Texas decedent, the plaintiff was not asking a federal court to admit a will to probate, to administer an estate, or to wrest control of an estate from state court.¹² Instead, the plaintiff sought damages in tort for interference with a prospective gift, an in personam action "at law" that did not threaten to interfere with the state probate proceeding.¹³ By concluding that the tort claim did not implicate the probate exception, the Court reaffirmed a narrow view of the exception and ducked the looming question—whether the exception applies to matters brought in federal court pursuant to federal bankruptcy or other grants of federal question jurisdiction.¹⁴

While the decision signals the Court's continuing adherence to what it termed a "distinctly limited" view of the probate exception,¹⁵ *Marshall* leaves ample room for further discussion. Subsequent lower court decisions, for example, reveal a thriving debate over the breadth of the exception. Thus, the federal courts have refused to consider an application for an order compelling payment from a trust fund¹⁶ and have blocked the adjudication of a dispute over attorney's fees payable in a probate proceeding.¹⁷ On the other hand, the federal courts have agreed to hear suits that would, if successful, deplete the limited assets of a living trust¹⁸ or expand a decedent's estate by adding assets to it.¹⁹ At the same time, one federal court used *Marshall* to

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.

11. See *Marshall*, 547 U.S. at 306–12 (analyzing cases that dealt with the probate exception and the domestic relations exception).

12. *Id.* at 312.

13. *Id.* *Inter partes* claims between diverse parties, even those large enough to deplete the entire estate, have long been cognizable in federal court, notwithstanding the probate exception. See *Markham v. Allen*, 326 U.S. 490, 492, 494 (1946). For doubts about the wisdom of recognizing tortious interference claims of the kind at issue in *Marshall*, see John C.P. Goldberg & Robert H. Sitkoff, *Torts and Estates: Remedying Wrongful Interference with Inheritance*, 65 STAN. L. REV. 335, 338–40, 365–97 (2013).

14. See *Marshall*, 547 U.S. at 308–09 (disclaiming any need to decide if the bankruptcy statute included a probate exception comparable to that associated with the diversity statute).

15. *Id.* at 310–12.

16. *Kennedy v. Trs. of the Testamentary Trust*, 406 F. App'x 507, 509–10 (2d Cir. 2010).

17. *Bedree v. Bedree*, 396 F. App'x 312, 315 (7th Cir. 2010) ("Legal fees are costs of administering the estate, and thus, if the district court weighs in on the propriety of these fees it would improperly intrude into administration of the estate." (citation omitted)).

18. See *Curtis v. Brunsting*, 704 F.3d 406, 409–10 (5th Cir. 2013) (explaining that assets in a living trust generally avoid probate because the assets are owned by the trust, not the decedent).

19. See, e.g., *Gustafson v. zumBrunnen*, 546 F.3d 398, 400 (7th Cir. 2008):

neutralize the probate exception but nevertheless declined to hear the matter under the *Colorado River* abstention doctrine.²⁰

Apart from the judicial debate over the exception's breadth, conceptual problems linger. So long as the probate exception rests on a historically informed understanding of the power of English courts of law and equity, the Court will face questions about the scope of the exception. To begin with, Article III itself confers judicial power in terms of law and equity,²¹ thus lending color to the argument that the probate exception has constitutional roots in the omission of ecclesiastical jurisdiction. Moreover, the law-and-equity formulation on which the Court has based its diversity interpretation also undergirds the statutory grant of federal question jurisdiction. As Judge Posner has observed, the Court's proffered justification for excluding probate matters from the diversity docket would appear to apply with equal force to matters within the district court's federal question jurisdiction.²²

In this Article, we go in search of the probate exception, drawing on standard modes of legal analysis and interpretation. We begin in Part II with a critical analysis of the theories that purport to explain why Article III of the Constitution may exclude probate matters from federal court. For reasons having to do with the text, structure, and history of the judicial article, we reject these theories and construct an alternative account. We focus in particular on the meaning of the terms "cases" and "controversies" in Article III. The Supreme Court has blended those two terms in concluding that Article III limits federal courts to the adjudication of disputes between adverse parties with concrete opposing interests. This adverse-party requirement can partly explain the probate exception; as we will see, many probate proceedings begin with uncontested submissions for the admission of wills to probate and for the appointment of executors.

The suit, though based ultimately on the will, is not within the probate exception to federal jurisdiction. The judgment sought would just add assets to the decedent's estate; it would not reallocate the estate's assets among contending claimants or otherwise interfere with the probate court's control over and administration of the estate.

20. See *Jimenez v. Rodriguez-Pagan*, 597 F.3d 18, 24, 27–32 (1st Cir. 2010) (reasoning the case did not fall within the limited scope of the probate exception, but it did, however, require abstention by the federal court due to the *Colorado River* abstention doctrine).

21. See U.S. CONST. art. III, § 2, cl. 1 (extending judicial power of the United States 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").

22. See *Jones v. Brennan*, 465 F.3d 304, 307 (7th Cir. 2006) (Posner, J.) (noting that the probate exception was well established in federal law when Congress in 1875 granted jurisdiction over any suit in law and equity arising under the Constitution, laws and treaties of the United States).

Such uncontested submissions do not present a “controversy” within the meaning of Article III and thus lie beyond federal judicial power.

At the same time, drawing on separate work on the power of Article III courts to exercise noncontentious jurisdiction in federal question “cases,” we show that the adverse-party requirement does not apply across the board. Federal courts have long been given, and have agreed to accept, jurisdiction over *ex parte* proceedings, such as applications for naturalization, benefit claims, applications for warrants, and various uncontested bankruptcy matters.²³ In agreeing to hear such noncontentious matters, the federal courts administer federal law in much the same way state courts administer state law in connection with probate proceedings. We think the source of underlying law plays a crucial role in defining the scope of the federal courts’ noncontentious jurisdiction. Article III extends judicial power only to “controversies” or “disputes” between adversaries on state law matters and thus forecloses noncontentious jurisdiction.²⁴ But the definition of “cases” extends more broadly to encompass any claim of right based on federal law. We therefore conclude that Congress could assign probate administration to the federal courts in connection with otherwise constitutionally proper federal legislation that regulated, say, the commercial implications of estates with ties to more than one state or implemented estate-related treaties with foreign countries.²⁵ So long as state law governs probate, however, the federal courts lack power to administer the law in *ex parte* proceedings and cannot hear common form probate petitions that rest on state law.

23. See James E. Pfander & Daniel D. Birk, *Article III Judicial Power, the Adverse Party Requirement, and Non-Contentious Jurisdiction*, 124 YALE L.J. (forthcoming 2015) (manuscript at 15, 20–26) (unpublished draft on file with authors) (listing applications for search and FISA warrants, uncontested bankruptcy proceedings, and subpoenas, among others, as proceedings that lack adverse parties).

24. *Id.* (manuscript at 5) (“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 register or claim a legal interest under a federal statute.”).

25. Our preference for Commerce Clause agnosticism stems from the highly contested contours of that source of federal power. See *generally* NFIB v. Sebelius, 132 S. Ct. 2566 (2012) (disclosing a sharp division on the Court as to the scope of the commerce power). Still, the Court has continued to adhere to the view that “[t]he power of Congress over interstate commerce is not confined to the regulation of commerce among the states,” but extends to activities that “have a substantial effect on interstate commerce” as well as activities that substantially affect commerce “only when aggregated with similar activities of others.” *Id.* at 2585–86 (Roberts, C.J.) (quoting *United States v. Darby* 312 U.S. 100, 118–19 (1941)). To the extent Congress were to make findings as to the impact of large estates on interstate commerce, and were to focus on estates with assets in more than one jurisdiction, one could argue that Congress was regulating matters “in” interstate commerce as well as matters with a substantial effect on such commerce.

Part III of the Article turns from constitutional to statutory issues, focusing on how the probate exception came to be embedded in the law of federal jurisdiction. The historical story begins with some background on the superior courts of law and equity in England and the separation of their work from that of the church courts, which bore primary (but not exclusive) responsibility for probate matters. We also examine early practice in the state and federal courts. While a variety of currents run through the Supreme Court's decisional law, we find surprisingly substantial support for our claims about the origins and nature of the probate exception. Indeed, during the nineteenth century, the Court itself suggested that the absence of a controversy created the exception but that federal power extends to all controversies, even those that grow out of probate proceedings.²⁶

Part IV briefly considers the modern scope of the probate exception. While we have identified a constitutional predicate for the probate exception based on the inability of the federal courts to entertain *ex parte* or uncontested proceedings on matters governed by state law, that narrow exception has little prospect of informing the content of current law. It nonetheless bears noting that our approach represents a small but potentially significant departure from the Supreme Court's decision in *Marshall v. Marshall*, which defined the exception in statutory rather than constitutional terms.²⁷ Moreover, the *Marshall* Court took a slightly broader view of the scope of the exception than do we, ruling out federal jurisdiction over suits to "annul a will,"²⁸ despite the fact that such litigation would present an *inter partes* dispute of the kind that would seemingly satisfy the "controversy" requirement of Article III.²⁹ Our view of congressional power could prove significant in two settings: if Congress were inclined to broaden federal diversity jurisdiction by including all *inter partes* probate disputes between citizens of different states, we see no constitutional objection. Similarly, if Congress were inclined to

26. *Ellis v. Davis*, 109 U.S. 485, 497 (1883):

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.

27. *Marshall v. Marshall*, 547 U.S. 293, 307–08 (2006).

28. *Id.* at 311–12 (treating actions to probate or annul a will as well as those that would reach a res in the custody of state court as falling within modern definitions of the probate exception).

29. *See id.* at 317 (Stevens, J., concurring in part and concurring in the judgment) (citing *Gaines v. Fuentes*, 92 U.S. 10, 22 (1876), for the proposition that federal courts have power to entertain disputes over the proposed annulment of a will).

federalize probate and assign uncontested matters to the federal courts, we find nothing in Article III that would bar the way.

II. EXPLORING CONSTITUTIONAL LIMITS ON FEDERAL PROBATE JURISDICTION

Scholars and jurists have advanced three separate arguments that the Constitution itself forbids the federal courts from exercising probate jurisdiction. First, some contend that Article III permits the federal courts to proceed only in law and equity, thus implicitly ruling out probate proceedings on the ground that they were grist for the English ecclesiastical courts.³⁰ Second, some posit a federalism-based limit on the exercise of jurisdiction over probate matters.³¹ Third, some contend that Article III extends only to cases and controversies, thereby foreclosing the federal courts from hearing *ex parte* (nonadverse) petitions for the initiation of probate proceedings. Relatedly, the case-and-controversy requirement may appear inconsistent with certain administrative chores associated with appointing and overseeing the work of the estate's personal representative.³² We evaluate these arguments in turn.

A. Cases in Law and Equity

In exploring the limits of law and equity, we begin with the well-known terms of Article III, which extend the judicial power of the United States to a variety of cases and controversies.³³ The law and equity qualification, however, applies only to cases arising under federal law. The relevant provision extends judicial power to “all

30. See *Ohio ex rel. Popovici v. Agler*, 280 U.S. 379, 383–84 (1930) (voicing the view that the ecclesiastical nature of probate jurisdiction foreclosed federal courts of law and equity from entertaining such matters). For an account of ecclesiastical jurisdiction in early modern England, see *infra* Part III.B.

31. See, e.g., *Glidden Co. v. Zdanok*, 370 U.S. 530, 584 (1962).

32. Convention holds, perhaps incorrectly, that the federal courts cannot administer the law in *ex parte* proceedings, but may only entertain cases and controversies. For an account, 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 (2006) (arguing that Article III limits the federal courts to the adjudication of disputes between adverse parties and forecloses non-adverse proceedings, such as settlement class actions). On the application of this idea in the probate context, see *Ellis v. Davis*, 109 U.S. 485, 497 (1883) (explaining that probate matters “*ex parte* and merely administrative” cannot be entertained by federal courts until it becomes “necessary to settle a controversy . . . [between diverse citizens]”).

33. For background on the framing of the judicial article of the Constitution, see JAMES E. PFANDER, *ONE SUPREME COURT: SUPREMACY, INFERIORITY, AND THE JUDICIAL POWER OF THE UNITED STATES* (2009); see also Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205 (1985).

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.”³⁴ The remaining grants include no such “law and equity” qualification; Article III simply extends the judicial power to “all Cases of admiralty and maritime Jurisdiction”; to “all Cases affecting Ambassadors, other public Ministers, and Consuls”; and to a variety of “Controversies” defined by the alignment of parties, including disputes between “Citizens of different States.”³⁵

The argument for reading this extension of judicial power as an implicit exclusion of probate authority has both textual and historical elements. First, drawing on the historical structure of the courts of England, the argument regards the head of ecclesiastical jurisdiction as a source of judicial power separate from law and equity. England assigned judicial authority to a wide range of separate courts: the superior courts of Westminster Hall included two common law tribunals (King’s Bench and Common Pleas), one equitable tribunal (the High Court of Chancery), and one tribunal of mixed law and equity parentage (the Court of Exchequer).³⁶ In addition to these courts of law and equity, the High Court of Admiralty presided over cases of prize and capture; the military courts enforced military discipline; and the ecclesiastical courts handled matters of faith and communion with the Church of England.³⁷ While King’s Bench deployed supervisory writs, including mandamus, habeas corpus, and prohibition, to oversee the work of the Admiralty and ecclesiastical

34. See U.S. CONST. art. III, § 2, cl. 1.

35. *Id.*

36. For an overview of the structure of the English court system in the eighteenth century, see 1 HOLDSWORTH, *supra* note 8, at 194–264, 446–76; WILLIAM BLACKSTONE, COMMENTARIES. The fourth superior court, the Court of Exchequer, entertained both revenue matters and cases at common law and in equity and sat in a space adjoining Westminster Hall.

37. The high courts of admiralty and ecclesiastical jurisdiction sat together at Doctor’s Commons in London and applied canon law and procedure in the determination of disputes. See 1 HOLDSWORTH, *supra* note 8, at 547, 562, 573, 594–95. The proctors (or lawyers) who appeared for the parties to these matters were similarly learned in the canon law, and many would have studied at the great English universities, where Roman canon law (rather than the common law of England) was the focus of instruction. For a useful summary of ecclesiastical practice in the late eighteenth and early nineteenth century, see THE SPECIAL AND GENERAL REPORTS MADE TO HIS MAJESTY BY THE COMMISSIONERS APPOINTED TO INQUIRE INTO THE PRACTICE AND JURISDICTION OF THE ECCLESIASTICAL COURTS OF ENGLAND AND WALES (London et al. eds. 1832) [hereinafter COMMISSIONERS’ REPORT] (describing in detail the jurisdiction and practice of the ecclesiastical courts and suggesting reforms to improve efficiency). 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, 212–43 (Ass’n of Am. Law Schs. ed., 1909) (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”).

courts, it did not hear appeals from their decrees.³⁸ No single supreme court, aside from the judicial wing of the House of Lords, had power to examine all these sources of judicial authority.³⁹

Viewed from the English perspective, then, one might adopt an *expressio unius* reading in which the text of Article III would be seen as selecting three heads of judicial power and leaving the rest behind. On this view, the courts of the United States have power to hear cases at law, cases in equity, and cases of admiralty and maritime jurisdiction, but no power to hear ecclesiastical or military matters. By treating ecclesiastical jurisdiction as a separate category of judicial power, this argument would essentially foreclose the Article III courts from hearing the wide array of matters that fell exclusively to the English church courts in the eighteenth century.⁴⁰ The matters so foreclosed would include the probate of wills and the appointment of personal representatives and executors to oversee a decedent's estate as well as such family law matters as the annulment of marriages, the provision of spousal support, and the provision of care for orphans.⁴¹ The fact that English ecclesiastical courts handled all of these matters has long supplied a prominent justification for both the probate and domestic relations exceptions.⁴²

38. For an account of King's Bench oversight through the writ of prohibition, see 1 HOLDSWORTH, *supra* note 8, at 629; see also Norma Adams, *The Writ of Prohibition to Court Christian*, 20 MINN. L. REV. 272, 272–87 (1935). Professor Helmholtz reports that ecclesiastical courts sometimes ignored writs of prohibition and continued to adjudicate matters that King's Bench regarded as off limits to them. See R.M. HELMHOLTZ, *CANON LAW AND THE LAW OF ENGLAND* 77 (1987). King's Bench also issued writs of mandamus to compel the issuance of letters of administration in cases where the ecclesiastical courts wrongly refused to do so. See WILLIAM TAPPING, *MANDAMUS* 82–83 (1842).

39. On the appellate role of the House of Lords, see 1 CHARLES HOWARD MCILWAIN, *THE HIGH COURT OF PARLIAMENT AND ITS SUPREMACY* 164 (1910) (describing the appellate jurisdiction of the House of Lords). Decisions of the Lords controlled the particular dispute but did not necessarily establish a precedent that commanded the respect of the superior courts. See James E. Pfander & Daniel D. Birk, *Article III and the Scottish Judiciary*, 124 HARV. L. REV. 1613, 1652 (2011). The Lords did not exercise supervisory powers and could not play the coordination role long associated with superior courts. *Id.*

40. Even viewed from an English perspective, one can hardly characterize the church courts as exercising exclusive jurisdiction over matters of probate. Matters relating to the oversight and enforcement of trusts, a common tool of estate planning for several centuries, naturally came within the jurisdiction of the courts of equity. See Winkler, *supra* note 2, at 82–88 (discussing the predominance of equity in trust administration).

41. For further discussion of the contours of the ecclesiastical courts' exclusive jurisdiction over probate matters, see *infra* Part III.

42. To be sure, most observers follow the Supreme Court and link the probate exception to the omission of ecclesiastical jurisdiction from the statutory conferral of diversity jurisdiction in "all suits of a civil nature at common law or in equity." Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73 (1789); see *Marshall v. Marshall*, 547 U.S. 293, 306–08 (2006) (linking the probate exception to the Judiciary Act of 1789); *Ankenbrandt v. Richards*, 504 U.S. 689, 698–701 (1992) (decreeing that domestic relations exception would heretofore be regarded as having derived from the

Yet the claim that the deliberate omission of ecclesiastical jurisdiction now bars federal courts from hearing matters assigned to the English church courts in the eighteenth century presents serious textual, historical, and structural problems. Although the Framers of Article III were quite familiar with the structure of the English court system, they also had a variety of additional judicial structures available as models for their handiwork. For example, they were familiar with their own state judicial systems, which often assigned probate jurisdiction not to church courts but to secular courts that they variously called probate courts, ordinary courts, prerogative courts, and orphans courts.⁴³ Some of these courts did more than admit wills to probate; they would grant relief at law or in equity.⁴⁴ As a consequence, we have little reason to believe that the Framers regarded the probate of wills as a matter uniquely associated with the exercise of ecclesiastical jurisdiction or that they would have regarded the omission of ecclesiastical jurisdiction from the Article III jurisdictional menu as signaling anything, one way or another, about the power of the federal courts to hear probate matters.

If the *expressio unius* argument considerably weakens when viewed against the backdrop of state judicial arrangements, it appears to collapse entirely when one considers the nature of ecclesiastical jurisdiction. As their name suggests, ecclesiastical courts were responsible for adjudicating claims relating to the obligations that individuals owed as members of the established church.⁴⁵ These obligations extended quite broadly, including duties to refrain from blasphemy and defamation, from loaning money on usurious terms, and from engaging in such religious improprieties as drunkenness, fornication, and adultery.⁴⁶ The Church acceded to power over domestic relations by virtue of its authority over marriage, birth, bastardy, and the like.⁴⁷ Its power over probate matters grew out of

limited scope of judicial authority conferred in the diversity jurisdictional grant). *See generally* Nicolas, *supra* note 8, at 1500 (tracing the probate exception to the Judiciary Act of 1789).

43. Nicolas, *supra* note 8, at 1514–19; Winkler, *supra* note 2, at 90–91 & nn.60–64.

44. *See* Winkler, *supra* note 2, at 91 (describing the varied powers of the colonial probate courts and explaining that they sometimes granted relief available in England at law or in equity). Following independence, some probate courts organized by the state governments regarded themselves as exercising ecclesiastical jurisdiction and incorporated the probate law precedents from England. *See* Nicolas, *supra* note 8, at 1518.

45. *See generally*, 3 BLACKSTONE, *supra* note 36, at *62.

46. On the jurisdiction of the ecclesiastical courts, see 1 HOLDSWORTH, *supra* note 8, at 619; COMMISSIONERS' REPORT, *supra* note 37, at 112–70 (describing ecclesiastical court jurisdiction over such matters as marriage, adultery, church seats, dilapidations, tithes, sequestrations, brawling, and defamation).

47. *See generally*, 1 BLACKSTONE, *supra* note 36, at *422–33 (Chapter 15).

end-of-life confession of sins, death-bed bequests, and a perception that most individuals who died intestate would want their assets, if any, used for religious purposes.⁴⁸ In any case, the remedy for an individual's refusal to comply with the order of an ecclesiastical court was excommunication—exclusion from the established church.⁴⁹

When one recognizes that the mind of the eighteenth century lawyer tended to categorize law by linking writs and remedies, it quickly becomes clear that no one involved in drafting Article III could have seriously entertained the possibility of adding ecclesiastical jurisdiction to the jurisdictional menu.⁵⁰ While many of the states had church establishments at the time of the framing, the United States as a whole had no established church.⁵¹ Even though the First Amendment's ban on such national church establishments would not take effect until 1791, the Constitution contemplated a secular rather than a religious government.⁵² Thus, the document refrains from any invocation of the deity and explicitly forbids any religious test for office.⁵³

It would have been incongruous in the extreme for the Framers of such a secular government to have invested the federal judiciary

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

49. Unlike chancery which had “considerable powers of enforcement,” the remedies of the church courts were limited to “excommunication.” HELMHOLZ, *supra* note 38, at 97. But that remedy threatened the target with the following serious consequences:

He was excluded from pleading in secular courts. His company was to be shunned by all Christians. In England he could be arrested and imprisoned if the bishop “signified” to the King that he had remained unrepentantly excommunicate for 40 days or more. Excommunication was, in short, an unhappy position from which an ordinary man would seek to be released.

Id.; see also 1 HOLDSWORTH, *supra* note 8, at 630–32 (summarizing disabilities).

50. For a persuasive argument that eighteenth century thinking about the use of judicial power tended to revolve around remedies, see Anthony J. Bellia, Jr., *Article III and the Cause of Action*, 89 IOWA L. REV. 777, 784–92 (2004) (characterizing the cause of action in both law and equity as remedies-based).

51. For an account of the Framers' experience with established churches, both in England and in the several states, see Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2110–11, 2126 (2003) (reporting that five southern colonies and four counties of Metropolitan New York had established religions at the time of the Revolution, that three colonies were created as havens for dissenters, and that the Puritan establishment lasted in Massachusetts until 1833). The United States, in keeping with the First Amendment, has never created an established church at the national level.

52. See *generally*, ALVIN W. JOHNSON & FRANK H. YOST, SEPARATION OF CHURCH AND STATE IN THE UNITED STATES 4–16 (2d ed. 1948) (tracing the idea that church and state should be separated to a Declaration of Rights adopted by the Virginia House of Burgesses in 1776, before the adoption of the Declaration of Independence).

53. U.S. CONST. art. VI, cl. 3 (“[N]o religious Test shall ever be required as Qualification to any Office or public Trust under the United States.”). Religious tests were an element of religious establishment. See McConnell, *supra* note 51, at 2113.

with the powers of ecclesiastical courts. The federal government had no business issuing judicial decrees of excommunication to any parishioner, no matter how far she had lapsed from the true faith. As a consequence, one searches the records of the federal convention in vain for any proposal to confer ecclesiastical jurisdiction on the federal courts.⁵⁴ If no one took seriously the possibility of *including* ecclesiastical jurisdiction in Article III, then surely the *omission* of that jurisdiction has little resolving power in determining the range of matters Article III courts can entertain.

Sure enough, when we drill down into the records of the Philadelphia Convention in an effort to isolate the considerations that apparently shaped the “law and equity” formulation in Article III, we find little evidence that a desire to exclude the jurisdiction of the ecclesiastical courts shaped that decision. As Article III emerged from the Committee of Detail, it simply vested the “Judicial Power of the United States” in one Supreme Court and in such inferior courts as Congress might choose to constitute.⁵⁵ William Johnson, a delegate from Connecticut, proposed to add “both in law and equity” after the reference to the United States.⁵⁶ According to Madison’s notes, Johnson proposed the change because he believed “the judicial power ought to extend to equity as well as law.”⁵⁷ One delegate, George Read, objected to “vesting these powers in the same Court,”⁵⁸ but the motion carried. Later, during deliberations on the Committee of Style report, the convention dropped “law and equity” from Section 1’s reference to judicial power, opting for a “law and equity” reference as it now appears as part of Section 2’s provision for jurisdiction over all cases arising under federal law.⁵⁹ None of the discussions, as far as the record reveals, adverted to the impact of these changes on federal authority over ecclesiastical or probate matters.

Indeed, as one of us argued in an earlier work, Johnson’s proposed change in the judicial article was doubtless meant to *broaden* the jurisdiction of the federal courts by giving them power to grant relief in law and equity.⁶⁰ While such joinder of law and equity was

54. See 4 MAX FARRAND, THE RECORDS OF THE PHILADELPHIA CONVENTION 125 (1910) (omitting any reference to ecclesiastical courts from the index to debates at the constitutional convention).

55. 2 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 186 (Max Farrand ed., 1966).

56. *Id.* at 428.

57. *Id.*

58. *Id.*

59. *Id.* at 621.

60. See Pfander & Birk, *supra* note 39, at 1666–70.

unknown in England (except in the Court of Exchequer), Scotland combined law and equity in a single supreme court, the Scottish Court of Session.⁶¹ Lord Kames, a leading figure of the Scottish Enlightenment, urged the wisdom of such an expansive allocation of judicial power, noting that the consolidation of legal and equitable remedies in a single court simplified the task of providing complete relief to the parties.⁶² James Wilson, a leading Framers of Article III and one of the first Justices of the Supreme Court, later defended Kames's view in his well-known law lectures, urging that every court of law ought also to be a court of equity.⁶³ In the *Federalist Papers*, Alexander Hamilton offered a similar, if somewhat more Anglocentric, defense of the joinder of law and equity.⁶⁴

We thus have reason to conclude that the law-and-equity formulation in Article III was meant to expand the scope of remedies available to the federal courts and to offer the convenience of one-stop shopping for litigants in need of redress. At the same time, we have reason to doubt that the Framers meant the federal courts to issue orders of excommunication of the kind that enforced the judgments of the ecclesiastical courts in England. In that sense, surely, the federal courts lacked ecclesiastical jurisdiction. But it does not follow from the absence of a power to excommunicate that the federal courts were to be permanently debarred from handling any of the subjects that fell to the church courts of England. Usury litigation takes place in the federal courts pursuant to federal statutes that regulate the amount of interest federal banks may charge, as does litigation over defamation claims.⁶⁵ No one would contend that the historic role of ecclesiastical courts in usury and defamation places such matters beyond the

61. *See id.* at 1626.

62. *See generally*, HENRY HOME KAMES, PRINCIPLES OF EQUITY (1760).

63. 2 JAMES WILSON, LECTURES ON LAW (1791).

64. THE FEDERALIST NO. 80 (Jacob E. Cooke ed. 1961) (Alexander Hamilton).

65. On the power of ecclesiastical courts over usury claims, see HELMHOLZ, *supra* note 38, at 324 (“The medieval church claimed exclusive jurisdiction to determine what conduct amounted to usury.”). As for defamation, see COMMISSIONERS’ REPORT, *supra* note 37, at 167 (“The cognizance of Causes of Defamation, forms a part of the ancient Jurisdiction of the Ecclesiastical Courts.”). For the federal judicial role in usury claims against national banks, see *Beneficial Nat’l Bank v. Anderson*, 539 U.S. 1, 9–11 (2003) (concluding that federal law completely preempts the application of state usury laws to national banks, thereby transforming all such usury claims into federal rights of action subject to removal to the federal courts). Federal courts hear defamation claims, more commonly in the exercise of original or supplemental jurisdiction over state rights of action or more rarely on appeal from state courts that fail to heed First Amendment limits on liability for statements made about public figures. *See N.Y. Times v. Sullivan*, 376 U.S. 254, 283 (1964) (holding on appeal from state court that the First Amendment protected newspaper from liability for defamation of a public figure in the absence of “malice”); *Biospherics, Inc. v. Forbes, Inc.*, 151 F.3d 180, 186 (4th Cir. 1998) (applying the state law of defamation in the context of diversity-based original jurisdiction).

constitutional reach of federal courts today. So too, we think, with probate matters.

Structural considerations, including the well-known principle of coextensivity, confirm this conclusion. The principle of coextensivity holds that the adjudicative authority of the federal courts should extend to all questions of federal law, including those that implicate constitutional guarantees, acts of Congress, and federal treaties.⁶⁶ On this view, if an individual raises a claim of constitutional right, the federal courts should have power to hear the matter. And if Congress chooses to regulate within a field of its competence, the federal courts should have the authority to adjudicate claims growing out of such federal regulation. The Framers secured the principle of coextensivity through the extension of judicial power to all cases arising under the Constitution and laws of the United States.⁶⁷ While the scope of constitutional and statutory rights may change over time, the power of the federal courts will continue to extend to all federal questions.

The recognition of a probate exception could threaten the principle of coextensivity. Imagine a state probate court that discriminates on the basis of race or sex in the administration of a specific estate. Ordinarily, the Supreme Court could review the state court decree and remedy any unconstitutional forms of discrimination, exercising its appellate jurisdiction over issues of federal law.⁶⁸ Yet

66. For canonical statements of the principle of coextensivity, see *Osborn v. Bank of U.S.*, 22 U.S. (9 Wheat.) 738, 809 (1824) (explaining that the aim of the judiciary article in extending jurisdiction over all cases was to “make it co-extensive with the power of legislation . . . not to limit and restrain.”); *Cohens v. Virginia*, 19 U.S. 264, 384 (1821) (considering as a political axiom the principle that “the judicial power . . . must be co-extensive with the legislative, and must be capable of deciding every judicial question which grows out of the constitution and laws”). See generally, Robert J. Pushaw, Jr., *Article III’s Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447, 501–02 & n.269 (1994) (“[T]he Federalists’ axiom that judicial power must be commensurate with that of the political branches makes no sense unless they viewed federal courts as final expositors of federal law, not mere dispute resolvers.”).

67. THE FEDERALIST No. 80, at 534 (Jacob E. Cooke ed. 1961) (Alexander Hamilton):

It seems scarcely to admit of controversy, that the judiciary authority of the Union ought to extend to these several descriptions of cases: 1st, to all those which arise out of the laws of the United States, passed in pursuance of their just and constitutional powers of legislation; 2d, to all those which concern the execution of the provisions expressly contained in the articles of Union

68. On the importance of coextensivity, consider *Scott v. McNeal*, 154 U.S. 34 (1894). There, the Court held that it violated due process for a probate court to subject an estate to administration and authorize the sale of the property of a person who, though absent for seven years, turned out to be still alive. *Id.* at 46–51. While the case arose as a collateral attack on the probate disposition, one supposes that the Court could have heard the claim on direct review of the probate court’s decree had the individual appeared in time to assert the claim in that context. See also Sheldon S. Levy, *Probate in Common Form in the United States: The Problem of Notice in Probate Proceedings*, 1952 WIS. L. REV. 420 (1952).

such review would apparently be frustrated if the Court were to regard Article III's grant of federal question jurisdiction as including a probate exception. Or imagine a statute in which Congress specifically conferred on the federal courts the power to probate wills and administer estates that substantially affect interstate commerce.⁶⁹ Assuming that Congress has the power to enact such a law, it would violate the principle of coextensivity to deny the federal courts the role they had been assigned.

We believe the principle of coextensivity helps to explain the Court's sometimes awkward efforts to limit the probate and domestic relations exceptions to matters brought to federal courts on the basis of diversity jurisdiction. One can see that awkwardness, or inelegance, in *Ankenbrandt v. Richards*,⁷⁰ a leading example of the Court's efforts to cabin the domestic relations exception. There, the Court proclaimed the exception a creature of the diversity statute and went out of its way to hold that the Constitution does not "exclude domestic relations cases from the jurisdiction otherwise granted by statute to the federal courts."⁷¹ In so doing, it secured both its own power to engage in appellate review of state court decisions in the domestic relations context and the power of the lower federal courts to exercise jurisdiction over any new federal-law domestic relations claims that Congress has steered to the lower federal courts.⁷² Justice Blackmun called attention to the Court's ham-handedness, showing that the rules of interpretation on which the Court relied were equally applicable to federal-question claims as to diversity proceedings.⁷³ Although Justice Blackmun would have required federal courts to abstain from hearing matters within the domestic relations exception (thus reaching a conclusion similar to that of the majority), his

69. The statute might, for example, link federal power to estates with property in more than one state and an asset value in excess of \$10 million. On the scope of Congress's commerce power, see *supra* note 25.

70. 504 U.S. 689, 695–704 (1992).

71. *Id.* at 695–96. The Court noted that its appellate jurisdiction, previously extended to the review of domestic relations decisions of federal legislative courts, would be threatened by an Article III exception. *Id.* at 696–97.

72. For a partial list of such federal question statutes, see *id.* at 715 n.8 (Blackmun, J., concurring) (listing some six federal statutes that regulate aspects of the parent-child relationship). Since Blackmun's concurrence, new treaty obligations have added new domestic relations cases to the federal docket. See, e.g., *Chafin v. Chafin*, 133 S. Ct. 1017, 1022 (2013) (discussing the role of the federal courts under the International Child Abduction Remedies Act, in which they exercise the functional equivalent of concurrent jurisdiction over child custody disputes).

73. *Ankenbrandt*, 504 U.S. at 715 n.8.

separate opinion highlights the role that the principle of coextensivity likely played in the majority's decision.⁷⁴

One final point deserves brief mention as we conclude our discussion of the law-and-equity limits of Article III. As Judge Weinstein observed long ago in *Spindel v. Spindel*,⁷⁵ a domestic relations case, the Constitution's law-and-equity limits apply only to cases arising under federal law. No similar limits apply to the Article III grant of jurisdiction over controversies between citizens of different states.⁷⁶ Weinstein drew the logical conclusion: even if the law-and-equity limits were deemed to exclude ecclesiastical matters from Article III, the limits would not apply to matters brought within the diversity jurisdiction of the federal courts. Weinstein thus raised the possibility, disquieting from a coextensivity perspective, that the Article III power of federal courts was potentially broader in diversity than in federal question proceedings and could well embrace ecclesiastical matters governed by state law.

B. Federalism

Because state law and state courts control many aspects of the distribution of a decedent's property, traditional notions of federalism may tend to encourage the view that the federal courts lack power to entertain probate proceedings. At the time of the Framing, state court systems handled probate matters, and few would have anticipated the wholesale transfer of probate proceedings from state to federal court. That, no doubt, helps to explain why the Framers of Article III did not bother to address the power of the federal courts in relation to probate matters; they likely had no reason to ponder a federal role as the initial point of contact in probate issues. For the same reason, the Framers were unlikely to have chosen the omission of ecclesiastical jurisdiction from the federal jurisdictional menu as a way to ward off the possible assertion of federal probate authority.

On occasion, the Court has suggested that this tradition of state control may erect a constitutional barrier to federal judicial involvement. Thus, in *Glidden Co. v. Zdanok*, it distinguished the relatively broad judicial power of federal courts in the District of Columbia from the more narrow authority of federal courts located in one of the states.⁷⁷ The Court characterized this narrow authority as

74. See *id.* at 716–17 (collecting the federal question matters that could have been threatened by a broad domestic relations exception to Article III).

75. 283 F. Supp. 797 (E.D.N.Y. 1968).

76. *Id.* at 800–01.

77. 370 U.S. 530, 581 (1962).

stemming from “limitations implicit in the rubric ‘case or controversy’” and described both domestic relations and probate matters as illustrations of the sort of proceedings that were “traditionally within the domain of the States.”⁷⁸

The *Glidden* Court stopped well short of holding that the Constitution bars the federal courts from entertaining probate proceedings. Its discussion simply sought to illustrate, in the context of a dispute that failed to implicate the probate or domestic relations exception, that the power of the federal courts in the District was potentially broader than that of federal courts in the states.⁷⁹ The discussion of probate was unnecessary to the decision of the case and thus qualifies as dicta. More recent decisions, including *Ankenbrandt*⁸⁰ and *Marshall*,⁸¹ discuss the domestic relations and probate exceptions entirely in statutory terms and disclaim any constitutional underpinnings to the doctrine. Time has thus apparently marched on since *Glidden*’s dicta, erasing any perceived federalism-based limits on the scope of federal judicial power. As we noted above, the principle of coextensivity helps to explain this change. So long as the federal government can regulate aspects of the probate of decedents’ estates or enter into treaties that implicate probate matters, its power to confer jurisdiction on the federal courts to hear any resulting disputes follows as a matter of course.⁸²

The Court’s most recent decisions tend to confirm that federalism does not operate as an independent limit on the scope of the judicial power to consider probate or domestic matters. Consider

78. *Id.* at 581 & n.54. In earlier cases the Court noted that probate law was entirely created by the states to help define the limits of federal jurisdiction in probate matters. *See Ellis v. Davis*, 109 U.S. 485, 497 (1883):

The original probate, of course, is [a] mere matter of state regulation, and depends entirely upon the local law; for it is that law which confers the power of making wills, and prescribes the conditions upon which alone they may take effect; and as, by the law in all the states, no instrument can be effective as a will until proved, no rights in relation to it, capable of being contested between parties, can arise until preliminary probate has been first made.

See also Barber v. Barber, 62 U.S. 582, 602 (1858) (Daniel, J., dissenting) (arguing on federalism grounds against a federal judicial role in domestic relations).

79. The case dealt with the status of the Court of Claims and the Court of Custom Appeals as Article III courts, concluding that their power to entertain some matters outside the scope of the typical federal court docket did not deprive them of Article III status. *See Glidden Co.*, 370 U.S. at 572–73.

80. *Ankenbrandt v. Richards*, 504 U.S. 689, 698–701 (1992).

81. *Marshall v. Marshall*, 547 U.S. 293, 306–07 (2006).

82. Thus, Congress has assigned some custody litigation to federal court in the course of implementing the Hague Convention on International Aspects of Child Abduction. *See Chafin v. Chafin*, 133 S. Ct. 1017, 1022 (2013).

the decision in *Adoptive Couple v. Baby Girl*.⁸³ There, applying the Indian Child Welfare Act,⁸⁴ the Court reviewed a state court's resolution of an action brought by an enrolled member of the Cherokee Nation who claimed rights as the father of a child adopted by a non-Indian couple in South Carolina. The majority did not address the possibility that the state court's interpretation of this federal statute in the context of a child custody determination fell within the domestic relations exception to Article III.⁸⁵ Justice Thomas did raise constitutional doubts in his concurrence, but he based his argument on his view that Congress lacks power under the Indian Commerce Clause to regulate the parental rights of tribal members.⁸⁶ Similarly, in another case the Court noted the domestic relations context in which a recent dispute arose over an ex-spouse's entitlement to the death benefits of a federal employee.⁸⁷ But that context did not debar federal adjudication, it merely created a "presumption against pre-emption" of somewhat limited strength.⁸⁸ The current framework thus suggests that, in both the probate and domestic relations context, familiar rules of constitutional interpretation will define the scope of Congress's regulatory authority and the preemptive effect of its enactments under the Supremacy Clause. If federal law passes muster under these tests, thereby overcoming federalism-based arguments for local control, no Article III objection will arise to block federal adjudication.

C. Cases and Controversies

Having thus dismissed traditional "law and equity" and federalism-based explanations for the probate exception, we turn next to examine the "case or controversy" requirement as a possible Article III basis for the exception. The Supreme Court has long held that Article III "confines the judicial power of the federal courts to deciding actual 'Cases' or 'Controversies.'"⁸⁹ Moreover, it has defined the case-

83. *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2565 (2013) (interpreting the Indian Child Welfare Act to reverse the decision of the state supreme court).

84. Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901–1963 (2014).

85. *See Adoptive Couple*, 133 S. Ct. at 2559.

86. *See id.* at 2566–67 (Thomas, J., concurring) (explaining that the Indian Commerce Clause does not provide Congress with a source of power to regulate non-economic activity, such as parental rights).

87. *Hillman v. Maretta*, 133 S. Ct. 1943, 1950 (2013).

88. *Id.* (quoting *Egelhoff v. Egelhoff*, 532 U.S. 141, 151 (2001)). As it turns out, the presumption was overcome in the particular case and the Court found that a Virginia statute was preempted. *See id.* at 1953.

89. *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2661 (2013).

or-controversy requirement to require the appearance of adverse parties. Probate proceedings often begin with a simple application for the admission of a will to probate, a proceeding known historically as probate in the common form. Unless someone appears to contest the admission of the will to probate (thereby triggering a will contest between adverse parties), the proceeding may continue on an *ex parte* basis. The Supreme Court has occasionally suggested that the adverse-parties requirement may prevent the federal courts from entertaining such an *ex parte* proceeding.⁹⁰ (We return to these cases in part IV.)

A second, related objection arises from the administrative character of much of the work performed in a typical probate proceeding. Once a court has admitted a will to probate, it will typically name a personal representative to act as a fiduciary in collecting and distributing the assets of the decedent's estate. The personal representative's administrative process may entail litigation, either to defend the estate from the claims of creditors or to prosecute claims on behalf of the estate against the decedent's debtors. Such *inter partes* disputes have frequently appeared on the dockets of the federal courts when the requirements of diversity were satisfied.⁹¹ Sometimes, however, no such disputes will arise, thus depriving the proceeding of any adverse quality. The probate court eventually issues an order to approve the distribution of the estate's assets in accordance with the terms of the will, providing the personal representative with a measure of immunity from future claims. In most cases, one assumes, probate proceedings begin and end without any disputation.

The uncontested nature of many probate proceedings poses a challenge to federal cognizance and a problem of jurisdictional theory. If, as the Court has sometimes suggested, the adverse-party rule applies inflexibly and with equal force to all matters brought before Article III courts, the rule could create a substantial gap in, or probate exception to, federal judicial power. But we do not believe such an across-the-board adverse-party rule has been consistently applied. To

90. See *Ellis v. Davis*, 109 U.S. 485, 497 (1883):

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.

For Judge Posner's echo of this perception, see *infra* note 176.

91. See Winkler, *supra* note 2, at 117–25 (tracing the evolution of federal diversity jurisdiction over *inter partes* disputes over assets subject to probate administration).

the contrary, Congress has repeatedly conferred judicial power on the federal courts to hear uncontested or *ex parte* proceedings, and the Supreme Court has repeatedly validated the exercise of judicial power over such matters. Far from an anomalous departure from a thoroughgoing adverse-party rule, these instances of federal *ex parte* or administrative practice represent illustrations of a heretofore obscure form of federal jurisdiction known as “noncontentious” jurisdiction. Rooted in Roman-canonical procedure and incorporated into the civil law codes of Europe, noncontentious jurisdiction also took hold in the equity, admiralty, and ecclesiastical practice of the courts of England and in the legal practice of British North America.

For reasons that one of us develops at greater length elsewhere,⁹² we think the practice of noncontentious jurisdiction by the courts of the United States has become too deeply embedded to dismiss as anomalous or aberrational. At least four separate arguments support this conclusion. First, the Framers were quite familiar with court systems that did not invariably insist on full party adverseness as a condition of the exercise of judicial power.⁹³ Second, in the years immediately after the framing, Congress assigned, and the federal courts agreed to hear, a range of *ex parte* proceedings.⁹⁴ Third, the federal courts continue to hear a variety of *ex parte* and nonadverse matters, suggesting that the adverse-party rule should be understood, pace Justice Kennedy, as a prudential element of federal justiciability law⁹⁵ rather than an ironclad requirement of Article III.

92. See Pfander & Birk, *supra* note 23 (listing applications for search and FISA warrants, uncontested bankruptcy proceedings, and subpoenas, among others, as proceedings that lack adverse parties).

93. The Roman law tradition included both contentious and noncontentious jurisdiction within the judicial power. Noncontentious or voluntary jurisdiction typically entailed an *ex parte* application for a judicial decision or certification of some sort. Many judicial proceedings in the civil law tradition thus included *ex parte* features, including proceedings in admiralty and certain forms of proceeding before the Scottish Court of Session, the high court of Scotland.

94. Thus, Congress assigned the federal circuit courts to hear *ex parte* pension petitions of disabled war veterans, an authority the Justices refused to exercise due to a lack of finality. For an account, see James E. Pfander, *Judicial Compensation and the Definition of Judicial Power in the Early Republic*, 107 MICH. L. REV. 1, 6 (2008). In addition, Congress in 1790 authorized aliens to seek naturalized citizenship by filing *ex parte* petitions and accompanying evidence with the federal district courts. See James E. Pfander & Theresa R. Wardon, *Reclaiming the Immigration Constitution of the Early Republic: Prospectivity, Uniformity, and Transparency*, 96 VA. L. REV. 359, 359–441 (2010). In neither instance did the judges suggest that the absence of adverse parties foreclosed their consideration of the petitions.

95. For a list of the matters that federal courts consider on an *ex parte* basis today, see Pfander & Birk, *supra* note 23. Justice Kennedy’s opinion for the Court in *United States v. Windsor* described the adverse-parties requirement as a prudential element of the Court’s justiciability doctrines. See 133 S. Ct. 2675, 2687 (2013); see also *Hohn v. United States*, 524 U.S. 236, 243 (1998) (finding that an *ex parte* application for a certificate of appealability was a “case” in the Courts of Appeals for purposes of the Court’s own certiorari jurisdiction).

To provide a concrete example, the federal courts perform the functional equivalent of probate oversight in connection with bankruptcy proceedings.⁹⁶ Bankruptcy filings begin with a petition that may, or may not, be contested.⁹⁷ Debtors often secure uncontested discharges of their obligations; if the debtor has no assets, creditors have little reason to participate. Scholars have argued that *ex parte* bankruptcy proceedings test the limits of the Article III adverse-party requirement, but we have yet to hear *judicial* doubts about their constitutionality.⁹⁸

Fourth and perhaps more significantly, the Court's own decisional law upholds the power of the federal courts to hear *ex parte* proceedings.⁹⁹ In the leading case, *Tutun v. United States*, the Court addressed the question whether it was permissible for Article III courts to entertain *ex parte* petitions for naturalization. The Court upheld the federal judicial role, pointing to a history that dated to early naturalization laws in the 1790s and to the possibility that the United States might appear as an adverse party in any particular case.¹⁰⁰ Some argue that the Court's construct of potential adverseness may be available in bankruptcy to sustain an *ex parte* proceeding;¹⁰¹ after all, creditors might come forward to contest any bankruptcy petition. Similarly, an *ex parte* probate petition may lead to a will contest and a change from a common to a solemn form proceeding.¹⁰² Indeed, one suspects that heirs and legatees appear more frequently in will contests than did the United States in nineteenth-century naturalization proceedings. To the extent potential adverseness

96. See Ralph Brubaker, *On the Nature of Federal Bankruptcy Jurisdiction: A General Statutory and Constitutional Theory*, 41 WM. & MARY L. REV. 743, 833–34 (2000) (explaining that federal common law granted subject-matter jurisdiction over bankruptcy pleadings through diversity jurisdiction, which then extended jurisdiction to allow courts to consider any claims by the debtor's creditors).

97. *Id.*; cf. Ralph E. Avery, *Article III and Title 11: A Constitutional Collision*, 12 BANKR. DEV. J. 397, 417–18 n.137 (1996) (arguing that the bankruptcy petition itself, and various other aspects of bankruptcy practice, do not present justiciable controversies).

98. *Id.*; see Brubaker, *supra* note 96; cf. Avery, *supra* note 97.

99. See *Tutun v. United States*, 270 U.S. 568, 577 (1926) (holding that federal courts have jurisdiction to consider *ex parte* naturalization petitions and observing that the United States is “always a possible adverse party.”). Although the *Tutun* Court faced an issue concerning the scope of appellate jurisdiction, it resolved that issue by treating *ex parte* naturalization petitions as “cases” within the meaning of Article III. See *id.* at 576–77.

100. *Id.*

101. See Pfander & Birk, *supra* note 39.

102. See *Ellis v. Davis*, 109 U.S. 485, 496–97 (1883) (outlining differences in probate procedures throughout the states and weighing their effects on possible arguments for and against establishing subject-matter jurisdiction in federal courts). For more on the historical origins of the relationship between common form and solemn form probate proceedings, see *infra* Part III.B.2.

operates as a cure to any shortage of party adverseness, in short, it could save the federal judicial role in probate from any Article III challenge.

For several reasons, however, we do not believe that the presence of potential adversaries can explain the power of the federal courts to entertain *ex parte* matters. First, the cases do not consistently articulate such a theory in the course of upholding the exercise of noncontentious jurisdiction; even in *Tutun*, Justice Brandeis mentioned potential adverseness in an offhand, makeweight sort of way. Second, the Court's Article III case-or-controversy jurisprudence does not recognize the viability of arguments based on potential interests. Indeed, in one of the Court's most 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.¹⁰³ Ripeness decisions point in the same direction, rejecting the idea that a future disagreement can support the invocation of the judicial power.¹⁰⁴ On this view, a potential future adversary cannot confer power over a pending case any more than the prospect of hypothetical future injury can confer standing and ripeness in a case where they are lacking.¹⁰⁵

How then can one square *ex parte* practice with the adverse-party requirement? We believe the answer lies in the very different language that Article III uses in conferring judicial power on the courts of the United States in "cases" and "controversies." As we have seen, the term "cases" as used in the judicial article extends to claims of right that touch upon the Constitution, laws, or treaties of the United States.¹⁰⁶ We believe that federal courts can administer federal

103. *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013) (alteration in original) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)).

104. See *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128 n.8 (2007) (requiring a sufficiently immediate injury to create an actual controversy requiring immediate relief); F. Andrew Hessick, *Probabilistic Standing*, 106 NW. U. L. REV. 55, 65–66 (2012) (arguing that probabilistic injuries should be regarded as satisfying the standing requirement).

105. An intriguing opinion from the Office of Legal Counsel, 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 Honorable 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. *Id.*

106. See *Osborn v. Bank of U.S.*, 22 U.S. (9 Wheat.) 738, 819 (1824) (Marshall, C.J.) (explaining that the judicial power in cases arising under the constitution, laws, and treaties of

law by hearing *ex parte* claims under procedures adopted by Congress (such as naturalization petitions upheld in *Tutun v. United States*¹⁰⁷). But this power of administration likely extends only to cases that implicate federal law. Federal jurisdiction over “controversies,” by contrast, extends only to the resolution of disputes between adversaries. When state law supplies the rule of decision and jurisdiction depends on the alignment of the parties, the federal courts can play only a dispute-resolution role. We believe in short that the power of the federal courts to entertain original *ex parte* proceedings comes into play only when the claim rests upon federal law.¹⁰⁸

A surprisingly substantial body of evidence supports this claim. Thus, in practice, the federal courts have entertained original *ex parte* applications for judicial recognition of rights conferred by federal law (such as naturalization petitions and pension applications), but they have consistently required disputes over matters governed by general or state law (such as equity receiverships and probate matters). Apart from practice, the text and early interpretation of Article III support the suggested distinction between “cases” (which encompass original *ex parte* applications) and “controversies” (which do not). The term “case” does not connote the presence of an opposing party in quite the same way that the term “controversy” does. Indeed, leading interpretations of the term “case” were phrased in terms broad enough to encompass *ex parte* submissions. Chief Justice Marshall explained that the judicial power was “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.”¹⁰⁹ It appears that

the United States “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”). For an account of Chief Justice Marshall’s theory of a case, see Pfander & Birk, *supra* note 23.

107. 270 U.S. 568, 577 (1926) (treating an *ex parte* application to federal district court for naturalized citizenship as a case arising under federal law within the power of the federal district courts). For an account of *Tutun*, see Pfander & Birk, *supra* note 23.

108. In our view, federal courts that first obtain jurisdiction over a dispute can exercise ancillary noncontentious jurisdiction over certain uncontested matters that crop up in the course of resolving that dispute. Thus, the federal courts must approve uncontested class action settlement agreements, *see* Fed. R. Civ. P. 23(e), and conduct *ex parte* proceedings in connection with the entry of default judgments, *see* Fed. R. Civ. P. 55, even where the claims at issue rest on state law. Similarly, suits brought by creditors to enforce rights based on state or common law could result in the initiation of equitable receiverships and the often substantial administrative chores they entail. *See, e.g.,* Riehle v. Margolies, 279 U.S. 218 (1929). The limit on judicial power thus applies to the exercise of jurisdiction over an original petition that appears, uncontested, in federal court, such as a voluntary petition in bankruptcy.

109. The full quote reads as follows:

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

Marshall, who was later to proclaim an *ex parte* order granting naturalized citizenship conclusive as the “judgment” of a court of record,¹¹⁰ phrased the definition of “cases” to sweep in noncontentious claims of right by a single party, rather than just contentious claims between opponents.

If we correctly understand the case-controversy distinction, Article III has rather straightforward implications for the power of federal courts to entertain probate proceedings. We see no barrier to the exercise of probate jurisdiction under a federal law enacted pursuant to a proper source of congressional power. Just as federal bankruptcy proceedings have long entailed the exercise of both contentious and noncontentious jurisdiction, we believe that the power of Article III courts over a federalized body of probate law could include consideration of uncontested common form probate applications. Uncontested probate applications arising under such a federal law should present a “case” within the judicial power, just as uncontested naturalization petitions did in the nineteenth century. When state law provides the rule of decision and jurisdiction depends on the alignment of the parties, however, Article III permits the federal courts to play only a dispute-resolution role. In other words, the durable distinction between *ex parte* probate matters (which the state courts routinely control) and *inter partes* disputes between the estate and its heirs, creditors, and legatees may well reflect the

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.

Osborn, 22 U.S. at 819; see also *Cohens v. Virginia*, 19 U.S. 264, 408 (1821) (defining the term suits to include “all cases where the party suing claims to obtain something to which he has a right”). 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 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.” JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION 485 (1858). For both Marshall and Story, then, the key to a “case” was the assertion of a federal question claim of right in the form prescribed by law. *Id.*; see also *Osborn*, 22 U.S. at 819.

110. 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. 393, 402 (1830) (argument of counsel) (contending that naturalization proceedings were not judicial but merely “ministerial”; 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: “In the performance of this duty, the judge exercises judicial functions, and is bound by the same rules of evidence, as in other cases.” *The Margareta*, 16 F. Cas. 719, 721 (1815).

limited *constitutional* power of federal courts to entertain original *ex parte* administrative proceedings grounded in state law.¹¹¹

Similarly, the requirement that courts in probate proceedings appoint a personal representative or executor to collect and distribute the assets of the estate does not appear to pose an insurmountable obstacle to federal management of probate estates. The Appointments Clause of Article II clearly empowers Congress to invest the appointment of “inferior officers” in the “courts of law.”¹¹² The federal courts have long exercised the power to appoint magistrate judges, bankruptcy judges, court clerks, special masters, and others who assist in the litigation process.¹¹³ In response to *Hayburn’s Case*, one of the nation’s earliest encounters with limits on judicial power, Congress identified commissioners (appointed by the federal district courts) as the initial forum for the determination of the pension claims of disabled veterans.¹¹⁴ Federal courts of equity played a similar appointment and oversight role later in the nineteenth century,

111. We distinguish between original *ex parte* applications, such as naturalization petitions, and ancillary *ex parte* proceedings, such as judicial investigation of consent decrees and default judgments. Such ancillary powers of judicial inquiry, though nominally non-contentious, enter federal court as contentious proceedings that typically satisfy the adverse-party requirement. See Pfander & Birk, *supra* note 23.

112. U.S. CONST. art. II, § 2. For an overview of the drafting history and early application of the “court of law” provision, see James E. Pfander, *The Chief Justice, the Appointment of Inferior Officers, and the “Court of Law” Requirement*, 107 NW. U. L. REV. 1125, 1147–49 (2013).

113. See generally *id.* at 1151–53 (describing the congressional enactments authorizing the federal courts to appoint clerks, commissioners, and magistrates). More controversially, in *Morrison v. Olson*, the Supreme Court allowed a specially constituted federal court to appoint independent counsel under the Ethics in Government Act, even though the statute did not place the counsel in a subordinate relationship to the appointing court. See 487 U.S. 654, 660 (1988). The Court first concluded that the interbranch character of the appointment did not pose a constitutional problem. *Id.* at 664. Second, the Court found that the explicit grant of appointment authority in Article II provided the federal courts with a source of appointment authority independent of those that would advance their Article III responsibility for the adjudication of cases and controversies. *Id.* at 676. Both features of the *Morrison* decision have drawn their share of criticism. See *id.* at 697 (Scalia, J., dissenting) (criticizing the Court’s decision to weaken the structural integrity of the separation of powers doctrine); see also MARTIN H. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF FEDERAL POWER* 15–22 (2d ed. 1992). We simply observe that the judicial appointment of an officer to oversee probate proceedings does not implicate either controversial feature of *Morrison*: as an intrabranched appointment that seeks to advance the administration of decedents’ estates, such an appointment would appear to fall squarely within a litigation-centric vision of Article II that even *Morrison*’s sharpest critics have accepted. See *Morrison*, 487 U.S. at 697 (Scalia, J., dissenting) (declining to criticize the majority’s ruling that jurisdiction could be questioned through Article III’s “Case or Controversy” requirement).

114. 2 U.S. (2 Dall.) 408, 409–10 (1792).

appointing equity receivers to control the assets of railroads and other corporate entities in financial crisis.¹¹⁵

In sum, we believe that Article III courts have ample power to hear *ex parte* proceedings, but their noncontentious jurisdiction extends only to disputes brought before the federal courts as federal question “cases” arising under the Constitution, laws, or treaties of the United States. “Controversies,” as described in Article III, do not implicate federal law but instead qualify for federal adjudication based on the identity of the opposing parties. The most common form of “controversy” jurisdiction—that over disputes between citizens of different states—has long been treated as conferring power to resolve disputes rather than to administer the law. Simply put, we do not believe that federal courts can exercise noncontentious jurisdiction when the matter turns on state law and jurisdiction depends on the existence of a controversy. The plain language of Article III appears to have ruled out federal judicial cognizance of *ex parte* and administrative matters of probate. As the next part explains, the Court’s nineteenth-century decisions tend to confirm this account of the probate exception.

III. EXPLORING THE ROOTS OF THE PROBATE EXCEPTION

Nineteenth-century decisions give voice to something like the narrow conception of the probate exception that we have sketched. Those cases certainly recognized a probate exception and assumed, on occasion, that the exception rested on a constitutional foundation.¹¹⁶ But the simple fact remains that Congress had not conferred probate authority on the federal courts, either in federal question “cases” or diverse-party “controversies,” so the Court had no occasion to address the constitutional issue head on.

The relevant statute, the Judiciary Act of 1789, authorized the federal circuit courts to hear only “suits” in “law and equity” between diverse parties;¹¹⁷ no probate authority was conferred. Moreover, Congress implemented this rule with progressively more explicit references to the equity practice and procedure of the English courts of chancery. By tying practice to English conceptions of the scope of equity, Congress ruled out probate proceedings; neither the English common law courts nor the High Court of Chancery admitted wills to

115. For a discussion of federal jurisdiction to appoint receivers, see *Riehle v. Margolies*, 279 U.S. 218, 223 (1929).

116. See discussion *infra* Part III.C.

117. Judiciary Act of 1789, ch. 20, § 12, 1 Stat. 73.

probate or appointed personal representatives to manage decedents' estates.

In this Part, we set the stage for an examination of the leading precedents by quickly recounting the adoption of the federal jurisdictional statute and the rules regulating equity practice. Then we sketch the practice of the courts of law and equity in England, highlighting the areas in which their authority overlapped with that of the ecclesiastical courts in probate matters. With this background in place, we examine the Supreme Court's leading nineteenth century decisions on the power of federal courts to entertain probate proceedings.

A. Lower Federal Courts and the Scope of Equitable Jurisdiction

Congress first implemented Article III in the Judiciary Act of 1789, creating two sets of lower federal courts and staffing the Supreme Court with six Justices.¹¹⁸ District courts were established in each state with but a single district judge and jurisdiction over cases involving the collection of taxes on imported goods, cases of admiralty and maritime jurisdiction, and modest criminal matters.¹¹⁹ The early district courts had no general jurisdiction in equity. Circuit courts were also established in each state, staffed with the state's district judge and one or two circuit-riding Justices.¹²⁰ Circuit courts had broader authority, including power to hear more serious crimes, civil disputes involving aliens, and suits in "law and equity" between citizens of different states where the amount in controversy exceeded \$500.¹²¹ The reference to law and equity gave the circuit courts a measure of authority to hear disputes growing out of decedents' estates but (as we shall see) did not include the power to admit a will to probate.

A series of rules governing practice and procedure further defined the equitable powers of the federal circuit courts, driving them to emulate English practice. The first such rules were rather open-

118. See *id.* Accounts of the Act include JULIUS GOEBEL, JR., HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801, at 457–508 (1969).

119. See *Landmark Judicial Legislation: Judiciary Act of 1789*, FEDERAL JUDICIAL CENTER, http://www.fjc.gov/history/home.nsf/page/landmark_02.html (last visited September 1, 2014), archived at <http://perma.cc/7VZN-4Q54>. See generally 4 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800: ORGANIZING THE FEDERAL JUDICIARY (Maeva Marcus et al., eds., 1992).

120. See *Landmark Judicial Legislation: Judiciary Act of 1789*, *supra* note 119. See generally 4 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800: ORGANIZING THE FEDERAL JUDICIARY, *supra* note 119.

121. See Judiciary Act of 1789, § 12 (establishing federal diversity jurisdiction).

ended. Congress simply declared in 1789 that the “forms and modes of proceedings in causes of equity, and of admiralty and maritime jurisdiction shall be according to the course of the civil law.”¹²² Such language would certainly support, if not compel, resort to English practice in the High Courts of Chancery and Admiralty. A slightly different formulation appeared in 1792; for suits in equity and admiralty, Congress adopted the forms and modes of proceeding “according to the principles, rules and usages which belong to courts of equity and to courts of admiralty.”¹²³ But it added two outs: conferring discretion on the courts themselves to change or supplement the rules and empowering the Supreme Court to prescribe rules to govern proceedings in the lower courts.¹²⁴

Most observers, including the Court, assumed that the statute was meant to adopt the rules of practice of the English court of chancery. Thus, the Court explained in 1818 (in a delicate feat of circumlocution perhaps necessitated by the then-recent memories of the War of 1812) that it considered as controlling the rules of equity practice as they developed in “that country from which we derive our knowledge of those principles.”¹²⁵ So matters remained until 1822, when the Court promulgated a formal set of equity rules to govern practice in the lower federal courts.¹²⁶ Reportedly drafted by Justice Joseph Story, later the author of a well-regarded treatise on equity, the rules of equity bore the distinctive stamp of English law. Later versions of the equity rules appeared in 1842 and 1912.¹²⁷ While the rules evolved, they continued to reflect their English origins. As we discuss next, this English background helps to explain why federal courts, sitting in equity to resolve a controversy between diverse parties, would have viewed themselves as lacking the power to admit wills to probate.

122. Act of Sept. 29, 1789, ch. 21, § 2, 1 Stat. 93–94.

123. Act of May 8, 1792, ch. 36, § 2, 1 Stat. 275–76.

124. *Id.*

125. See *Robinson v. Campbell*, 16 U.S. 212, 222–23 (1818) (explaining that early American principles of equity were derived from those in place in England).

126. See *History of the Federal Judiciary: Equity Jurisdiction in the Federal Courts*, FEDERAL JUDICIAL CENTER, http://www.fjc.gov/history/home.nsf/page/jurisdiction_equity.html (last visited September 1, 2014), archived at <http://perma.cc/QC99-TSAH> (explaining the history of equity jurisdiction in the federal courts).

127. *Id.*

*B. A Sketch of the English Allocation of Jurisdiction over
Probate Matters*

The English legal system was composed of several distinct court systems operating in parallel, including courts of common law, equity, and admiralty as well as ecclesiastical and military courts. Each court had its own powers, procedures, and areas of competence. One consequence of this jurisdictional division of labor was that, depending on the circumstances and the remedy sought, complete relief for a given dispute might require the same parties to litigate the same issues in different courts, creating substantial jurisdictional overlap. Inheritance law was one area of law in which such overlap was common. While ecclesiastical courts had primary jurisdiction over essential probate functions, the courts of common law and equity also entertained suits related to the decedent's property. This Section traces the evolution of probate disputes in England from their medieval origins to their status in 1790, briefly outlines the types of procedures used in probate courts, and finally examines the overlap between such courts and those of law and equity.

1. Medieval Origins

We begin with a look at the work of ecclesiastical courts, which had acquired jurisdiction over probate by the fourteenth century.¹²⁸ In early medieval England, a man's widow and heirs were entitled to inherit portions of his personal property regardless of his wishes, leaving only the remainder free to be devised according to the decedent's final will.¹²⁹ Individuals died "intestate" if they left no final will directing the disposition of all of their goods. Originally the remainder of an intestate decedent's testable personal property went to the king, though the Crown sometimes delegated that right to local lords over their intestate tenants.¹³⁰ At the time it was understood

128. ALISON REPPY & LESLIE J. TOMPKINS, *HISTORICAL AND STATUTORY BACKGROUND OF THE LAW OF WILLS: DESCENT AND DISTRIBUTION, PROBATE AND ADMINISTRATION* 108 (1928).

129. The portions of a decedent's estate reserved in this way were termed the wife and heirs' "reasonable parts." A surviving wife and heirs would each receive one-third of the decedent's personal property, leaving only a third to be devised. In the event that the deceased had no issue, the wife would receive one-half, leaving the other half to be devised. Similarly one-half would go to the heirs in the event that there was no wife. By the old laws of England people could only devise all of their personal property if they left neither spouse nor children. 2 BLACKSTONE, *supra* note 36, at *492. Regardless of how much of a decedent's estate was testable, the decedent's executor had authority to seize the entirety of the estate before distributing the "reasonable parts" and the residue. REPPY & TOMPKINS, *supra* note 128, at 115.

130. 2 BLACKSTONE, *supra* note 36, at *494.

that the “man who dies intestate will probably have died unconfessed,” and so it was thought that his personal property should be put to posthumous use for the benefit of the decedent’s soul, whose fate was otherwise uncertain.¹³¹ Pursuant to that goal, the king gave the church the right to dispose of intestate personal property as it saw fit, since the clergy were most qualified to put such property to pious use in the name of the deceased.¹³²

The church’s interest in the decedent’s personal property shaped probate proceedings, encouraging the ecclesiastical courts to require proof that such wills were valid.¹³³ Should the ecclesiastical court be satisfied with the proof of a will’s validity, it would grant probate (from the Latin *probare*, meaning to prove or demonstrate), “which consisted of a certification by an authorized court that proof of compliance with the law had been made.”¹³⁴ At first, a decedent’s estate was administered directly by church officials.¹³⁵ This evidently resulted in widespread abuse, and so the ecclesiastical court was compelled “to delegate its powers to administrators, whom it was

131. 1 HOLDSWORTH, *supra* note 8, at 626–27.

132. Because “spiritual men are of better conscience than laymen, and that they had more knowledge what things would conduce to the benefit of the soul of the deceased.” 2 BLACKSTONE, *supra* note 36, at *494.

133. REPPY & TOMPKINS, *supra* note 128, at 108–09:

Having jurisdiction over administration, it seemed logical that the ecclesiastical courts should also acquire a right to investigate any circumstances which might deprive them of the benefit of administration, such as a testament, alleged to have been executed by the person deceased. This, of course, called for proof that the testament had been executed, published and attested as the law required, and that the testator possessed a sound and disposing mind at the time.

See also 2 BLACKSTONE, *supra* note 36, at *494:

And, as [the church] had thus the disposition of intestates’ effects, the probate of wills of course followed: for it was thought just and natural, that the will of the deceased should be proved to the satisfaction of the prelate, whose right of distributing his chattels for the good of his soul was effectually superseded thereby.

Some local lords or boroughs evidently retained rights to their tenant’s intestate personal property even after the king gave most such rights to the church. In those areas it was the local manor courts rather than the ecclesiastical courts which would determine the validity of wills, since it was the local authorities rather than the church which stood to gain intestate property should the will prove invalid. See Winkler, *supra* note 2, at 84 n.29 (explaining reasoning allowing local manor courts in England to determine validity of wills as opposed to ecclesiastical courts).

134. REPPY & TOMPKINS, *supra* note 128, at 109.

135. Initially, after distributing the personal property belonging to spouses and heirs, the church kept the entire residue of the estate without paying any of the decedent’s debts. 2 BLACKSTONE, *supra* note 36, at *495. The first significant check on the church’s authority in this area was a statute mandating that the church first pay the decedent’s debts before taking the residue. *Id.* Nevertheless, abuse and fraud continued to be prevalent for as long as the church directly administered estates. *Id.*; see also 1 HOLDSWORTH, *supra* note 8, at 627. (noting distribution of property by the church was often marked by fraudulence until legislative interference).

obliged to appoint from among the relatives of the deceased.”¹³⁶ Thus even after the church lost the ability to directly dispose of intestate estates as it saw fit, it retained jurisdiction both to grant probate to wills and, should no will be proved, to issue letters of administration designating a personal representative of the intestate estate who would then be responsible for its lawful distribution.¹³⁷

The role of the ecclesiastical courts in probate law was thus twofold. If there was a valid will, then the court would officially authorize the executor named therein to take possession of the decedent’s property and distribute it according to the testator’s intent. Otherwise the ecclesiastical court would appoint an administrator. Administrators exercised powers similar to those of executors, save for the fact that there was, by definition, no will or testament to govern distribution of the estate.¹³⁸ Apart from a short interruption during the Interregnum, those two essential features of probate law—granting probate and appointing a personal representative to administer the decedent’s estate—remained in the hands of the ecclesiastical courts well into the nineteenth century.¹³⁹

2. Early Modern England

By the late eighteenth century, English ecclesiastical courts conducted two kinds of probate proceedings: probate in the common form and probate in the solemn form. Probate in the common form was an *ex parte* proceeding that the executor generally initiated upon production of the will.¹⁴⁰ The ecclesiastical court would grant probate upon the oath of the executor as to the validity of the will or, in the event of some irregularity, its proof by affidavit.¹⁴¹ These proceedings

136. 1 HOLDSWORTH, *supra* note 8, at 627.

137. See 2 BLACKSTONE, *supra* note 36, at *495–96 (explaining church’s power to grant probates to wills and appoint administrators).

138. See *id.* at *507. A will was sometimes annexed to an administration after an administrator was appointed, in which case administrators were even more similar to executors. *Id.* One other difference is that administrators were appointed by the ecclesiastical court and had no power to administer an estate until after their appointment, while executors were appointed by decedents in their final will or testament, and could begin executing that instrument without first waiting for it to be probated. *Id.* Of course, should they execute a will later invalidated, the executors would expose themselves to liability. *Id.*

139. During the Interregnum, the Long Parliament replaced ecclesiastical courts with a secular Court for the Probate of Wills and Granting of Administration. 2 ACTS AND ORDS. INTERREGNUM, 1642–1660, at 702–03 (C.H. Firth & R.S. Rait, eds., 1972). For a discussion of the probate reforms considered and ultimately implemented by the Long Parliament, see LLOYD BONFIELD, *DEVISING, DYING AND DISPUTE: PROBATE LITIGATION IN EARLY MODERN ENGLAND* 53–57 (2012).

140. REPPY & TOMPKINS, *supra* note 128, at 112.

141. *Id.*

were not contested, and because no notice was given to the next of kin, parties with an adverse interest were not likely to be present.¹⁴² This process established the prima facie validity of a will by simply confirming that it met with the canon law requirements for a valid will.¹⁴³ Probate in the common form was relatively quick and inexpensive, but it was not binding on future proceedings to probate the will in solemn form.¹⁴⁴ Probate in the common form was not a prerequisite for the initiation of a solemn form proceeding, and in fact, parties foreseeing disputes over the validity of the will would often choose to pursue the solemn form in the first instance.¹⁴⁵

Probate in the solemn form established the final, rather than the prima facie, validity of the will.¹⁴⁶ Unlike at common form, this was a contested *inter partes* proceeding in which all interested parties were notified and given an opportunity to attend and be heard.¹⁴⁷ Executors could initiate this process themselves, though the process was also triggered if any interested party disputed the validity of the will, even if it had already been proved in a prior common form proceeding.¹⁴⁸ Solemn form probate generally followed the canon law rules of procedure used by the ecclesiastical courts,¹⁴⁹ distinct from the adversarial procedures used in English courts of common law or equity. At the conclusion of the proceeding, the court would either grant probate to the will or appoint a representative to administer the estate.

Apart from initial matters of probate and administration, ecclesiastical courts could handle a number of disputes related to the estate. Parties named in the will could bring *inter partes* suits in ecclesiastical court against the executor to collect debts from the decedent's estate,¹⁵⁰ at least where the will mentioned the debt.¹⁵¹ However, limitations on the jurisdiction of the ecclesiastical courts

142. *Id.*; see also BONFIELD, *supra* note 139, at 250–51 (discussing uncontested English ecclesiastical court probate proceedings).

143. See Winkler, *supra* note 2, at 84 n.34 (explaining ecclesiastical courts would use canon law to establish prima facie validity of will).

144. BONFIELD, *supra* note 139, at 251.

145. *Id.*

146. Winkler, *supra* note 2, at 85.

147. REPPY & TOMPKINS, *supra* note 128, at 112.

148. *Id.*

149. The plaintiff (usually the will's advocate) would first make their case and call witnesses, after which the adverse parties would make their allegations and call their witnesses, until finally the judge made a determination. *Id.* at 112–13.

150. *Id.* at 132. Ecclesiastical courts could also demand an inventory of the decedent's estate and an accounting of the administration. *Id.* at 118.

151. Winkler, *supra* note 2, at 85.

meant that some parties could only satisfy their interests in the decedent's estate by pursuing separate actions in England's secular courts. Common law courts handled various debts claims and disputes over the inheritance of land, while the courts of equity oversaw the administration and enforcement of trusts and acted as courts of last resort when remedies were unavailable in other tribunals.

3. Managing the Overlap of Law, Equity, and Probate

We can now sketch the division of judicial labor in England with a view toward better understanding what those who drafted the Judiciary Act of 1789 meant in limiting the federal judicial role to suits in law and equity. Although common law courts had broad jurisdiction over freehold property claims, they did not assert jurisdiction over probate. Indeed, the validity of a will was, at least initially, a matter for ecclesiastical authority alone.¹⁵² Still, common law courts were the primary venue for resolving disputes over the inheritance of freehold property. Under feudal assumptions, ownership of land was thought to pass immediately to one's legal heirs.¹⁵³ Common law courts exercised jurisdiction over title to land through the all-purpose action in ejectment¹⁵⁴ and retained that jurisdiction in the sixteenth century when restrictions on the decedent's ability to transfer freehold property by will and devise were loosened.¹⁵⁵ Common law courts thus came to deal with wills only indirectly, as evidence for use in the course of otherwise proper proceedings.¹⁵⁶

The role of the courts of equity was to provide just relief where no adequate remedy was available in another forum. As remedial gaps appeared during the tug-of-war between the ecclesiastical and common law courts over the remedies they could provide, courts of equity stepped in. Creditors who sought to collect debts from the lands of the deceased found their remedies at law inadequate and turned to

152. See, e.g., *The King v. Inhabitants of Netherseal*, (1742) 100 Eng. Rep. 1006, 1007 (K.B.) (“[N]othing but the probate, or letters of administration with the will annexed, are legal evidence of the will in all questions respecting personality.”); see also Winkler, *supra* note 2, at 84 n.32 (explaining that common law courts could not raise issue of will validity not previously established).

153. Winkler, *supra* note 2, at 82–83.

154. *Id.*

155. Statute of Wills, 1540, 32 Hen. 8, c. 1 (Eng.).

156. See Winkler, *supra* note 2, at 83 n.25 (citing *Eccleston v. Petty*, (1689) 90 Eng. Rep. 650 (K.B.)) (noting that common law courts only determined will validity indirectly and dealt with it similar to validity of a deed).

equity.¹⁵⁷ Having authority to enforce trusts on freehold property, equity came to agree that it had the power to impose and oversee a constructive trust on inherited lands.¹⁵⁸ Chancery also agreed to require detailed accounts from the personal representatives of decedents' estates, after concluding that the alternatives were too highly technical and narrow in scope to provide effective relief.¹⁵⁹ Over time, these roles grew; once an ecclesiastical court had passed on the probate of a will and appointed a personal representative, courts of equity could exercise comprehensive power over most every controversy touching the decedent's estate.¹⁶⁰ There was, in short, nothing inherent in matters of probate or inheritance that blocked courts of law and equity from intervening.

C. The Federal Probate Exception in the Nineteenth Century

Accounts of the American probate exception in the nineteenth century went through two phases. In the antebellum period, the Court adhered fairly closely to English ideas about the proper allocation of probate authority between state probate courts and federal courts exercising diversity jurisdiction over "suits" in "law and equity." Thus, in 1827, the Court declared in *Armstrong v. Lear*¹⁶¹ that state courts exercising ecclesiastical jurisdiction had the exclusive right to probate a will of personal property. Justice Story wrote for the Court, dismissing a case brought in a federal court of equity against an estate administrator because the will had not yet been probated:¹⁶²

By the common law, the exclusive right to entertain jurisdiction over wills of personal estate, belongs to the ecclesiastical Courts, and before any testamentary paper of personalty can be admitted in evidence, it must receive probate in those Courts. . . . [T]he probate of wills of personalty to belong exclusively to the proper [probate] Court here, exercising ecclesiastical jurisdiction.¹⁶³

A few years later the Court reiterated that the "courts of the United States have no probate jurisdiction" in *Fouvergne v. City of New Orleans*, holding that state probate court decisions on the validity of a

157. REPPY & TOMPKINS, *supra* note 128, at 148.

158. *Id.*

159. *See id.* at 148–49 (describing the role of Chancery in bringing estate administrators to account).

160. *Id.* To be sure, some cases suggest that courts of equity had no power to set aside a will once it had been established in ecclesiastical court because parties could always obtain adequate relief in another forum. *See, e.g.,* *Kerrich v. Bransby*, (1727) 3 Eng. Rep. 284, 286 (H.L.) (casting doubt on Chancery's power to entertain a will contest).

161. 25 U.S. 169 (1827).

162. *Id.* at 175–76.

163. *Id.*

will be conclusive and that challenges to such findings must be brought in state, not federal, court.¹⁶⁴

Neither of these cases specified the reason that federal courts were incompetent to hear probate matters, and neither expressly invoked constitutional limits. But one can see at least three ideas at work in these early accounts: that federal courts lack ecclesiastical jurisdiction; that federal courts have been limited by statute to suits in law and equity; and that federal courts, applying principles of federalism, should defer to state court primacy. Truthfully, the antebellum jurist may have believed all three ideas to be self-evident. Later cases certainly make clear that the exclusive nature of probate jurisdiction could just as easily arise from the technical limitations on the powers of courts of equity as from the lack of ecclesiastical jurisdiction or the perceived primacy of state law.

During the latter half of the nineteenth century, the Court introduced a new element into its account of the probate exception. Rather than the limits of equity or lessons of federalism, the Court came to emphasize the distinction between the “controversies” or *inter partes* disputes that were proper for federal adjudication and the sort of *ex parte* or administrative work that federal courts could not undertake in probate matters. Consider *Gaines v. Fuentes*,¹⁶⁵ which arose from the attempted removal to federal court of a state suit concerning the validity of a Louisiana landowner’s will.¹⁶⁶ In explaining why removal was proper, the Court explained that:

The Constitution imposes no limitation upon the class of cases involving controversies between citizens of different States, to which the judicial power of the United States may be extended; and Congress may, therefore, lawfully provide for bringing, at the option of either of the parties, all such controversies within the jurisdiction of the Federal judiciary.¹⁶⁷

...

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

164. 59 U.S. 470, 473 (1855) (citing *Tarver v. Tarver*, 34 U.S. 174, 179–80 (1835), which earlier had supported the same proposition by reference to *Armstrong v. Lear*). Later still, a decedent’s next of kin challenged the issuance of letters of administration by a state probate court in a federal equity proceeding. See *Caujolle v. Ferrié*, 80 U.S. 465, 465 (1871). The Court dismissed the challenge, holding that federal courts sitting in equity were bound by the determinations of a state probate court on the matter of who should administer an estate, resting the decision on the fact that such actions by an ecclesiastical court in England would be binding on English chancery courts. See *id.* at 473–74.

165. 92 U.S. 10, 10 (1875).

166. *Id.*

167. *Id.* at 18.

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.¹⁶⁸

These passages by Justice Stephen Field 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 nonadversarial character.¹⁶⁹

Subsequent cases echo Justice Field's idea that the exception applies to the nonadversary or administrative quality of probate proceedings. Consider the account in *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.¹⁷⁰

168. *Id.* at 21–22.

169. The majority in *Gaines* implied that any exception to federal jurisdiction in matters of probate was statutory, but Justice Bradley in dissent was far more specific, declaring that the statutory grant of federal diversity jurisdiction extended only to suits in law and equity, and that probate matters were not included in this grant because they were resolved in ecclesiastical courts, not those of law or equity:

Now, the phrase, "suits at common law and in equity," . . . must be construed to embrace all litigations between party and party which in the English system of jurisprudence, under the light of which the Judiciary Act, as well as the Constitution, was framed, were embraced in all the various forms of procedure carried on in the ordinary law and equity courts, as distinguished from the ecclesiastical, admiralty, and military courts of the realm. The matters litigated in these extraordinary courts are not, by a fair construction of the Judiciary Act, embraced in the terms "suit at law or in equity," . . . This court has in repeated instances expressly said that the probate of wills and the administration of estates do not belong to the jurisdiction of the Federal courts under the grant of jurisdiction contained in the Judiciary Act; and it may, without qualification, be stated, that no respectable authority, in the profession or on the bench, has ever contended for any such jurisdiction. . . . The controversy is not of that sort or nature which belongs to the category of a suit at law or in equity, as those terms were used in the Judiciary Act.

Id. at 24–25 (Bradley, J., dissenting). Justice Bradley was careful to say that contested probate proceedings could constitutionally be removed to federal court should Congress pass a new statute conferring diversity jurisdiction over controversies without the law and equity restriction. *Id.*:

Whether, after a will is proposed for probate, and a *caveat* has been put in against it, and a *contestatio litis* has thus been raised, and a controversy instituted *inter partes*, Congress might not authorize the removal of the cause for trial to a Federal court, where the parties *pro* and *con* are citizens of different States, is not now the question. The question before us is, whether Congress has ever done so; and it seems to me that it has not.

170. 109 U.S. 485, 497 (1883).

The *Ellis* Court thus confirmed that the federal judiciary could hear any *inter partes* dispute, so long as the statutory diversity requirements were met. At the same time, the Court specified that the “original” or “preliminary” probate must occur in a state court because controversies could arise only over rights flowing from a will, rights that did not exist until created by a grant of probate in state court that often, and perhaps typically, resulted from an *ex parte* proceeding.¹⁷¹

By far the most provocative articulation of the *ex parte* account of the probate exception appears in *Byers v. McAuley*, a decision in which the Court overturned a lower federal court’s decision to impose equitable administration on the estate of a decedent.¹⁷² The Court recognized that federal courts have power to perform comparable administrative chores when they oversee equitable receiverships to restructure the affairs of a corporation for the benefit of creditors. Such receiverships, though predicated on a diverse-party dispute, were understood as empowering the court to take control of the property of the debtor corporation as a *res* and to exercise ancillary jurisdiction over the claims of nondiverse parties. But, as the Court explained, such an expansive view of federal equity did not extend to decedents’ estates:

[In an equity receivership,] [p]ossession of the *res* draws to the court having possession all controversies concerning the *res*. If original jurisdiction of the estates of deceased persons were in the federal court, it might, by instituting such an administration, and taking possession of the estate through an administrator appointed by it, draw to itself all controversies affecting that estate But it has no original jurisdiction in respect to the administration of a deceased person. It did not, in this case, assume to take possession of the estate in the first instance; and it cannot, by entertaining jurisdiction of a suit against the administrator, draw to itself the full possession of the estate, or the power of determining all claims against it.¹⁷³

For the *Byers* Court, the power to administer decedents’ estates derives from the power to appoint the administrator in the initial, often *ex parte*, proceeding to admit the will to probate. If, hypothetically, the federal courts were given original jurisdiction over

171. *Id.*:

The original probate, of course, is mere matter of state regulation, and depends entirely upon the local law; for it is that law which confers the power of making wills, and prescribes the conditions upon which alone they may take effect; and as, by the law in all the states, no instrument can be effective as a will until proved, no rights in relation to it, capable of being contested between parties, can arise until preliminary probate has been first made.

See also *O’Callaghan v. O’Brien*, 199 U.S. 89, 110 (1905) (distinguishing pure probate from *inter partes* proceedings).

172. 149 U.S. 608 (1893).

173. *Id.* at 619.

the initial probate application, the Court suggests that they could probate the will and oversee the administration. But lacking the power to hear the initial petition under jurisdictional grants that encompass only state-law controversies and confer no original federal probate jurisdiction, federal courts cannot take over the administrative duties from the state courts. Simple rules of equitable priority require federal deference.¹⁷⁴

The Court's focus on the administrative quality of the initial probate application helps to explain why it rejected federal judicial power over probate estates and yet agreed to exercise a similar power in the context of equity receiverships. On the surface, the two proceedings bear some resemblance; both involve matters of state law and the exercise of administrative judicial power. But the typical equitable receivership began as a bill in equity, brought by a creditor against a debtor corporation. Federal jurisdiction was thus based not on the submission of an *ex parte* petition for probate and administration but on the presence of a dispute between diverse citizens.¹⁷⁵ The receivership, if one was imposed, was viewed as an equitable remedy; instead of execution on the property of the debtor, the receivership operated much like a debtor-in-possession bankruptcy proceeding in which the firm remained intact, its obligations were restructured, and the pain was shared among stakeholders. While the administrative processes were similar, the equity receivership began with a controversy, whereas the probate proceeding began with an *ex parte* application for proof of the will.

In drawing this distinction, the *Byers* Court gave voice to principles very much in keeping with our own conception of the power of federal courts to exercise noncontentious jurisdiction. As to matters of federal law, Congress has power to convey administrative or noncontentious jurisdiction on the federal court to hear *ex parte* "cases," such as the naturalization petitions upheld in *Tutun*. Administrative power also extends on an ancillary or incidental basis to remedial matters that arise in the course of proceedings otherwise properly before the federal court, such as equity receiverships. But so long as state law continues to govern the effectiveness of a will, initial power to admit wills to probate remains a matter for state judicial administration, and federal courts have no role to play. It takes a controversy to ground the jurisdiction of the federal courts over

174. On the rules of equitable priority as they developed in the context of federal-state concurrent jurisdiction, see James E. Pfander & Nassim Nazemi, *The Anti-Injunction Act and the Problem of Federal-State Jurisdictional Overlap*, 92 TEX. L. REV. 1, 1–73 (2013).

175. On the power of the federal courts to hear friendly equitable receivership petitions, see *In re Reisenberg*, 208 U.S. 90, 107 (1908). See generally Pfander & Birk, *supra* note 23.

matters of state law. Neither Congress nor the state legislatures can assign the federal courts original jurisdiction over *ex parte* applications for the initiation of probate proceedings governed by state law.¹⁷⁶

IV. MAKING SENSE OF THE PROBATE EXCEPTION TODAY

Having proposed a new account of the probate exception as an Article III limit on the power of federal courts to entertain original *ex parte* applications for relief based upon state law, we consider recent decisional law. While our account certainly differs in important respects from that of the Supreme Court in *Marshall v. Marshall*, it would not likely produce a substantial change in the way federal courts have been handling probate issues. Indeed, the lessons of our approach apply most directly to what Congress can and cannot assign to the federal judiciary, and more indirectly to existing statutes that confer (or have been interpreted to confer) only limited power on the federal judiciary. We begin this Part with a sketch of *Marshall* and then take up issues that have divided the lower federal courts.

The Supreme Court's 2006 decision in *Marshall v. Marshall*¹⁷⁷ shows some signs of the judicial minimalism for which the Roberts Court has become known. Avoiding the question whether the probate exception applied to matters brought within the federal bankruptcy jurisdiction of the federal courts, the Court focused instead on the narrow scope of the probate exception. It began by restating its view that federal courts have no statutory diversity jurisdiction to probate or annul a will, administer a decedent's estate, or otherwise "dispose of property that is in the custody of a state probate court."¹⁷⁸ The

176. We thus disagree, in part, with the view of Judge Posner in *Struck v. Cook Cnty. Pub. Guardian*, 508 F.3d 858, 859 (7th Cir. 2007), that:

the modern understanding is that the exception, except insofar as it bars the federal courts from entertaining nonadversary proceedings, such as the uncontested appointment of a guardian or the uncontested probate of a will, which are not cases or controversies within the meaning of Article III, is based on a pragmatic interpretation of the statutes that give the federal courts jurisdiction over cases at law and in equity.

We believe such non-adversary matters could be cases, but not controversies.

177. 547 U.S. 293 (2006).

178. *Id.* at 311–12. As for the *Marshall* Court's suggestion that the power of a federal court does not extend to suits between diverse parties that seek to annul a will, consider *Gaines v. Fuentes*, 92 U.S. 10, 20 (1875). The *Gaines* Court squarely held that the diversity jurisdiction of the federal courts extended to the removal of a "suit" brought in state court to annul a will "as a muniment of title, and to limit the operation of the decree admitting it to probate." *Id.* As the Court explained:

[W]henever 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

Court also refused to credit the state's determination of the exclusivity of its own jurisdiction, reaffirming its earlier holdings that federal jurisdiction can "not be impaired by subsequent state legislation creating courts of probate."¹⁷⁹ Recognizing that the case at hand did not "involve the administration of an estate, the probate of a will, or any other purely probate matter," the Court permitted the assertion of federal jurisdiction by the bankruptcy court.¹⁸⁰ It explained its previously stated concern with "interference" as "a reiteration of the general principle that, when one court is exercising *in rem* jurisdiction over a *res*, a second court will not assume *in rem* jurisdiction over the same *res*."¹⁸¹ This principle of deference to prior custody explains why federal courts cannot "dispose of property that is in the custody of a state probate court."¹⁸² In *Marshall*, however, the tort claim did not threaten the probate court's custody but only sought to impose in personam liability on the beneficiary of the estate.

Our approach would not call for a different result in *Marshall*. To be sure, the *Marshall* Court based the probate exception entirely on statutory grounds,¹⁸³ and we regard the exception as rooted in Article III of the Constitution. But the *Marshall* case did not implicate the constitutional limits we have identified. It was an *inter partes* dispute over tortious interference with a promised bequest and thus clearly satisfied the requirements of party adverseness. Everyone agreed that the initial submission of the will to probate was a subject for the Texas state court to handle. In the absence of any attempt on the part of the federal court to exercise jurisdiction over an *ex parte* proceeding grounded in state law, the probate exception as we have defined it does not come into play. We therefore would agree that the dispute's implication of the estate of a wealthy decedent did not oust the federal bankruptcy court's jurisdiction. While we believe that

there is that they should not take jurisdiction of any other controversy between the parties.

Id. at 22. As *Marshall* observed, however, the *Gaines* decision was apparently limited by later cases that treated a suit to annul as supplemental to the probate court's power to establish the will. See *Marshall*, 547 U.S. at 311 (citing *Sutton v. English*, 246 U.S. 199, 208 (1918)). Yet both *Gaines* and *Sutton* were decided at a time when the Court looked to the structure of state court proceedings to define the scope of the district court's *inter partes* authority. Having correctly concluded that state law cannot oust a district court of its diversity jurisdiction over a genuine dispute, the Court should not give much weight to the *Sutton* Court's finding that Texas did not permit *inter partes* disputes to annul a will.

179. *Marshall*, 547 U.S. at 312–14.

180. *Id.* at 312 (quotation marks omitted).

181. *Id.* at 311.

182. *Id.* at 312.

183. See *id.* at 308–09 (linking probate exception to federal jurisdiction to language in Judiciary Act of 1789).

Congress, having properly federalized the law of probate, could assign probate matters to federal courts for administration as “cases,” we do not believe that the existing federal bankruptcy statute purports to make such an assignment.

We thus believe that Congress retains a great deal of control over the scope of the probate exception, notwithstanding our view that it has roots in the Constitution. And so long as Congress chooses to defer to the state role in probate matters, state court primacy in the administration of the probate estate will do much of the work in defining the practical work-a-day scope of the probate exception. The Court has long required the federal courts to tailor their decrees in diverse-party disputes so as to respect the primacy of the state courts in overseeing probate administration. That was the message of *Markham v. Allen*.¹⁸⁴ After placing the probate exception on statutory grounds, the Court added that federal courts do have “jurisdiction to entertain suits in favor of creditors, legatees and heirs, and other claimants against a decedent’s estate to establish their claims so long as the federal court does not interfere with the probate proceedings or assume general jurisdiction of the probate or control of the property in custody of state court.”¹⁸⁵ In warding off federal “control of the property in custody of a state court,” the Court appears to have built on its earlier *in rem* analogy in an effort to protect the state’s primacy in the administration of estates governed by state law.

A second, and more fundamental, difference may separate our approach from that of the *Marshall* Court. We think Congress has power to authorize the federal courts to entertain a claim based on state law to annul a will, so long as the requisite diversity of citizenship appears between opposing parties.¹⁸⁶ Consider suits to annul a will for fraud. *Marshall* was at pains to exclude such matters from federal cognizance, doing so on the basis of statutory considerations that enjoy a measure of historical support. After all, while equity generally entertained fraud claims of all sorts, a well-established rule prevented equity from taking jurisdiction of such claims in connection with disputes over the validity of wills. Joseph Story explained the rule as follows:

184. 326 U.S. 490 (1946).

185. *Id.* (internal quotation marks omitted).

186. Suits to annul a will can arise as diverse-party controversies and should, on our theory, qualify for federal adjudication. That’s the message of cases from the nineteenth century. *See supra* Part III.

In certain cases, as of fraud in obtaining a will, whether of personal estate or real estate, the proper remedy is exclusively vested in other Courts; in wills of personal estate in the Ecclesiastical Courts, in wills of real estate in the Courts of Common Law.¹⁸⁷

To the extent that one views the probate exception as an outgrowth of the limits of equity, in short, one can readily understand why suits to annul a will for fraud were thought to lie beyond the statutory power of federal courts vested with diversity jurisdiction over suits “in law and equity.” The *Marshall* Court thus adopted an understandable version of an established rule in choosing to treat suits to annul a will as beyond the diversity jurisdiction statute as currently framed.¹⁸⁸

However well supported as a matter of statutory interpretation, the *Marshall* Court’s view of federal power over suits to annul a will has little foundation in Article III. (We suspect the *Marshall* Court would agree, having concluded that the exception rests on statutory grounds that Congress can modify.) Notably, as Judge Weinstein observed in *Spindel v. Spindel*, the controversy bases of jurisdiction in Article III contain no “law and equity” restriction.¹⁸⁹ So long as the suit to annul satisfies the elements of diversity as a “controversy” between citizens of different states, it would seem to qualify for federal jurisdiction under Article III. On this view, Congress could, if it chose, expand the diversity jurisdiction of the federal courts to encompass will contests between contending parties from different states. We certainly do not advocate such an expansion; as a matter of policy, we tend to support restrictions in the scope of diversity jurisdiction, rather than expansions. We simply sketch the possibility as way of highlighting the difference, small but significant, between the broader, statutory probate exception defined in *Marshall v. Marshall* and the narrower, constitutional exception that we see as implicit in the idea of a controversy.

With this background in place, we can now turn to the questions that have divided lower federal courts in the wake of *Marshall*.¹⁹⁰ On the first question, whether the probate exception

187. 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE AS ADMINISTERED IN ENGLAND AND AMERICA 194 (1836). On reviewing Story and other authorities, Professor Langbein accordingly concluded that, when the claim was fraud, “the Chancery was without authority to determine the validity of the execution of a will.” John H. Langbein, *Fact Finding in the English Court of Chancery: A Rebuttal*, 83 YALE L.J. 1620, 1623 (1974).

188. See *Marshall*, 547 U.S. at 311–12.

189. See 283 F. Supp. 797, 800–01 (E.D.N.Y. 1968).

190. One question, whether the probate exception applies to claims under federal law, the Court deliberately sidestepped. See *Marshall*, 547 U.S. at 308 (“Federal jurisdiction in this case is premised on 28 U.S.C. § 1334, the statute vesting in federal district courts jurisdiction in bankruptcy cases and related proceedings.”).

applies to cases arising under federal law,¹⁹¹ we think the answer is mixed. As we noted in Part II, the principle of coextensivity suggests that the Court has the power to oversee on appeal all violations of federal law that occur in connection with state probate proceedings. What's more, we believe that Congress has the power, if it chooses to federalize the law of probate, to assign the *ex parte* chores of probate and administration to the federal judiciary. Federal noncontentious jurisdiction extends to "cases" under Article III.¹⁹² But we do not think that most *current* federal jurisdictional statutes should be interpreted as conferring original jurisdiction on the federal district courts to conduct pure probate proceedings. Those statutes, unlike the naturalization laws and other sources of original noncontentious federal jurisdiction, provide for the resolution of contentious disputes between adverse parties. We see little basis for concluding that these laws seek to displace state court administration of probate estates.¹⁹³

In a second post-*Marshall* puzzle, federal courts have divided in their analysis of the probate exception's application to claims relating to the administration of an *inter vivos* trust and other "will substitutes."¹⁹⁴ Tackling that problem in *Oliver v. Hines*,¹⁹⁵ one district court emphasized the Court's narrow view of the probate exception:

[T]he thrust of the *Marshall* decision makes clear that the scope of the probate exception is limited to actual probate matters. The Supreme Court rejected the repeated

191. Compare *In re Goerg*, 844 F.2d 1562, 1565 (11th Cir. 1988) (holding that the probate exception does not apply to federal question jurisdiction), with *Jones v. Brennan*, 465 F.3d 304, 307 (7th Cir. 2006) (Posner, J.) (holding that the probate exception does apply to federal jurisdiction), and *In re Marshall*, 392 F.3d 1118, 1131–32 (9th Cir. 2004), *rev'd on other grounds*, *Marshall*, 547 U.S. at 311 (extending the probate exception to federal question cases).

192. One might wonder if Congress could simply confer probate jurisdiction on the federal courts so that any claim for probate would arise under the grant of jurisdiction. We think such a jurisdictional statute would run afoul of the principle that cases arise under federal law only when a federal question "forms an ingredient of the original cause." See *Osborn v. Bank of U.S.*, 22 U.S. (9 Wheat) 738, 823 (1824). Jurisdictional grants alone do not supply the requisite ingredient. See, e.g., *Mesa v. California*, 489 U.S. 121, 138–39 (1989) (construing the federal officer removal statute to confer jurisdiction only when the official raises a substantive federal question). For an account of protective jurisdiction, see James E. Pfander, *Protective Jurisdiction, Aggregate Litigation, and the Limits of Article III*, 95 CAL. L. REV. 1423 (2007).

193. Thus, a Kentucky federal bankruptcy court assumed that the probate exception applied with equal force to bankruptcy proceedings and blocked the approval of a settlement agreement that contained a provision nullifying a will, citing *Marshall* for the proposition that federal courts cannot annul a will. See *In re Brown*, 484 B.R. 322, 330–32 (Bankr. E.D. Ky. 2012).

194. Compare *Curtis v. Brunsting*, 704 F.3d 406, 409–10 (5th Cir. 2013) (holding that the probate exception does not apply to trust property because that property never came under the control of a probate court), with *Evans v. Pearson Enters., Inc.*, 434 F.3d 839, 849 (6th Cir. 2006) (holding that refusing to hear cases regarding "will substitutes" is consistent with the probate exception).

195. 943 F. Supp. 2d 634 (E.D. Va. 2013).

expansion of the exception to matters that were merely ancillary to probate. An *inter vivos* trust is not a will, and although it may, on occasion, serve as the functional equivalent of a will, the application of the probate exception to such trusts would mark an unwarranted expansion of the exception.¹⁹⁶

While acknowledging that *inter vivos* trusts and other legal devices may be the functional equivalent of wills that the probate exception would prevent federal courts from adjudicating, *Oliver* permitted federal jurisdiction because the trust was not technically a will.¹⁹⁷ We agree with this reading of *Marshall* and simply add that we would not expect the probate exception to apply to a genuine controversy unless litigation over an *inter vivos* trust were to begin with an initial *ex parte* application to a state court that sought to prove or establish the trust.

A similarly narrow view of the exception emerges from a series of *inter partes* disputes over assets claimed by or from a probate estate. In *United States v. Tyler*, the Third Circuit found that federal jurisdiction extended to an action to recover tax revenue from the sale of a decedent's property, notwithstanding that the property was under the administration of a state probate court.¹⁹⁸ The "judgment was not against any *res* held by the state probate court; it was a judgment *in personam* . . . to pay the government its share of the proceeds."¹⁹⁹ Similarly, in *Curtis v. Brunsting*, the Fifth Circuit held that the probate exception did not apply to a living trust because trusts were not part of the decedent's estate at the time of death and therefore never came under the *in rem* jurisdiction of a state probate court.²⁰⁰ Probate exception decisions in other circuits have similarly turned on whether a state probate court already had control over the property at the center of the dispute, even if those cases do not use the vocabulary

196. *Id.* at 638.

197. *Id.* But see *Chabot v. Chabot*, No. 4:11-CV-217-BLW, 2011 WL 5520927, at *4 (D. Idaho 2011) (concluding that "the probate exception analysis applies to trusts that act as will substitutes"); *Leskinen v. Halsey*, No. CV 12-623(JFB)(ETB), 2013 WL 802915 (E.D.N.Y. Jan. 28, 2013) (broadly interpreting the probate exception as intended to prohibit federal involvement in the administration of decedents' estates).

198. *United States v. Tyler*, 528 Fed. App'x 193, 197 (3d Cir. 2013).

199. *Id.*

200. *Curtis v. Brunsting*, 704 F.3d 406, 409–10 (5th Cir. 2013):

However, nothing suggests that the Texas probate court currently has custody or *in rem* jurisdiction over the Trust. It likely does not. Assets placed in an *inter vivos* trust generally avoid probate, since such assets are owned by the trust, not the decedent, and therefore are not part of the decedent's estate. In other words, because the assets in a living or *inter vivos* trust are not property of the estate at the time of the decedent's death, having been transferred to the trust years before, the trust is not in the custody of the probate court and as such the probate exception is inapplicable to disputes concerning administration of the trust.

of in rem jurisdiction.²⁰¹ Finally, in *Lefkowitz v. Bank of New York*,²⁰² the Second Circuit acknowledged that *Marshall* narrowed the scope of the probate exception.²⁰³ The court accordingly blocked jurisdiction over claims that would wrest control of property from state probate courts²⁰⁴ but allowed claims that did not directly interfere with a state court's possession, including those that "undoubtedly intertwine with the litigation proceeding in the probate courts."²⁰⁵ Overlapping and duplicative adversary proceedings, even those that happen to grow out of a decedent's estate, do not fall within the probate exception.

V. CONCLUSION

Our search has turned up a probate exception in an unlikely corner of Article III. While the judicial power in federal question "cases" extends broadly to encompass both contentious and noncontentious forms of jurisdiction, the judicial power in "controversies" has a more limited sweep. Both the textual reference to "controversies" in the Constitution and the practice of the federal courts confirm that federal power in diversity extends only to the resolution of disputes between adverse parties that meet the alignment requirements of Article III. As a result, Congress cannot assign, and the federal courts cannot exercise, noncontentious or *ex parte* jurisdiction over matters of administration grounded in state law.

Such an account of the probate exception explains much but should not unsettle federal practice. Federal courts retain broad

201. The First and Seventh Circuits have each held that federal courts may adjudicate claims that will add to an estate in probate without running afoul of the probate exception because such a dispute does not require a federal court to usurp control over property already under the control of a state probate court. *See Jimenez v. Rodriguez-Pagan*, 597 F.3d 18, 24 (1st Cir. 2010) ("Indeed, the very relief sought here is enlargement of the decedent's estate through assets not currently within it. While divvying up an estate falls squarely within the probate exception, merely increasing it does not."); *Gustafson v. zumBrunnen*, 546 F.3d 398, 400 (7th Cir. 2008):

The suit, though based ultimately on the will, is not within the probate exception to federal jurisdiction. The judgment sought would just add assets to the decedent's estate; it would not reallocate the estate's assets among contending claimants or otherwise interfere with the probate court's control over and administration of the estate.

202. 528 F.3d 102 (2d Cir. 2007).

203. *Id.* at 105 ("Before *Marshall*, most federal courts, including ours, had interpreted the probate exception more broadly than the Supreme Court has now defined it."); *see Moser v. Pollin*, 294 F.3d 335, 340 (2d Cir. 2002) (describing a conjunctive test used to determine whether application of the probate exception to federal diversity jurisdiction is appropriate).

204. *Lefkowitz*, 528 F.3d at 107.

205. *Id.* at 107–08.

federal question jurisdiction over both contentious and noncontentious matters and can oversee all disputed federal issues that arise in the course of state court probate proceedings. Congress also retains broad power to regulate and to assign cases arising from such regulation to the federal courts, in keeping with the doctrine of coextensivity. But to the extent that Congress leaves matters of probate to state law, it cannot enlist the federal courts in the administration of applications to probate a will. While we would narrowly interpret this exception to federal judicial power, we regard it as a small but significant reminder that Article III reserves a role for the state courts in our federal system.