

## ADVERSE INTERESTS AND ARTICLE III

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**ABSTRACT**—In an important article in the *Yale Law Journal*, James Pfander and Daniel Birk claim that adverseness is not required by Article III for cases arising under federal law. This Article takes the position that Pfander and Birk have not made the case for reconsidering adversity requirements for Article III cases. Adverseness may be present when there is adversity of legal interests, even when adverse argument is not present. From this perspective, a number of Pfander and Birk’s examples of non-contentious jurisdiction manifested adverseness. In rem-type proceedings such as bankruptcy and prize cases required the determination of adverse interests, in situations where impediments often existed to voluntary extrajudicial resolution. Service or notice in some form was generally provided, which gave opportunities for adverse argument. In addition, the issuance of warrants, while ex parte, involved adverse interests in a context where predeprivation notice would undermine the utility of the proceeding, notice occurred on execution of the warrant, and opportunity for argument was then often available. Pfander and Birk’s examples of pension and naturalization determinations are not as readily characterized as adverse. The Court, however, treated federal judges’ pension determinations as appropriate, if at all, as the work of individual commissioners rather than Article III judges. Naturalization petitions are perhaps Pfander and Birk’s best example of non-contentious jurisdiction, but the Court explicitly approved the practice as appropriate under Article III only after provisions for notice to, and potential appearance by, the United States.

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INTRODUCTION

“In every court,” Blackstone wrote in 1768, “there must be at least three constituent parts, . . . : the *actor*, or plaintiff, who complains of an injury done; the *reus*, or defendant, who is called upon to make satisfaction for it; and the *judex*, or judicial power.”<sup>1</sup> In 1800, Representative John Marshall interpreted the “Case[]”<sup>2</sup> in Article III to incorporate a similar set of requirements: “[t]here must be parties to come to court, who can be reached by its process, and bound by its power; whose rights admit of ultimate decision by a tribunal to which they are bound to submit.”<sup>3</sup>

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<sup>1</sup> 3 WILLIAM BLACKSTONE, COMMENTARIES \*25; see also 1 EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 39 (London 1628) (“[I]n everie Judgement there ought to be three persons, Actor, Reus, and Iudex.”); Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559, 1568 & n.29 (2002) (“For centuries, Anglo-American lawyers have thought that the very existence of most kinds of judicial proceedings depends upon the presence (actual or constructive) of adverse parties.”).

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

<sup>3</sup> The Honorable John Marshall, *Speech Delivered in the House of Representatives, of the United States, on the Resolutions of the Hon. Edward Livingston, Relative to Thomas Nash, Alias Jonathan Robbins* (March 7, 1800), in 4 THE PAPERS OF JOHN MARSHALL 82, 96 (Charles T. Cullen ed., 1984) [hereinafter John Marshall Speech]; *id.* at 95 (“A case in law or equity . . . was a controversy between parties which had taken a shape for judicial decision.”).

Numerous Supreme Court decisions reiterate the need for parties with adverse interests who will be bound by the results of the litigation.<sup>4</sup>

In addition, standing doctrine reflects the need for adverse interests that will be affected by the litigation. Standing requires not only a plaintiff who claims a legally cognizable interest that will be affected by the controversy but also a defendant who has in some sense caused injury to the plaintiff's interests and can provide redress. The causation may consist in the defendant's having an adverse legal interest that the plaintiff seeks to diminish or transfer to himself rather than that the defendant necessarily has disturbed the status quo.<sup>5</sup> Under existing doctrine, though, the fact that Congress or a state legislature is willing to treat the parties as having sufficient adverse interests does not automatically make it so.<sup>6</sup>

While several scholars have defended adversity as an Article III requirement and criticized certain types of proceedings as failing to meet it,<sup>7</sup> the adversity requirement also has its critics.<sup>8</sup> In an impressive article in

<sup>4</sup> See, e.g., *United States v. Ferreira*, 54 U.S. (13 How.) 40, 46 (1852) (indicating that certain determinations of treaty claims were not cases because, inter alia, the United States was not authorized to appear as a party to oppose the claim); *Marye v. Parsons*, 114 U.S. 325, 330 (1885) (“[N]o court sits to determine questions of law *in thesi*. There must be a litigation upon actual transactions between real parties, growing out of a controversy affecting legal or equitable rights as to person or property.”); *California v. San Pablo & Tulare R.R. Co.*, 149 U.S. 308, 314 (1893) (“The duty of this court, as of every judicial tribunal, is limited to determining rights of persons or of property, which are actually controverted in the particular case before it.”); *United States v. Duell*, 172 U.S. 576, 588 (1899) (determining that the Court of Appeals of the District of Columbia could review the decision of the Commissioner of Patents, and stating that “the proceeding in the Court of Appeals on an appeal in an interference controversy presents all the features of a civil case, a plaintiff, a defendant and a judge”); *Muskrat v. United States*, 219 U.S. 346, 361 (1911) (stating that judicial power “is the right to determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction”); see also *id.* at 357 (indicating that a case requires “the existence of present or possible adverse parties whose contentions are submitted to the court for adjudication” (quoting *In re Pac. Ry. Comm’n*, 32 F. 241, 255 (C.C.N.D. Cal. 1887))).

<sup>5</sup> See, e.g., HENRY L. MCCLINTOCK, HANDBOOK OF THE PRINCIPLES OF EQUITY §§ 192–195 (2d ed. 1948) (describing actions to quiet title and to remove a cloud on title); *id.* § 194, at 523 (“Where adverse possession has given title to the land, the adverse possessor may maintain the suit . . . [to quiet title] against the holder of record title.”).

<sup>6</sup> See *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 573 (1992) (rejecting the argument that “the injury-in-fact requirement had been satisfied by congressional conferral upon *all* persons of an abstract, self-contained, noninstrumental ‘right’ to have the Executive observe the procedures required by law”); *Muskrat*, 219 U.S. at 360–63 (dismissing a suit that Congress explicitly authorized to contest the constitutionality of a congressional statute); *New Hampshire v. Louisiana*, 108 U.S. 76, 91 (1883) (dismissing claims where state legislation authorized the state to sue on behalf of citizens holding bonds of another state, stating that “one State cannot create a controversy with another State, within the meaning of that term as used in the judicial clauses of the Constitution, by assuming the prosecution of debts owing by the other State to its citizens”).

<sup>7</sup> See, e.g., Ralph E. Avery, *Article III and Title 11: A Constitutional Collision*, 12 BANKR. DEV. J. 397, 400 (1996) (arguing that some of the main elements of the bankruptcy code do not comply with

the *Yale Law Journal*, James Pfander and Daniel Birk claim that adverseness is not required by Article III for “Cases” under federal law.<sup>9</sup>

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Article III’s case or controversy requirement); Michael T. Morley, *Consent of the Governed or Consent of the Government? The Problems with Consent Decrees in Government-Defendant Cases*, 16 U. PA. J. CONST. L. 637, 644–46 (2014) (criticizing consent decree practice as failing to satisfy adversity, and recommending in government–defendant cases that the plaintiff be required to show an entitlement to relief and that the remedy is necessary to redress the particular violation); *id.* at 641 n.16 (collecting scholarship on consent decrees); 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, 548–51 (2006) (providing historical and normative support for an adversity requirement, and arguing that settlement class actions do not conform to this requirement because they are not adversary at the time of filing); *id.* at 580 (arguing that if a case is adverse in the beginning, there is more assurance that it was not brought primarily to bind future litigants); TELFORD TAYLOR, *TWO STUDIES IN CONSTITUTIONAL INTERPRETATION* 85–88 (1969) (raising lack of adversity problems with surveillance warrants). Redish and Kastanek provide a detailed normative rationale for an adversity requirement, *see* Redish & Kastanek, *supra*, at 570–88, which this Article does not purport to provide.

<sup>8</sup> There are numerous critiques of standing doctrine, and particularly the requirement of injury in fact. *See, e.g.*, Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163 (1992). Related to standing requirements is mootness doctrine, which purports to require that the parties maintain an adequate stake throughout the litigation, not just at the outset. *See infra* note 139. Because the Court has sometimes applied mootness doctrine loosely, many articles take the position that mootness is unconstitutional. *See, e.g.*, Matthew I. Hall, *The Partially Prudential Doctrine of Mootness*, 77 GEO. WASH. L. REV. 562, 565–66 (2009) (arguing, based on review of cases, that there is “personal stake mootness” and “issue mootness,” and only the latter is of constitutional magnitude); Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 HARV. L. REV. 603, 609–10, 609 nn. 22–23, 610 n.24, 668 (1992) (arguing that the Court’s mootness doctrine should be seen as unconstitutional, and casting doubt on the constitutional status of justiciability doctrines generally); *cf.* Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247, 305–06 (1988) (arguing that a traditional personal stake should not be a constitutional requirement in actions for a deterrent remedy). This Article does not address the range of standing and mootness critiques.

<sup>9</sup> James E. Pfander & Daniel D. Birk, *Article III Judicial Power, the Adverse-Party Requirement, and Non-Contentious Jurisdiction*, 124 YALE L.J. 1346, 1357 (2015). In addition, Professor Pfander has coauthored several related articles. *See, e.g.*, James E. Pfander & Emily K. Damrau, *A Non-Contentious Account of Article III’s Domestic Relations Exception*, 92 NOTRE DAME L. REV. 117, 118–21, 145–46, 163–65 (2016) (arguing that federal courts should be able to handle uncontested domestic relations matters if they arise as federal question cases rather than diversity controversies, and could handle contested domestic relations matters under diversity jurisdiction); James E. Pfander & Michael J.T. Downey, *In Search of the Probate Exception*, 67 VAND. L. REV. 1533, 1538–39, 1551, 1556, 1579 (2014) (making a similar claim as to probate matters). Professor Pfander and his coauthors argue that federal law “Cases” differ from diversity “Controversies” in that only the latter require adversity. *See, e.g.*, Pfander & Birk, *supra*, at 1357, 1424, 1442; Pfander & Downey, *supra*, at 1538–39; *see also* Robert J. Pushaw, Jr., *Article III’s Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447, 449–50, 519 (1994) (arguing that, under the original meaning of Article III, law exposition is the role of the federal courts in cases, while controversies focus on bilateral disputes); *id.* at 450 (arguing that the doctrines of standing, ripeness, and mootness are not constitutionally required as to cases). Many scholars see cases as encompassing both civil and criminal proceedings, while controversies include only civil proceedings. *See, e.g.*, John Harrison, *The Power of Congress to Limit the Jurisdiction of Federal Courts and the Text of Article III*, 64 U. CHI. L. REV. 203, 220 (1997); Daniel J. Meltzer, *The History and Structure of Article III*, 138 U. PA. L. REV. 1569, 1575

They rely on a statement by Chief Justice John Marshall, as well as a similar statement by Justice Joseph Story, that federal courts may exercise jurisdiction over cases “when the subject is submitted to it by a party who asserts his rights in the form prescribed by law.”<sup>10</sup> The authors also provide

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(1990). *But cf.* David E. Engdahl, *Intrinsic Limits of Congress’ Power Regarding the Judicial Branch*, 1999 BYU L. REV. 75, 149 n.278 (finding evidence insufficient for a case/controversy distinction either as to criminal/civil or as to law declaration/dispute resolution); Michael T. Morley, *Non-Contentious Jurisdiction and Consent Decrees*, 19 U. PA. J. CONST. L. 1, 14 (2016) (arguing that the Constitution uses “cases” and “controversies” interchangeably).

Pfander and Birk argue that this Article fails to grapple with their distinction between diversity controversies, which would require adversity, and federal cases. James E. Pfander & Daniel Birk, *Adverse Interests and Article III: A Reply*, 111 NW. U. L. REV. 1067, 1085–88 (2017) [hereinafter Pfander & Birk Reply]. To the extent that this Article shows that many of the federal question proceedings that the authors rely on as originally non-contentious—e.g., bankruptcy, prize, remissions, and warrants—were in fact adverse, the result renders questionable the purported case/controversy distinction that the authors seek to support. *Cf.* John Marshall Speech, *supra* note 3, at 95 (“A case in law or equity was a term well understood, and of limited signification. It was a controversy between parties which had taken a shape for judicial decision. If the judicial power extended to every *question* under the constitution it would involve almost every subject proper for legislative discussion and decision; if to every *question* under the laws and treaties of the United States it would involve almost every subject on which the executive could act.”); *infra* note 18 & Section II.A (indicating federal bankruptcy and diversity receiverships were treated comparably); *infra* note 119 (noting comparable treatment of diversity and federal question shareholder actions).

<sup>10</sup> Pfander & Birk, *supra* note 9, at 1419, 1442, 1453 (quoting *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 819 (1824)). Taken in context, there is nothing in the quoted statements from Chief Justice Marshall or Justice Story that is inconsistent with an adverse party requirement. Chief Justice Marshall’s statement was in the context of an adversarial dispute, and he gave an example shortly after the above quoted language: “The suit of *The Bank of the United States v. Osborn and others*, is a case, and the question is, whether it arises under a law of the United States?” *Osborn*, 22 U.S. at 819. The lack of inconsistency of the language quoted by Pfander and Birk with an adversity requirement for cases is further shown in Marshall’s 1800 speech in the House of Representatives in which he noted the need for adversity. *See supra* note 3 and accompanying text. That statement was immediately preceded by a statement similar to Chief Justice Marshall’s statement in *Osborn* that a case requires that a party “assert[] his rights in the form prescribed by law.” 22 U.S. at 819. Marshall explained,

By extending the judicial power to all *cases in law and equity*, the constitution had never been understood, to confer on that department, any political power whatever. To come within this description, a question *must assume a legal form, for forensic litigation, and judicial decision*. There must be parties to come into court, who can be reached by its process, and bound by its power; whose rights admit of ultimate decision by a tribunal to which they are bound to submit.

John Marshall Speech, *supra* note 3, at 95–96 (emphasis added). *But cf.* Pfander & Birk Reply, *supra* note 9, at 1069–70 & nn.10–11 (suggesting that Marshall’s statements as a representative should be discounted in light of Marshall’s statement as a judge in *Osborn*); *id.* at 1070 (claiming that this Article prefers “revisions of the Gilded Age to the choices of the Framers”).

The authors also rely on Justice Story’s statement, “A case, then, in the sense of this clause of the constitution, arises when some subject touching the constitution, laws, or treaties of the United States is submitted to the courts by a party who asserts his rights in the form prescribed by law.” Pfander & Birk, *supra* note 9, at 1419 (quoting 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1646, at 424 (photo. reprint 2005) (2d ed. 1851)). Justice Story cited, *inter alia*,

numerous examples of what they call “non-contentious jurisdiction” in the federal courts—essentially, instances when courts determine issues *ex parte*.

After presenting their enumeration of non-contentious cases, Pfander and Birk divide their examples into two categories: ancillary and original non-contentious cases. The first category comprises “non-contentious features . . . that are ancillary to an actual or potential dispute.”<sup>11</sup> Their ancillary category includes default judgments, consent decrees, and guilty pleas.<sup>12</sup> Given that these matters “arise in connection with a dispute between actual or potential adversaries,”<sup>13</sup> examples in the ancillary category would not seem significantly to undermine an adversity requirement.<sup>14</sup> Their second category, “actions that are originally non-contentious,”<sup>15</sup> presumably poses a greater threat to the adversity requirement. The authors include in this category prize jurisdiction,<sup>16</sup> remissions of fines,<sup>17</sup> bankruptcies and equity receiverships,<sup>18</sup> warrants,<sup>19</sup> and benefits determinations such as petitions for pensions<sup>20</sup> and for citizenship.<sup>21</sup>

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*Osborn* to support the proposition. STORY, *supra*, § 1646, at 424 n.2. As is true for Marshall’s similar language, the Story quotation is not inconsistent with an adversity requirement.

<sup>11</sup> Pfander & Birk, *supra* note 9, at 1440.

<sup>12</sup> *Id.* at 1441.

<sup>13</sup> *Id.*

<sup>14</sup> *See id.* at 1442–43 (indicating that courts can exercise ancillary non-contentious jurisdiction even in diversity controversies). As noted *infra* text accompanying note 33, no one contends that adversariness must pervade all issues in a lawsuit. This Article, therefore, does not focus on Pfander and Birk’s examples of ancillary non-contentious jurisdiction.

<sup>15</sup> Pfander & Birk, *supra* note 9, at 1440.

<sup>16</sup> *Id.* at 1446.

<sup>17</sup> *Id.* at 1445.

<sup>18</sup> *Id.* at 1441 & n.445. In later work, Pfander treats receiverships as in the ancillary category. *See* Pfander & Damrau, *supra* note 9, at 145–46. This is perhaps because equity receiverships were under the diversity jurisdiction, *see infra* note 123 and accompanying text, which Pfander and his coauthors treat as requiring contention. *See supra* note 9. Pfander and Birk may be suggesting that it is the initiation of bankruptcy proceedings as well as equity receiverships that is non-contentious. *See* Pfander & Birk, *supra* note 9, at 1441 (“In still other contexts, the party claims a right to invocation of administrative or judicial machinery for the disposition of an estate, as in bankruptcy or the appointment of an equity receiver.”). If “originally non-contentious” merely means that the actions begin without personal service on an adverse party who will nevertheless receive some form of service or notice thereafter, then even original non-contentious proceedings do not present a serious challenge to adversity requirements.

<sup>19</sup> Pfander & Birk, *supra* note 9, at 1441.

<sup>20</sup> *Id.* at 1361, 1364 (including pensions in the category of government benefits); *id.* at 1440–41 (including claims for entitlements to a benefit as original non-contentious proceedings).

<sup>21</sup> *Id.* at 1441, 1447.

In addition to providing examples and categories of non-contentious cases, Pfander and Birk minimize the apparent importance of cases in which the Court seemingly required adverseness. They argue that the Court's hostility to collusive cases was primarily directed against "collusive proceedings that assume the form of contentious ones," such as where friendly parties attempted to obtain decisions that would prejudice the rights of nonparties, or attempted to elicit constitutional precedent.<sup>22</sup> Pfander and Birk argue that the Court's criticism of such proceedings did not manifest a broader requirement of adverseness.<sup>23</sup> Similarly, they argue that federal judges' apparent hostility to hearing *ex parte* pension applications, as manifested in *Hayburn's Case*,<sup>24</sup> was principally directed against political branch review of judicial decisions rather than to the lack of adverseness.<sup>25</sup>

Pfander and Birk ultimately claim that we should expand our notions of what constitutes a case to include non-contentious proceedings.<sup>26</sup> Thus, in line with others who cast doubts on the Court's justiciability doctrines,<sup>27</sup> they would ultimately give more power to Congress to expand federal court jurisdiction.<sup>28</sup>

This Article takes the position that Pfander and Birk, while having significantly contributed to scholars' appreciation of the many *ex parte* matters handled by the federal courts, have not made the case for reconsidering adversity requirements for Article III cases.<sup>29</sup> This Article addresses Pfander and Birk's principal historical examples of original non-

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<sup>22</sup> *See id.* at 1433.

<sup>23</sup> *Id.* ("[T]he decisions that restrict the use of collusive cases do not actually question the power of the federal courts to hear non-contentious proceedings in general, but only collusive proceedings that assume the form of contentious ones.").

<sup>24</sup> 2 U.S. (2 Dall.) 409 (1792).

<sup>25</sup> Pfander & Birk, *supra* note 9, at 1432.

<sup>26</sup> *Id.* at 1357, 1473.

<sup>27</sup> Sunstein, *supra* note 8, at 235–36.

<sup>28</sup> Pfander & Birk, *supra* note 9, at 1473–74. Their most tangible result would be to give Congress greater leeway to assign to Article III courts the determination of *ex parte* claims, such as uncontested determinations of benefits. *See id.* at 1449–50. As to constitutional cases, they seem to think contention is preferable but not constitutionally required. *See id.* at 1455.

<sup>29</sup> Professor Morley has also written a reply to Pfander and Birk, arguing that "for a case or controversy to exist, the interested parties must not have . . . reached an affirmative agreement on all issues." Morley, *supra* note 9, at 3. Unlike this Article, Professor Morley does not dispute Pfander and Birk's historical evidence. *See id.* at 2. Rather, he claims that early Court practice is a "surprisingly unreliable guide in interpreting Article III." *Id.* at 4–8 (providing examples). He is particularly concerned with establishing that many consent decrees raise serious Article III concerns, as he argued in his prior Article, *see* Morley, *supra* note 7, and that this is true even under the framework proposed by Pfander and Birk. Morley, *supra* note 9, at 3, 9.

contentious jurisdiction including in rem-type proceedings such as bankruptcies, equity receiverships, prize, and remission of fines; warrants; and benefits determinations such as petitions for pensions and citizenship. In addition, the Article responds to Pfander and Birk's arguments that the Court's hostility to collusive proceedings was of limited significance and that Court's resistance to pension cases should be seen as focused on political branch review.

Part I defines the adversity requirement as a requirement of adversity of legal interests rather than necessarily adversity of legal arguments. As is evident in default judgments, unopposed transfers of legal interests are not necessarily voluntary transfers,<sup>30</sup> and judgments are often required for such transfers whether or not adverse parties appear. Multilateral claims upon limited assets face additional hurdles to voluntary extrajudicial resolution. Part II shows that in rem-type proceedings involved adverse legal interests and often evoked adverse argument. Part III considers warrants, where the utility of the procedure would be lost by pre-deprivation notice, and later opportunity for adverse arguments was generally available, at least as an historical matter. Part IV discusses how judicial hostility to collusive proceedings should not be read so narrowly as Pfander and Birk contend. Part V addresses pensions and naturalization. As to pensions, the evidence does not support treating judges' objections to pension work as focused only on nonjudicial review. Such pension work as the judges performed, moreover, was done as commissioners. Naturalization is perhaps the authors' best example of a non-contentious proceeding, but the Court only explicitly approved the practice as within Article III after amendments to the statutes provided notice and opportunity to be heard in the United States.

## I. DISTINGUISHING ADVERSE LEGAL INTERESTS AND ADVERSE ADVOCACY

### A. *Adverse Interests and Adverse Arguments*

In evaluating whether adverseness is required by Article III, one should distinguish two aspects of adverseness. One is a requirement of adverse legal interests that will be affected by a decree. Another is a requirement of adverse advocacy interests or adverse legal arguments. A prototypical case involves some issues as to which the parties have both adverse legal interests as well as adverse arguments. Adverse legal

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<sup>30</sup> See Morley, *supra* note 9, at 10 ("Thus, a meaningful distinction exists between mere lack of opposition and affirmative consent.").



arguments, however, are clearly not sufficient for a case, nor are they always necessary. By contrast, adverse legal interests are necessary and often sufficient. The most plausible version of the adverseness requirement is that a case requires a clash of legal interests but does not always require a clash of argument.<sup>31</sup>

*B. Involuntary Termination of Legal Interests Often Requires a Judgment*

To tease out why having adverse interests—but not adverse arguments—is a requirement for a case, consider two of Pfander and Birk’s examples of non-contentious proceedings: defaults and bankruptcy.<sup>32</sup> The characteristics of defaults and bankruptcies will reappear in other examples of supposed non-contentious proceedings and illustrate the need for adverse legal interests even if adverse argument might be dispensable.

Even in a typical bilateral case with adverse legal interests and arguments, no one would claim that the parties must make adverse legal arguments on all issues. Indeed, both older pleading practices and modern procedure have encouraged the narrowing of issues.<sup>33</sup> But what if the parties, at least as far as the court is concerned, apparently disagree about nothing? For example, in an ordinary contract dispute in which a creditor sues a debtor, the debtor may have no defense. If the creditor sues the debtor and the debtor is served, the debtor may default<sup>34</sup> or agree to entry of a consent judgment. If the defendant is not prepared to defend, why don’t the parties merely arrange their affairs contractually without a lawsuit?<sup>35</sup>

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<sup>31</sup> This formulation is Caleb Nelson’s. Caleb Nelson, Commentary on James Pfander’s *The Contested History of Article III’s Case-or-Controversy Requirement*, at the Hugh and Hazel Darling Foundation Originalism Works-in-Progress Conference, University of San Diego School of Law (Feb. 20–21, 2015), <http://www.sandiego.edu/law/centers/cscowebcasts/2015.php> [<https://perma.cc/2P2K-XK3F>]; cf. Brian P. Goldman, Note, *Should the Supreme Court Stop Inviting Amici Curiae to Defend Abandoned Lower Court Decisions?*, 63 STAN. L. REV. 907, 912–13 (2011) (noting the frequency of Supreme Court cases in which only one party appeared before the Court prior to 1954).

<sup>32</sup> Pfander and Birk characterize defaults as ancillary non-contentious proceedings and characterize bankruptcies as original non-contentious proceedings. Pfander & Birk, *supra* note 9, at 1440–41; cf. *id.* at 1371 (stating that bankruptcy “has long featured a combination of both adverse and non-adverse proceedings”). As noted above, Pfander and Birk’s category of ancillary non-contentious proceedings presents less of a challenge to adversity requirements than original non-contentious proceedings. See *supra* note 14 and accompanying text. To the extent that in rem-type proceedings such as bankruptcies (original) exhibit similar characteristics to defaults (ancillary), such original non-contentious proceedings also do not present a significant challenge to Article III adversity requirements.

<sup>33</sup> See, e.g., FED. R. CIV. P. 16(c)(2)(C) (indicating that the pretrial conference should consider “obtaining admissions and stipulations about facts and documents to avoid unnecessary proof”).

<sup>34</sup> Cf. Nelson, *supra* note 1, at 1569–72 (discussing historical support for the necessity of acquiring jurisdiction over the defendant, and the development of default and attachment proceedings).

<sup>35</sup> Cf. Redish & Kastanek, *supra* note 7, at 577 (suggesting that if the parties come to a court in agreement, they have no need for a judgment rather than a contract unless they are trying to bind third

Among other reasons, the debtor may lack any hard-edged compulsion to surrender his legal interests and admit liability without a lawsuit.<sup>36</sup> Even lacking a defense to a contract claim, the debtor will not necessarily voluntarily make himself amenable to the equivalent of judgment enforcement. For example, he may not hand over a portion of his wages that would be subject to garnishment in the event of a judgment.<sup>37</sup>

Consider, too, a multilateral dispute in which a distressed debtor has multiple creditors. Creditors may be unwilling voluntarily to give up their claims without the compulsion of legal proceedings, even if they have little chance of receiving satisfaction.<sup>38</sup> Nonjudicial, contractual solutions are further complicated when the insolvent debtor has numerous creditors whose interests in any remaining assets of the debtor would best be adjusted simultaneously.<sup>39</sup> This scenario for bankruptcy is typical of limited-fund and in rem proceedings (collectively referred to herein as in rem-type proceedings), which are familiar to the law of civil procedure.<sup>40</sup>

Such in rem-type proceedings necessarily include the potential for a form of default, just as in personam actions do. Despite provisions for

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parties). While some jurisdictions require “demand letters,” particularly in contract claims, as a prerequisite to suit, a plaintiff generally is not required to show an attempt at voluntary agreement as a precondition to filing suit.

<sup>36</sup> See John C.P. Goldberg & Benjamin C. Zipursky, *Rights and Responsibility in the Law of Torts*, in *RIGHTS AND PRIVATE LAW* 251, 265–66 (Donal Nolan & Andrew Robertson eds., 2012) (indicating that the obligation to provide redress in tort law arises from a power given to the victim to impose a liability on the defendant that is distinguishable from the primary right not to be injured and the defendant’s duty not to injure). A contractual obligation generally entails a duty to satisfy the contract without a judgment, but a party nevertheless may decline, or be unable, to perform.

<sup>37</sup> Obtaining a judgment will also establish priority over other later judgments. Priority can sometimes be established contractually through grant of a security interest. Sometimes one cannot establish priority contractually. For example, there are restrictions on the assignment of wages.

<sup>38</sup> In addition, loan forgiveness may lead to unfavorable tax consequences for the debtor. See, e.g., 26 U.S.C. § 61(a)(12) (2012).

<sup>39</sup> See Douglas G. Baird & Thomas H. Jackson, *Corporate Reorganizations and the Treatment of Diverse Ownership Interests: A Comment on Adequate Protection of Secured Creditors in Bankruptcy*, 51 U. CHI. L. REV. 97, 106 (1984) (“Bankruptcy law, at bottom, is designed to require these investors to act collectively rather than to take individual actions that are not in the interests of the investors as a group.”).

<sup>40</sup> Cf. Edward R. Morrison, *Bargaining Around Bankruptcy: Small Business Workouts and State Law*, 38 J. LEGAL STUD. 255, 296 (2009) (concluding that among small businesses, the use of federal bankruptcy as opposed to state procedures—such as assignments for the benefit of creditors—results from “bargaining failure between the business and its senior lenders”); *id.* at 259 (indicating that the functions traditionally assigned to bankruptcy are “remediating collective action and other coordination problems”).

notice,<sup>41</sup> some or all creditors might decline to file claims, based on their view of costs and benefits.<sup>42</sup> Indeed, parties who did not receive notice but as to whom reasonable notice was attempted under existing procedural due process requirements may have their interests altered in the bankruptcy proceeding given the perceived need to resolve claims to the estate in one proceeding.<sup>43</sup>

Both when a debtor defaults in a suit by a creditor and when a creditor fails to make a claim in a bankruptcy proceeding, an unopposed transfer of legal interests is not necessarily the same thing as a voluntary transfer.<sup>44</sup> Securing an unconsented transfer of legal interests often requires a judgment. A valid judgment will require notice comporting with existing procedural due process requirements. Ordinary defaults and bankruptcy proceedings thus share the following characteristics: (1) a need to make a conclusive determination of adverse legal interests that cannot readily be accomplished by voluntary extrajudicial action, (2) requirements of notice comporting with procedural due process requirements, and (3) the ability to make a conclusive determination, even if the owners of opposing interests fail to appear to make adverse arguments.<sup>45</sup>

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<sup>41</sup> See FED. R. BANKR. P. 2002 (listing rules for notice to creditors and others); FED. R. BANKR. P. 2002(l) (providing publication notice if notice by mail is not feasible); 11 U.S.C. § 523(a)(3) (2012) (providing that unsecured debts are not generally discharged).

<sup>42</sup> See Morley, *supra* note 7, at 671 (stating that in uncontested bankruptcies, as in defaults, the “underlying adverseness is not eliminated by the fact that a creditor might not find it economically worthwhile to contest”); *cf.* Redish & Kastanek, *supra* note 7, at 587 n.157 (arguing that because creditors are always potential adversaries in bankruptcy, an advance determination of adversariness may be impossible). In addition, creditors do not have to file a proof of claim if the debtor is in Chapter 11 and the debt is not disputed, contingent, or unliquidated. See § 501(a); FED. R. BANKR. P. 3003(c).

<sup>43</sup> In certain mass tort bankruptcies, the plans purport to alter the rights of people whose injuries have not yet manifested themselves. The bankruptcy court will appoint a representative for future claimants. See Epstein v. Official Comm. of Unsecured Creditors of Piper Aircraft Corp., 58 F.3d 1573, 1576–77, 1576 n.2 (11th Cir. 1995) (discussing different tests courts have used to determine if future claimants have cognizable claims); § 524(g)–(h) (providing that plans may include trusts for future asbestos claimants, and that courts may appoint a representative).

<sup>44</sup> See Morley, *supra* note 9, at 10 (noting that lack of opposition and consent are not the same); *id.* (arguing that in some of Pfander and Birk’s examples, “the whole reason that litigation exists in the first place is because the opposing party will not consent to the relief the plaintiff seeks”).

<sup>45</sup> While Pfander and Birk claim that this Article provides no criteria for applying its adverse interest requirements, see Pfander & Birk Reply, *supra* note 9, at 1085–88, this Article suggests that disputes that proceed ex parte tend to share the characteristics of defaults and in rem-type proceedings noted above. Warrants have similar characteristics of a need to affect adverse interests that cannot easily be adjusted by agreement, and requirements of notice comporting with procedural due process. See *infra* text accompanying notes 83–85. Pfander and Birk suggest that the lack of actual notice to the affected parties in some prize cases undermines the coherency of this account. See Pfander & Birk Reply, *supra* note 9, at 1086. Notice that complies with procedural due process, however, may of course fail to give actual notice. See, e.g., Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 314–15

## II. IN REM AND LIMITED-FUND PROCEEDINGS

Pfander and Birk give several in rem-type proceedings as examples of original non-contentious proceedings: bankruptcies, receiverships, prize cases, and remissions of forfeitures. All of these proceedings share with defaults the characteristics noted above and do not undermine an adverseness requirement.

A. *Bankruptcy and Equity Receiverships*

Pfander and Birk treat bankruptcy and equity receiverships as original non-contentious proceedings in the federal courts; bankruptcy has been addressed in Part I. Federal bankruptcy statutes, however, were short-lived before 1898, and larger corporations did not frequently use the bankruptcy statutes prior to certain enactments in the late 1930s.<sup>46</sup> Before then, federal court equity receiverships served as a vehicle for corporate reorganizations of their debt structure.<sup>47</sup> Both bankruptcy and equity receiverships required notice to those with potential claims;<sup>48</sup> they also manifested the need for, and the ability of the court to make, a conclusive determination even if adverse parties do not appear.

B. *Prize Jurisdiction*

Prize jurisdiction in admiralty has similar characteristics: the need for a resolution, notice comporting with due process, and the ability to enter a final decree even absent the appearance of those with adverse interests. The laws of war traditionally allowed, during hostilities, the seizure of enemy

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(1950). That cases involving adverse interests may proceed even absent adverse parties results from the perceived necessity of making a determination, rather than from the desirability of ex parte proceedings.

<sup>46</sup> DAVID A. SKEEL, JR., *DEBT'S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA* 3–4 (2001) (noting that bankruptcy laws enacted in 1800, 1841, and 1867 were short-lived, but that the 1898 law had “staying power”); *id.* at 48 (indicating that while the Act of 1867, after an 1874 amendment, as well as the 1898 Act, included corporate bankruptcy, those acts were rarely used by large corporations).

<sup>47</sup> *See id.* at 101 (indicating that the Chandler Act of 1938 and the Trust Indenture Act of 1939 brought more corporate insolvency and reorganization proceedings under the federal statute, and “decimated existing [corporate] reorganization practice”); *id.* at 125–27 (indicating that corporations eventually would turn to Chapter 11 reorganization to allow managers to retain control of the corporation).

<sup>48</sup> *See* James Byrne, *The Foreclosure of Railroad Mortgages in the United States Courts*, in *SOME LEGAL PHASES OF CORPORATE FINANCING, REORGANIZATION AND REGULATION* 77, 96 (1917) (indicating that as part of the receivership order, or immediately thereafter, orders were entered, inter alia, “requiring all creditors to present claims to a designated master before a fixed date; and directing that notice be published in certain newspapers; that a copy of the order be mailed to creditors who are on the books of the company; that any creditor be allowed to object to the claim of any other creditor; and that a hearing be had before the master on the date fixed in the order or on such other date as the master may name”).

armed vessels as well as enemy commercial ships and cargo.<sup>49</sup> In addition, American and neutral ships could be subject to seizure for violating the nonintercourse laws and American embargoes.<sup>50</sup> When the seizing party, whether a government officer or a privateer, brought the vessel into port, the determination of interests typically proceeded by libel as part of the prize jurisdiction of the federal courts.<sup>51</sup>

Such libel proceedings are in rem<sup>52</sup> and adjudicate conflicting legal interests among claimants to particular property, similar to bankruptcy. Parties with claims on the vessel and cargo are potentially adverse to one another. To be sure, in prize cases, the parties were characterized differently than in an in personam suit. At least as a formal matter, the seized ship was the defendant.<sup>53</sup> Service was on the ship; “when the

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<sup>49</sup> RUFUS WAPLES, *A TREATISE ON PROCEEDINGS IN REM* § 292, at 394 (Chicago, Callaghan & Co. 1882) (“The general rule is that belligerents have a right to make prize of each other’s property found upon the high seas; and to this rule there are but few exceptions.”).

<sup>50</sup> See, e.g., 2 GEORGE LEE HASKINS & HERBERT A. JOHNSON, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES, FOUNDATIONS OF POWER: JOHN MARSHALL, 1801–1815*, at 409–10 (1981) (indicating that forfeitures under the Non-Intercourse Acts, enacted from 1798 through 1800 during the “Quasi-War” with France, were primarily imposed on residents of the United States); Act of Apr. 18, 1806, ch. 29, § 1, 2 Stat. 379, 379 (prohibiting generally the importation of certain goods from Great Britain, Ireland, and the British colonies); Embargo Act of 1807, ch. 5, § 1, 2 Stat. 451, 451–52 (placing an embargo on all ships within the United States bound for any foreign place, although allowing departure of foreign vessels when notified of the Act); Non-Intercourse Act of 1809, ch. 24, § 1, 2 Stat. 528, 528 (interdicting British and French vessels from the territory of the United States); *id.* § 2, 2 Stat. at 528–29 (forbidding citizens and residents of the United States from intercourse with such vessels); *id.* § 4, 2 Stat. at 529 (forbidding importation from France and Great Britain, with certain exceptions for American vessels).

<sup>51</sup> See ERASTUS C. BENEDICT, *THE AMERICAN ADMIRALTY: ITS JURISDICTION AND PRACTICE*, §§ 510–511, at 282–83 (photo. reprint 2009) (1850) (discussing the requirement that the captor immediately give notice to the commissioner or judge when the captor came into port, and turn over all documents, and that the captor must produce one or more of the persons captured as witnesses whose depositions with the ship’s papers were sealed and transmitted to the clerk of court).

<sup>52</sup> See, e.g., *Jennings v. Carson*, 8 U.S. (4 Cranch) 2, 23 (1807) (“The proceedings of [admiralty] court are *in rem*, and their sentences act on the thing itself.”); BENEDICT, *supra* note 51, § 359, at 201–02; see also Caleb Nelson, *The Constitutionality of Civil Forfeiture*, 125 *YALE L.J.* 2446, 2467 (2016) (discussing *The Palmyra*, 25 U.S. (12 Wheat.) 1 (1827), an *in rem* forfeiture proceeding). Damages actions for captures without probable cause, however, were in personam. See BENEDICT, *supra* note 51, § 362, at 202–03; *id.* § 509, at 282.

<sup>53</sup> See *Jennings*, 8 U.S. (4 Cranch) at 24 (characterizing the proceedings as against the ship); WAPLES, *supra* note 49, § 1, at 2 (stating that proceedings in rem treat property “as the defendant, susceptible of being tried and condemned, while the owner merely gets notice, along with the rest of the world, and may appear for his property or not”); cf. THOMAS J. SCHOENBAUM, *ADMIRALTY AND MARITIME LAW* § 1-2, at 9 (5th ed. 2012) (indicating that current *in rem* admiralty actions continue to personify the vessel).

proceeding is against a ship, the process commences with a warrant directing the arrest of the ship.”<sup>54</sup> There was also notice by publication.<sup>55</sup>

Because the ship was deemed the defendant, both the captors and other claimants were the actors or plaintiffs and could initiate proceedings,<sup>56</sup> and all were seen as adverse to one another. Indeed, the entire world was deemed adverse. Justice Story adverted to the binding nature of in rem forfeiture on the world, and stated, “The reasonableness of this doctrine results from the very nature of proceedings *in rem*. All persons having an interest in the subject matter, whether as seizing officers, or informers, or claimants, are parties or may be parties to such suits, so far as their interest extends.”<sup>57</sup>

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<sup>54</sup> *Jennings*, 8 U.S. (4 Cranch) at 24 (citing 2 ARTHUR BROWNE, A COMPENDIOUS VIEW OF THE CIVIL LAW, AND OF THE LAW OF THE ADMIRALTY 397 (1802)); see also BENEDICT, *supra* note 51, § 365, at 204 (stating that notice is necessary to bind individuals, and that in proceedings in rem “notice is served upon the thing itself”); WAPLES, *supra* note 49, § 42, at 54 (“What citation is, in a personal civil action, seizure is in the *actio in rem*, so far as it is notice to all interested.”); *id.* § 65, at 89 (indicating that seizure is sufficient notice to owners, based on the presumption “that every man knows whether his lands are in the adverse possession of another”); cf. Rule IX, Rules of Practice of the Courts of the United States in Causes of Admiralty and Maritime Jurisdiction, 44 U.S. (3 How.) i, v (1845) (“In all cases of seizure and in other suits and proceedings in rem, the process, unless otherwise provided for by statute, shall be by a warrant of arrest of the ship, goods or other thing to be arrested, and the marshal . . . shall cause public notice thereof and of the time assigned for the return of such process and the hearing of the cause to be given in such newspaper within the district as the District Court shall order . . . .”); FED. R. CIV. P. SUPP. C (providing for the arrest of the vessel in proceedings in rem); SCHOENBAUM, *supra* note 53, § 14-3, at 895–97 (describing in rem procedures for arrest of the vessel, followed by publication if the vessel has not been released); George Rutherglen, *The Contemporary Justification for Maritime Arrest and Attachment*, 30 WM. & MARY L. REV. 541, 549 (1989) (criticizing aspects of maritime arrest in general, but noting that “the lack of notice after arrest poses only theoretical problems in most cases”).

<sup>55</sup> See Kevin Arlyck, *Forged by War: The Federal Courts and Foreign Affairs in the Age of Revolution* 123 (Sept. 2014) (unpublished Ph.D. dissertation, New York University) (on file with the *Northwestern University Law Review*) (stating that under standard procedure in admiralty, the court in a particular case “issued a writ of attachment against the vessel and a monition directing any interested parties to show cause why the libel should not be sustained”); see also WAPLES, *supra* note 49, § 64, at 88 (“Notice in actions *in rem* is doubly given: by *seizure* and by *publication*.”); *id.* § 70, at 95 (indicating that publication of notice of admiralty proceedings is called a monition); cf. Nelson, *supra* note 1, at 1572 (discussing the development of quasi in rem proceedings in England, and the importance of the “*purported* issuance and attempted service” on the defendant, even if the summons were “not actually delivered in a way that the defendant would learn of it”); *id.* at 1573–74 (discussing similar requirements of a summons or voluntary appearance in the United States).

<sup>56</sup> *Jennings*, 8 U.S. (4 Cranch) at 23; Kevin Arlyck, *Plaintiffs v. Privateers: Litigation and Foreign Affairs in the Federal Courts, 1816–1822*, 30 L. & HIST. REV. 245, 265–66 (2012) (discussing various cases where those claiming ownership initiated libels); Arlyck, *supra* note 55, at 157 (discussing cases filed by British consuls as to ships captured by French privateers and brought into United States ports); cf. *id.* at 211 (noting that privateers’ violations of American neutrality could justify restoration to the owners).

<sup>57</sup> *Gelston v. Hoyt*, 16 U.S. (3 Wheat.) 246, 312–13 (1818); see also *id.* at 313 (“The decree of the court acts upon the thing in controversy, and settles the title of the property itself, the right of seizure,

One might object that in a proceeding lacking personal service and making the entire world adversaries, the proceedings would end up without anyone contesting the libel. And that was indeed sometimes the case.<sup>58</sup> The arrest of the ship as part of the libel proceeding, however, generally gave notice to the master of the captured vessel, and the courts treated the master as the representative of the owners of the vessel, cargo,<sup>59</sup> and insurers.<sup>60</sup> Accordingly, masters, as well as the owners of vessels and cargos,<sup>61</sup> and

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and the question of forfeiture. If its decree were not binding upon all the world upon the points which it professes to decide, the consequences would be most mischievous to the public. In case of condemnation no good title to the property could be conveyed, and no justification of the seizure could be asserted under its protection.”)

<sup>58</sup> Pfander and Birk cite Kevin Arlyck’s thesis for the proposition that early prize claims were often nonadversarial, which Arlyck attributed to the fact that there was nothing to litigate. *See* Pfander & Birk, *supra* note 9, at 1369 & n.93; Arlyck, *supra* note 55, at 260–64 (particularly describing occurrences during the War of 1812). The procedures mentioned above, *see supra* note 51, for securing the ship’s papers and taking depositions might have supplied conclusive evidence that the ships were subject to condemnation—particularly when the ships were enemy vessels. *See* WAPLES, *supra* note 49, § 95, at 132 (suggesting that the evidence taken from enemy captured officers and others would seldom be helped by further proof). Arlyck also suggests that because the proceedings moved quickly it may have been difficult for owners to arrange representation. *See* Arlyck, *supra* note 55, at 264; *see also* WAPLES, *supra* note 49, § 309, at 409 (explaining that enemy owners had no standing in court, but that such an owner could make an appearance “by an agent or attorney, and deny that he is an enemy, that his property is enemy property, that it has been used by the enemy or captured from the enemy”); *cf.* *McVeigh v. United States*, 78 U.S. (11 Wall.) 259, 266–68 (1870) (holding it was error for the federal court to have entered a decree pro confesso when counsel for an alleged enemy entered an appearance in a forfeiture action); *id.* at 267 (indicating alien enemies who can be sued have a right to defend); WAPLES, *supra* note 49, § 371, at 468 (discussing *McVeigh* on this point).

Whether or not owners appeared, however, a court order was needed as a prerequisite to a valid sale of the ships and goods. *See supra* note 57; Arlyck, *supra* note 55, at 258–59. The libel action could also provide for the distribution of the proceeds among the captors. *See* Arlyck, *supra* note 55, at 258–59.

<sup>59</sup> *See, e.g.,* *The Hiram*, 12 U.S. (8 Cranch) 444, 445 (1814) (indicating that the master claimed the vessel on behalf of the owner, and the supercargo [generally a representative of the cargo owners on board a ship] claimed the cargo on behalf of Griffith and various other shippers); *The Rapid*, 12 U.S. (8 Cranch) 155, 155 (1814) (listing the master in the caption of a contested prize case); *The Admiral*, 70 U.S. (3 Wall.) 603, 611 (1865) (indicating that the master filed a claim on behalf of the British ship owners and the New Brunswick cargo owners).

<sup>60</sup> *The Mary*, 13 U.S. (9 Cranch) 126, 146 (1815) (indicating that the insurers were considered parties through the master (citing *Croudson v. Leonard*, 8 U.S. (4 Cranch) 434, 437 (1808)). On the particular facts, however, the cargo owners were not foreclosed from seeking remission by the ship owners’ failing to contest the seizure which resulted in the vessel’s condemnation. *Id.* at 146–47. The owners may have failed to appear due to the worthlessness of the ship to them, given that it was subject to a bottomry bond. *Id.* A bottomry bond pledges a ship as security for repairs, and the debt is generally cancelled if the ship is lost on the same voyage.

<sup>61</sup> *See, e.g.,* *Glass v. The Sloop Betsey*, 3 U.S. (3 Dall.) 6, 6 (1794) (indicating that after a vessel had been captured by a French privateer, “the owners of the sloop and her cargo filed a libel in the District Court of Maryland, claiming restitution, because the vessel belonged to subjects of the king of Sweden, a neutral power, and the cargo was owned, jointly by Swedes and Americans”); *The Prize Cases*, 67 U.S. (2 Black) 635, 637–38 (1863) (describing various parties seeking restoration of their ships); *The Paquete Habana*, 175 U.S. 677, 679 (1900) (indicating that as to both fishing vessels at issue

consular officials commonly appeared in the litigation as parties.<sup>62</sup> Contested prize cases were frequent,<sup>63</sup> and the failure to appear was treated as a default.<sup>64</sup> To the extent some interested parties did not receive notice or faced other difficulties in making an appearance, the proceedings nevertheless met then-existing procedural due process requirements, where service of the property and publication sufficed.<sup>65</sup> Indeed, that some owners of adverse interests were outside the court's in personam jurisdiction likely contributed to the perceived necessity of proceeding against the property.<sup>66</sup>

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in prize cases, a claim was interposed by the master on behalf of himself and the crew, and of the owner).

<sup>62</sup> See, e.g., *The Divina Pastora*, 17 U.S. (4 Wheat.) 52, 52–53 (1819) (indicating that the Spanish consul was claiming restitution of a ship that Buenos Ayres rebels had seized as enemy property/prize); cf. *The Antelope*, 23 U.S. (10 Wheat.) 66, 67–68 (1825) (prize case in which vice-consuls of Spain and Portugal sought return of captured slaves as property of their citizens); *The Santa Maria*, 23 U.S. (10 Wheat.) 431, 432 (1825) (prize case where the Spanish consul sued for restitution on behalf of the original owners); BENEDICT, *supra* note 51, at 435 (providing a form in which a consul says he believes libeled property is British); Arlyck, *supra* note 56, at 245–47 (recounting successes of consular officials in obtaining restoration of ships seized by privateers authorized by South American revolutionary governments, who had violated the federal neutrality law); *id.* at 263–64 (indicating that a consul could initiate proceedings “without specific authorization from the property owners”); *id.* at 265 (noting that consuls pressed both large and small claims).

<sup>63</sup> See, e.g., *The Joseph*, 12 U.S. (8 Cranch) 451 (1814); *The Sally*, 12 U.S. (8 Cranch) 382 (1814); *The St. Lawrence*, 12 U.S. (8 Cranch) 434 (1814); see also Pfander & Birk, *supra* note 9, at 1395 (“[T]he seized ship’s owner, captain, or crew could potentially (and sometimes did) appear to contest condemnation of the prize.”). See generally William R. Casto, *The Origins of Federal Admiralty Jurisdiction in an Age of Privateers, Smugglers, and Pirates*, 37 AM. J. LEGAL HIST. 117, 150 (1993) (discussing the many prize cases in the Supreme Court from 1789–1801).

<sup>64</sup> See *The Mary*, 13 U.S. (9 Cranch) at 143 (characterizing the failure of American owners to show up to contest a forfeiture as “contumacy”); WAPLES, *supra* note 49, § 2, at 3 (stating requirements of all in rem actions include: “7. Notice of seizure and libel must be given to the world, if the world is to be bound by the decree. 8. Opportunity for filing claims, interventions and answers must be afforded. 9. Default should be entered against all non-appearers”); *id.* § 95, at 132 (indicating that in prize cases, the evidence, generally taken “from the captured officers and others of the prize,” will be presented to the court though no one may have appeared); BENEDICT, *supra* note 51, §§ 449–52 (discussing defaults); cf. *Stratton v. Jarvis*, 33 U.S. (8 Pet.) 4, 8–9 (1834) (describing procedures of a libel for salvage and reflecting an expectation that property owners would appear).

<sup>65</sup> See WAPLES, *supra* note 49, § 64, at 89 (indicating that the presumption of notice might in many cases be incorrect, “but the presumption is necessary to the very existence of proceedings *in rem* [and t]he cases of hardship are comparatively few, while the benefits of this mode of procedure are so great that it would be almost impossible to enforce our revenue and navigation laws, liens in admiralty, and many statute rights, without the use of it”).

<sup>66</sup> See *supra* note 57 and accompanying text; WAPLES, *supra* note 49, § 308, at 408 (“Why, since the right to condemn is always found in the hostility implied from ownership, must the proceedings always be *in rem*? Because we have no jurisdiction over a public enemy so as to sue him *in personam*.”); *id.* § 625, at 772 (“And whatever there may be of apparent injustice in the system, there is another side from which it may be viewed where the injustice of refusing the action is very much more apparent.”).



### C. Remission of Forfeitures

A variety of embargo, revenue, and customs laws provided for forfeiture of ships and goods involved in violation of those laws.<sup>67</sup> Some forfeiture proceedings were part of the prize jurisdiction.<sup>68</sup> Whether or not involving prize, forfeitures generally proceeded as in rem libel actions.<sup>69</sup> Statutes also provided that the party whose property had been subject to forfeiture could seek a remission, that is, forgiveness of the forfeitures in whole or part.<sup>70</sup> The remission procedure was often seen as a continuation of the in rem forfeiture proceedings because the remission affected the distribution of the property in the hands of the court.<sup>71</sup>

A libel and remission might proceed as follows. Customs officials of a particular port seized ships and goods for violations of the embargo or customs laws. At the instance of the seizing officials, the District Attorney for the United States then brought the libel or forfeiture proceeding.<sup>72</sup> Customs officials had strong incentives to participate in the proceedings because they would be entitled to a half (moiety) or some other portion of the proceeds if the court held the goods forfeit.<sup>73</sup>

After a court determined the property was subject to forfeiture but before the distribution of proceeds, an owner might file in the libeling court a petition for remission. The remissions were governed by statute which

<sup>67</sup> See Nelson, *supra* note 52, at 2465–66.

<sup>68</sup> See, e.g., *The Mary*, 12 US (8 Cranch) at 389–92 (involving prize and a remission).

<sup>69</sup> An application for remission of a penalty presumably might proceed in personam. Notice would still be given to the government and the officers. See, e.g., Act of May 26, 1790, ch. 12, § 1, 1 Stat. 122.

<sup>70</sup> See, e.g., *id.*

<sup>71</sup> See *United States v. Morris*, 23 U.S. (10 Wheat.) 246, 292 (1825) (stating that the “suit, or prosecution, does not end with the judgment, but embraces the execution,” which could be affected by a remission after the judgment); *M’Lane v. United States*, 31 U.S. (6 Pet.) 404, 424 (1832) (“Where a sentence of condemnation has been finally pronounced in a case of seizure, the court, as an incident to the possession of the principal cause, has a right to proceed to decree a distribution of the proceeds, according to the terms prescribed by law.”).

<sup>72</sup> *The Confiscation Cases*, 74 U.S. (7 Wall.) 454, 458 (1868) (stating that while the libel mentioned the name of the informer, the suits were initiated by the District Attorney for the United States); *BENEDICT*, *supra* note 51, at 546–51 (providing examples of libels brought by the District Attorney of the United States for the Southern District of New York).

<sup>73</sup> See *Morris*, 23 U.S. at 290–91 (noting the duty of the collector to prosecute the claims on behalf of the government and that while customs officers were parties in interest, they were subordinate to the United States as the formal party); *The Princess of Orange*, 19 F. Cas. 1336, 1336 (S.D.N.Y. 1831) (No. 11,431) (explaining that the collector of customs confiscated smuggled jewels and diamonds, and “directed the district attorney to prosecute the goods for condemnation”); cf. *Dorsheimer v. United States*, 74 U.S. (7 Wall.) 166, 166 (1868) (indicating as to the internal revenue laws, that the collectors have authority to prosecute for recovery of fines and forfeitures on behalf of the United States, and that the collector or deputy collector to first inform would receive a moiety (citing Act of June 30, 1864, ch. 173, § 179, 13 Stat. 223, 305)).

prescribed standards by which the Secretary of the Treasury could grant them, such as the lack of “wilful negligence or any intention of fraud” by the owner.<sup>74</sup> The court made fact-findings relevant to this standard and forwarded them to the Secretary.<sup>75</sup> The Secretary’s determination of remission was returned to the court administering the forfeiture, such that the determination would generally control the disposition of the property. The Secretary’s remission determination, if within statutory authority, foreclosed not only the interest of the United States but also that of the customs officials in their moiety of the remitted amounts.<sup>76</sup> The ability of the Secretary to foreclose the interests of seizing officials resulted from the Court’s seeing the rights of forfeiture and remission as belonging to the United States rather than to the customs officials.<sup>77</sup>

The back and forth between the Court and the Secretary of Treasury may appear violative of rules against executive review of judicial determinations.<sup>78</sup> Whatever their other constitutional defects, however, the judges’ proceedings generally did not lack adversity. The initial remission statute provided:

[T]he said judge shall inquire in a summary manner into the circumstances of the case, first causing reasonable notice to be given to the person or persons claiming such fine, penalty or forfeiture, and to the attorney of the United States for such district, that each may have an opportunity of showing cause against the mitigation or remission thereof . . . .<sup>79</sup>

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<sup>74</sup> Act of May 26, 1790, ch. 12, § 1, 1 Stat. 122, 122–23; *see also* Act of Feb. 27, 1813, ch. 33, § 1, 2 Stat. 804, 805 (directing the Secretary of the Treasury to remit all forfeitures, penalties, and fines for bona fide American property brought to the country after the declaration of war in a nonclandestine manner).

<sup>75</sup> *See Morris*, 23 U.S. (10 Wheat.) at 285 (“The facts are submitted to the Secretary, for the sole purpose of enabling him to form an opinion, whether there was willful negligence, or intentional fraud . . . .”); *The Margaretta*, 16 F. Cas. 719, 722 (C.C.D. Mass. 1815) (No. 9,072) (discussing the necessity of transmission of the statement of facts by the judge to the Secretary).

<sup>76</sup> *See Morris*, 23 U.S. (10 Wheat.) at 292, 296 (indicating that the United States could grant remission even after condemnation).

<sup>77</sup> *Id.*

<sup>78</sup> *Cf.* Russell Wheeler, *Extrajudicial Activities of the Early Supreme Court*, 1973 SUP. CT. REV. 123, 133 (characterizing remissions actions as “truly judicial” even though they “did not involve the decision of cases or controversies”).

<sup>79</sup> Act of May 26, 1790, ch. 12, § 1, 1 Stat. 122, 122; *see also* Act of Mar. 3, 1797, ch. 13, § 1, 1 Stat. 506, 506 (containing a similar notice provision); Act of Jan. 2, 1813, ch. 7, § 1, 2 Stat. 789, 789–90 (referring to persons petitioning under the Act of March 3, 1797); Act of Feb. 27, 1813, ch. 33, § 1, 2 Stat. 804, 805 (same); *cf.* *M’Lane v. United States*, 31 U.S. (6 Pet.) 404, 406–07, 424–25 (1832) (statement of facts showing notice to the collector, in a proceeding under the Act of July 29, 1813, giving the ship owners the same benefits as under the Act of Jan. 2, 1813 (citing Act of July 29, 1813, ch. 34, § 1, 6 Stat. 122, 122)). Pfander and Birk advert to the notice provision in the 1790 statute, but state, “the district judge could proceed to assemble a factual record even where no adverse party came

Despite their claims being seen as more or less derivative of the government's, the customs officials were considered parties in interest with a right to appear before the judge to contest the petitioner's request for remission even if the United States favored it.<sup>80</sup> In *M'Lane v. United States*, for example, the collector was given notice and presented a protest, and that protest was appended to the judge's fact-findings forwarded to the Secretary.<sup>81</sup> Even after the Secretary's order of remission, the officers in *M'Lane* successfully argued in the court that a certain part of the proceeds was not statutorily remittable.<sup>82</sup>

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Pfander and Birk provided as historical examples of original non-contentious proceedings a number of in rem-type proceedings: bankruptcies, receiverships, prize, and remissions. Such proceedings, however, all responded to a need to resolve conflicting claims to property that were difficult to adjust by agreement, provided service comporting with procedural due process, and could affect claims to the property even if parties failed to appear. In addition, those with adverse interests frequently appeared to make adverse arguments. The in rem-type proceedings do not undermine the need for adverse legal interests as a requirement for Article III cases.

### III. WARRANTS

Pfander and Birk also offer warrants as an example of original non-contentious litigation in the federal courts.<sup>83</sup> Courts and magistrates generally issue warrants without the participation of the person whose property or liberty may be impaired. As is true for in rem proceedings, warrant practice reflects a need to affect adverse interests that cannot easily be adjusted by agreement between the parties—here, the government and the target. The obvious justification for proceeding ex parte is that notice to

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forward to contest the petition for remission.” Pfander & Birk, *supra* note 9, at 1366–67, 1366 nn.74–76, 1367 n.77.

<sup>80</sup> *The Princess of Orange*, 19 F. Cas. 1336, 1337 (S.D.N.Y. 1831) (No. 11,431) (rejecting, in a proceeding under the Act of March 3, 1797, the government's argument that the collector could not oppose the remission, when the government was supporting the claim for remission so that the seized jewels could be returned to King of the Netherlands from whom they were stolen).

<sup>81</sup> 31 U.S. (6 Pet.) at 407.

<sup>82</sup> *Id.* at 428–29; *see also* *The Margareta*, 16 F. Cas. 719, 722–23 (C.C.D. Mass. 1815) (No. 9,072) (indicating remission could not apply as to an importation occurring after the passage of the act authorizing remissions).

<sup>83</sup> Pfander & Birk, *supra* note 9, at 1375, 1441.

the target may make the goods or the person harder to secure.<sup>84</sup> The lack of a requirement of advance notice to the target is an aspect of procedural due process in this context; it is not about the lack of adverse interests.

The absence of notice, moreover, was generally soon remedied. As shown by Telford Taylor, after issuance of the warrant, its execution generally gave immediate notice to the target, and frequently led to immediate adverse arguments.<sup>85</sup> For example, the victim of a theft might swear out a complaint stating probable cause to believe that stolen goods would be found in a particular place.<sup>86</sup> If the goods were found, both the goods and the suspect were brought immediately before the judge. The search target could argue that the goods were in fact his own and should be restored to him.<sup>87</sup> Similarly, in early twentieth-century federal cases, persons whose goods were seized could move for their return, either as part of a criminal action if they were already defendants or in a separate proceeding.<sup>88</sup> Arrest warrants also give notice to the arrestee upon their execution and give rise to adversary determinations of the legality of detention and, eventually, of criminal liability.

To support their claim of a lack of adverseness as to warrants, Pfander and Birk cite the fact that historically “a lawful warrant” would have the effect of providing a defense to the searching individuals if the search

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<sup>84</sup> See Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 765 (1994) (indicating that an *ex parte* warrant for contraband, criminal instrumentalities, and other dangerous items “could issue, without notice to the owner of the place, lest he be tipped off and spirit away the goods, or lest the items cause imminent harm”); cf. TAYLOR, *supra* note 7, at 59–60 (noting that search warrants can be used to find incriminating evidence, whereas a subpoena to the defendant requiring him to turn over the same evidence would run into Fifth Amendment problems).

<sup>85</sup> TAYLOR, *supra* note 7, at 82 (“Temporary restraining order and search warrant differ in that the initial clandestinity is a necessary feature only of the latter, but they are alike in the far more basic respect that both are ancillary *ex parte* preludes to confrontation and controversy.”); see also Amar, *supra* note 84, at 803 (noting that in the past, notice was “contemporaneous with the intrusion”).

<sup>86</sup> Cf. TAYLOR, *supra* note 7, at 44–45 (indicating that stolen goods warrants were common for much of the nineteenth century, but began to fade with the appearance of the exclusionary rule and organized police forces).

<sup>87</sup> Cf. *Halsted v. Brice*, 13 Mo. 171, 175 (1850) (in a trespass action, holding that the warrant should not have been admitted as to ownership of the seized tools, given that the warrant was informal and insufficient). Many of the warrant cases used as authority in this section, including *Halsted*, were cited by Taylor. See TAYLOR, *supra* note 7, at 44 & 188 n.71, 86 & 202 n.194.

<sup>88</sup> See, e.g., *Cogen v. United States*, 278 U.S. 221, 223–25 (1929) (noting the use of motions in advance of trial for return of the property and suppression of the evidence); *id.* at 225–27 (discussing independent proceedings for return of evidence, as by a stranger to the litigation, or where the criminal proceeding has been disposed of, or after acquittal); *id.* at 227–28 (indicating that motions made by defendants pretrial for suppression were generally interlocutory and not immediately appealable).

victim sued them in trespass.<sup>89</sup> To be sure, legal warrants often supplied a defense to trespass actions and thus could limit contestation by way of such post-search actions. Even a warrant lawfully issued on a showing of probable cause, however, did not necessarily give a defense to the complainant on a stolen goods warrant if no stolen goods were found.<sup>90</sup> Contests occurred, moreover, as to whether warrants were indeed lawful. Trespass defendants could be liable if probable cause and good faith were absent<sup>91</sup> or if there were inadequate descriptions of places and goods.<sup>92</sup> In all events, contests seeking return of property were available.<sup>93</sup>

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<sup>89</sup> Pfander & Birk, *supra* note 9, at 1375–76; *see also* Amar, *supra* note 84, at 774 (indicating that if there was no warrant accompanying a search, the target could have a trespass suit); *id.* at 781 (indicating that if a warrant was issued from a court of general jurisdiction, the determination of probable cause would be treated as *res judicata* and could only be questioned by a higher court).

<sup>90</sup> *See, e.g.*, Chipman v. Bates, 15 Vt. 51, 58–61 (1843) (noting there was a dispute as to whether the complainant on a stolen goods warrant was strictly liable for trespass as the goods were not recovered, but finding that the open door meant there was no liability); *Beaty v. Perkins*, 6 Wend. 382, 383–86 (N.Y. Sup. Ct. 1831) (noting some English cases indicating that the informer on a stolen goods warrant could be strictly liable if no goods were found, but holding that the officer and the complainant could defend as the warrant was legally issued and executed); *see also* Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 589, 652 (1999) (discussing potential tort liability for private parties and officers who acted as complainants on warrants in the event of a fruitless search); *id.* at 626–27 (discussing the extent to which a warrant justified the executing officer's actions); *id.* at 652–53, 653 n.295 (noting that customs officers sometimes had protection from seizures which were later overturned by a court if they had reasonable cause). As Davies points out, officers might act as complaining witnesses and could be liable on the same terms as private complainants, who might be liable for a fruitless search despite a lawful warrant. *See id.* at 652 (“Moreover, an officer who initiated a revenue search was as accountable as a private complainant.”). *But cf.* Pfander & Birk Reply, *supra* note 9, at 1083 (“[P]ossible spin-off claims do not alter the fact that the constable could claim legal protection from a trespass action when acting pursuant to a lawful warrant.”).

Exceeding the scope of the warrant could similarly lead to liability. *See, e.g.*, Larthet v. Forgay, 2 La. Ann. 524 (1847) (affirming a judgment of liability for detaining a tobacconist and searching his shop, which was next to the cabaret specified in the warrant); *Humes v. Taber*, 1 R.I. 464, 472 (1850) (indicating that both the complaining witness and sheriff could be liable when the warrant commanded the search of the dwelling house of the individual leasing the premises to the plaintiff, but not the dwelling of the plaintiff himself).

<sup>91</sup> This was particularly true for the complaining witnesses. *See Malley v. Briggs*, 475 U.S. 335, 340–41, 341 n.3 (1986) (“In 1871, the generally accepted rule was that one who procured the issuance of an arrest warrant by submitting a complaint could be held liable if the complaint was made maliciously and without probable cause.”); *id.* at 344–45 (holding that a police officer whose warrant application resulted in an arrest alleged to be unconstitutional was only entitled to qualified immunity, which would be lost in the absence of probable cause); *Randall v. Henry*, 5 Stew. & P. 367, 378 (Ala. 1834) (noting that in a malicious prosecution case, the fact that the magistrate issued the warrant did not constitute an excuse if there was malice and no probable cause); *Carey v. Sheets*, 67 Ind. 375, 375–76, 378 (1879) (finding that while the constable could justify his actions under the warrant, those who procured the warrant could be liable for malicious prosecution if there were both want of probable cause and malice); *Bell v. Keepers*, 14 P. 542, 543 (Kan. 1887) (indicating that the person who swore out a complaint leading to the issuance of an arrest warrant could be liable if there was malice and no probable cause).

It is true that modern surveillance warrants are problematic from an Article III case or controversy requirement, as Taylor argued, because revelation and possible adverse contest will be delayed if they occur at all.<sup>94</sup> National security orders are particularly likely to escape eventual notice and adverse contests.<sup>95</sup> This Article does not enter the debate about the legality of such national security orders.<sup>96</sup> Traditional warrants, however, not only affected adverse legal interests but also generally gave notice and an opportunity for adverse argument. In summary, warrants presented a need for a determination of adverse legal interest that could not be resolved voluntarily, a need for a pre-notice determination of whether the warrant should issue, and a post-execution ability to contest at least some aspects of the warrant's validity.

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<sup>92</sup> See *Reed v. Rice*, 25 Ky. (2 J.J. Marsh) 44, 45–47 (1829) (holding that although those summoned to assist would not be held liable for trespass, the complainant and the constable executing the warrant could be liable given the lack of an adequate description of the place to be searched as required by the Kentucky constitution); *Barker v. Stetson*, 73 Mass. (7 Gray) 53, 54 (1856) (stating that if the warrant for seizure was issued under an unconstitutional statute, both the magistrate and the officer could be liable in trespass); *Sandford v. Nichols*, 13 Mass. (13 Tyng) 286, 288–89 (1816) (indicating the defendant revenue inspectors could have been liable because the warrant was not specific enough as to the persons whose houses were to be searched and goods that were the object of the search); *id.* at 289–90 (indicating that the damages might be slight because only forfeitable goods were taken); *id.* at 288–89 (indicating that the failure to attach the complaint did not vitiate a warrant, while also stating that if the warrant did not state any sufficient cause it would not justify the entry); *cf.* *Davies*, *supra* note 90, at 647–48 (providing authority that success of the search was not necessarily sufficient justification for violation of the home). Pfander and Birk do note that overbroad warrants did not confer immunity. Pfander & Birk, *supra* note 9, at 1376 n.127.

<sup>93</sup> See TAYLOR, *supra* note 7, at 48 (stating that there is an opportunity to quash the warrant and seek restoration of the property seized, although this provides little protection if nothing is seized, with trespass actions being “a very forlorn hope”); *id.* at 82 (stating that the return on the warrant provides an immediate opportunity to move to suppress the warrant and seek return of seized items).

<sup>94</sup> *Id.* at 79–88 (criticizing procedures for surveillance warrants, and noting problems as to “case or controversy” criteria including the lack of adverse parties).

<sup>95</sup> Pfander & Birk, *supra* note 9, at 1463 (noting the problem that targets may lack notice); see also *id.* at 1349 n.3, 1462–65 (discussing debate over FISA warrants). Congress in 2015 provided for the appointment of attorneys to serve as amicus curiae in the FISA court, under rules of the presiding judges, to provide as appropriate, inter alia, “legal arguments that advance the protection of individual privacy and civil liberties.” USA FREEDOM Act of 2015, Pub. L. No. 114-23, § 401(i)(1), (i)(4)(A), 129 Stat. 268, 279 (codified at 50 U.S.C. § 1803(i)(1), (i)(4)(A) (2015)).

<sup>96</sup> See generally Stephen I. Vladeck, *The FISA Court and Article III*, 72 WASH. & LEE L. REV. 1161 (2015) (raising questions as to the constitutionality of certain FISA procedures); Jack Goldsmith, *Internal Checks and Balances in the National Security Agency*, JACK GOLDSMITH (Sept. 17, 2012), <http://jackgoldsmith.org/internal-checks-balances-national-security-agency/> [https://perma.cc/762P-YBJR] (discussing the necessity for secrecy, and that internal checks try “to replicate in secret the role that checks and balances normally play in public”).

## IV. COLLUSIVE SUITS

Pfander and Birk provide some examples of non-contentious jurisdiction as to which the Court expressed criticism and declined jurisdiction—particularly collusive suits where the parties had, in some sense, cooperated in seeking a decision from the courts. They claim, however, that “the decisions that restrict the use of collusive cases do not actually question the power of the federal courts to hear non-contentious proceedings in general, but only collusive proceedings that assume the form of contentious ones.”<sup>97</sup> Their examples include *Lord v. Veazie*<sup>98</sup> and friendly shareholder litigation.<sup>99</sup> Further exploration of these cases, however, reinforces a general requirement of adverse interests.

Any assessment of collusive suits requires distinguishing instances in which the parties lacked genuinely adverse legal interests (hereinafter “merits collusion”) and cases where the parties had adverse legal interests but colluded primarily to set up a cause of action and obtain jurisdiction in the lower federal courts or in the Supreme Court (hereinafter “jurisdictional collusion”).<sup>100</sup> Examples of both can be found in early Supreme Court practice. *Fletcher v. Peck*<sup>101</sup> presents an example of merits collusion, where parties without genuine adverse interests set up a case to secure a decision to uphold the Yazoo land grants.<sup>102</sup> *Hylton v. United States*, which upheld a federal carriage tax,<sup>103</sup> appears to be more a case of jurisdictional collusion, where parties with \$16 in controversy alleged with obvious falsity that over

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<sup>97</sup> Pfander & Birk, *supra* note 9, at 1433; *see also id.* at 1435 (describing the reprobated cases as those that “aim[] to secure a precedent rather than to resolve a dispute”).

<sup>98</sup> 49 U.S. (8 How.) 251 (1850); Pfander & Birk, *supra* note 9, at 1433.

<sup>99</sup> Pfander & Birk, *supra* note 9, at 1436–37; *id.* at 1437–38, 1440 (arguing that a principal concern as to friendly disputes regarding constitutional issues was that the parties could not be relied on to develop an adequate record).

<sup>100</sup> Lindsay G. Robertson, “*A Mere Feigned Case*”: *Rethinking the Fletcher v. Peck Conspiracy and Early Republican Legal Culture*, 2000 UTAH L. REV. 249, 259 (“Feigned issues, like legal fictions, had developed in England to provide a means around jurisdictional impediments in a restrictive pleading environment.”); *see* Michael G. Collins, *Jurisdictional Exceptionalism*, 93 VA. L. REV. 1829, 1838–39 (2007) (discussing heavy reliance on pleadings, and cases where the Court held that a party had waived the lack of diversity by not raising it, and how parties could collude to have their case tried in federal court by a combination of a plaintiff’s jurisdictional plea and defendant’s non-objection); *id.* at 1839–41 (discussing procedural roadblocks to contesting subject matter jurisdiction); *cf.* Pfander & Birk, *supra* note 9, at 1434–35 (noting that early feigned cases could be somewhat like modern declaratory judgments and were trying to assure a federal forum for a resolution of a real dispute). The categories of merits and jurisdictional collusion will not always be perfectly distinct.

<sup>101</sup> 10 U.S. (6 Cranch) 87 (1810).

<sup>102</sup> Robertson, *supra* note 100, at 252–56. There may also have been jurisdictional collusion as to the amount in controversy. *See* HASKINS & JOHNSON, *supra* note 50, at 344–45.

<sup>103</sup> 3 U.S. (3 Dall.) 171, 175, 181 (1796).

\$2000 was in controversy to meet a requirement for Supreme Court review.<sup>104</sup> Merits collusion, where adverse legal interests are lacking, is a more serious challenge to adverseness requirements than jurisdictional collusion. The Court, however, dismissed neither *Fletcher* nor *Hylton* based on the cooperation of the parties.

Over time, however, the Supreme Court backed away from countenancing merits collusion, resulting in part from an increasing willingness to look beyond the face of the pleadings to determine justiciability and jurisdictional questions.<sup>105</sup> In *Lord v. Veazie*, the Court dismissed a suit between two parties effectively seeking a determination that a nonparty bank did not own certain navigation rights in the Penobscot River.<sup>106</sup> Chief Justice Roger Taney stated as to the parties, “it is evident that their interest in the question brought here for decision is one and the same, and not adverse . . . .”<sup>107</sup> Chief Justice Taney distinguished amicable cases where the parties will, “for the purpose of obtaining a decision of the controversy, . . . mutually admit facts which they know to be true.”<sup>108</sup> He explained “there must be an actual controversy, and adverse interests. The amity consists in the manner in which it is brought to issue before the court.”<sup>109</sup>

The Court similarly dismissed *Wood-Paper Co. v. Heft* for the lack of adverse interests.<sup>110</sup> In that case, a patent holder brought an infringement action which was dismissed by the lower court. The plaintiff patent holder then purchased the competing patent and sought by appeal to have the trial

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<sup>104</sup> DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 1798–1888*, at 32 (1985) (characterizing the Court’s willingness to decide *Hylton* as “extraordinary”); Susan Low Bloch, *The Early Role of the Attorney General in Our Constitutional Scheme: In the Beginning There Was Pragmatism*, 1989 DUKE L.J. 561, 613 n.173 (noting the transparent effort to get around the jurisdictional amount and the fact that “the United States had apparently paid Hylton’s attorneys”); Robertson, *supra* note 100, at 262–63 (discussing *Hylton*, as well as *Pennington v. Coxe*, 6 U.S. (2 Cranch) 33 (1804), which also contested a tax).

<sup>105</sup> See Collins, *supra* note 100, at 1861–70 (discussing the Taney Court’s decreasing reliance on the face of the pleadings to determine subject matter jurisdiction).

<sup>106</sup> 49 U.S. (8 How.) 251, 254–56 (1850).

<sup>107</sup> *Id.* at 254; see also Morley, *supra* note 7, at 657–64 (discussing *Veazie* and other cases where the parties were seeking the same relief).

<sup>108</sup> *Veazie*, 49 U.S. (8 How.) at 255.

<sup>109</sup> *Id.*; cf. 5 CARL B. SWISHER, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE TANEY PERIOD 1836–64*, at 538 (1974) (indicating that in *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842), the Pennsylvania legislature arranged for a trial with a special verdict against Prigg, so that a constitutional challenge to the Pennsylvania statute as to fugitive slaves could reach the Supreme Court); *id.* at 602 (discussing how the parties in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856), cooperated to shape the case for an appeal to the Supreme Court); *id.* at 601 (providing facts indicating there was a genuine dispute between Scott and Sanford).

<sup>110</sup> 75 U.S. (8 Wall.) 333, 336 (1869).



court's decision overturned with an apparent aim to prejudice parties in other patent litigation.<sup>111</sup>

Its increased willingness to look beyond the pleadings sometimes led the Court to reject cases involving jurisdictional collusion.<sup>112</sup> Nevertheless, the Court remained amenable to many forms of jurisdictional collusion. Indeed, the Taney Court, which decided *Veazie* and *Heft*, approved the use of shareholder derivative actions as a means for corporations to obtain federal diversity jurisdiction for challenges to allegedly unconstitutional state laws. If incorporated in a particular state, a corporation would not be diverse from that state's enforcement officials. The corporation therefore faced problems in attempting to bring a federal court suit against state officers, particularly before general federal question jurisdiction was available.<sup>113</sup> In *Dodge v. Woolsey*, however, the Court allowed an out-of-state shareholder to bring a derivative action against the in-state corporation in federal court to contest the corporation's paying a tax alleged to violate the Contracts Clause.<sup>114</sup> The shareholder suit would become a staple of constitutional challenges, as would similar suits by corporate bond trustees.<sup>115</sup>

Such shareholder and trustee suits seeking injunctions against the corporation's compliance with unconstitutional laws were, for the most

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<sup>111</sup> See *id.* at 334 (statement of the case, describing allegations of the intervenor that the suit "was now carried on without the appellees having any further interest in the defence, and for the purpose of obtaining the decree of this court in favor of the complainants to influence suits pending in the circuits in their favor and against strangers to this suit, . . . and that the intervenor was a defendant in one of these suits").

<sup>112</sup> See, e.g., *Bartemeyer v. Iowa*, 85 U.S. (18 Wall.) 129, 134–35 (1873) (affirming the decree from the state court upholding the constitutionality of a state prohibition law, but refusing to decide the constitutionality of the application of such a law to liquor owned prior to passage of the law, given that it was unlikely that the ownership extended back to 1851 when the liquor law had first been passed); *id.* at 135 (reasoning that the plaintiff could not have proven the facts necessary for the claim and that the Iowa Supreme Court did not consider it an issue raised by the record); *Dawson v. Columbia Ave. Sav. Fund, Safe Deposit, Title & Tr. Co.*, 197 U.S. 178, 180 (1905) (realigning the company as a plaintiff and thereby destroying diversity in a contract suit, where the suit was an attempt to avoid the effect of a prior decision against the company in the state supreme court); *id.* at 181 (finding no Contracts Clause issue that would sustain federal question jurisdiction); *United States v. Johnson*, 319 U.S. 302, 303–04 (1943) (per curiam) (dismissing where the landowner had engineered a friendly suit with a tenant who did not actually participate, to contest a federal price control act, although it was not alleged that any false allegation was made, and although the United States had intervened to defend the act).

<sup>113</sup> See Ann Woolhandler, *The Common Law Origins of Constitutionally Compelled Remedies*, 107 YALE L.J. 77, 90 (1997) (discussing potential obstacles faced by the corporation or shareholders attempting to obtain diversity to challenge government action in federal courts).

<sup>114</sup> 59 U.S. (18 How.) 331, 356–61 (1855); see also Woolhandler, *supra* note 113, at 91 (discussing *Dodge*).

<sup>115</sup> Woolhandler, *supra* note 113, at 95–98, 97 n.104, 98 n.110.

part, genuinely contentious, despite the lack of adversity between the shareholders and the corporation. Along with the corporation, in-state government enforcement officials were also party defendants.<sup>116</sup> The shareholders' and corporation's interests were adverse to the interests of the enforcement official.

It is true that the Court in *Hawes v. Oakland* announced that it was promulgating an equity rule requiring an affidavit from the plaintiff that “the suit is not a collusive one to confer on a court of the United States jurisdiction in a case of which it could otherwise have no cognizance.”<sup>117</sup> The Court, however, often applied the rule leniently—allowing a suit, for example, where the disagreement alleged between the shareholders and directors was that the directors had declined to file suit because of “embarrassments” to the corporation's raising its rights in state court.<sup>118</sup> While the Court continued to entertain numerous shareholder and trustee suits into the late nineteenth and early twentieth centuries,<sup>119</sup> such suits

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<sup>116</sup> See, e.g., *Dodge*, 59 U.S. (18 How.) at 336 (“[The plaintiff] makes George C. Dodge, the tax collector, the directors of the bank, and the bank itself, defendants.”). Pfander and Birk note the Court's expressions of misgivings about friendly suits, such as in *Chicago & Grand Trunk Railway Co. v. Wellman*, 143 U.S. 339 (1892), a case between a railroad passenger and a railroad in the state trial court. See Pfander & Birk, *supra* note 9, at 1436 & n.418. In *Wellman*, however, the plaintiff had not joined a government official in the trial court. See 143 U.S. at 344. The Supreme Court noted that the government had appeared in the Michigan Supreme Court, *id.*, and the United States Supreme Court went on to affirm the judgment below holding that the rate regulation was valid. *Id.* at 346; cf. *Atherton Mills v. Johnston*, 259 U.S. 13, 15–16 (1922) (noting that this case differed from *Truax v. Raich*, 239 U.S. 33, 38 (1915), in that the plaintiff challenging a labor act had failed to join a government official as a party, but ultimately holding the case moot because the child laborer had aged out of the act's coverage).

<sup>117</sup> 104 U.S. 450, 461 (1881); see Equity Rule 94, 104 U.S. ix, ix–x (1882) (enacting nearly identical language); see also John C. Coffee, Jr. & Donald E. Schwartz, *The Survival of the Derivative Suit: An Evaluation and a Proposal for Legislative Reform*, 81 COLUM. L. REV. 261, 266 (1981) (treating *Hawes* as indicating a policy to move away from a disreputable form of litigation).

<sup>118</sup> *Greenwood v. Freight Co.*, 105 U.S. 13, 15–16 (1881); see Woolhandler, *supra* note 113, at 97 & n.101 (discussing *Greenwood* on this point).

<sup>119</sup> See, e.g., *Reagan v. Farmers' Loan & Tr. Co.*, 154 U.S. 362, 388–93 (1894) (entertaining a suit by an out-of-state trustee on railroad bonds contesting allegedly unreasonable rates); *Smyth v. Ames*, 169 U.S. 466, 469–70 (1898) (statement of the case, indicating that diverse shareholders sued the corporations and state officers); Woolhandler, *supra* note 113, at 128 (noting continued use of diversity for raising constitutional challenges, even after 1875). Even when litigants relied on federal question as a basis for jurisdiction, they continued to use the shareholder suit for some time. See *Ex parte Young*, 209 U.S. 123, 143–45 (1908) (indicating in a shareholder case that there was no claim of diversity jurisdiction, and upholding the suit as a federal question case); see also *Smith v. Kan. City Title & Tr. Co.*, 255 U.S. 180, 199–202 (1921) (upholding federal question jurisdiction in a shareholder action challenging a bank's investments in bonds alleged to have been issued in excess of congressional power); Woolhandler, *supra* note 113, at 97 n.104 (suggesting that the shareholder form may have helped in showing inadequacy of remedies at law for acquiring equity jurisdiction). The requirements as to adversity do not appear to have been more stringent in diversity “controversies” than in the federal

eventually fell from use with the rise of anticipatory federal question actions.<sup>120</sup>

Similarly evidencing the Court's willingness to allow jurisdictional collusion were equity receiverships.<sup>121</sup> Receiverships, as noted above, were a means to adjust the debts of insolvent corporations.<sup>122</sup> Diversity jurisdiction would be obtained in federal court by using a diverse creditor to initiate the proceeding, usually based on enforcement of creditors' rights in some form.<sup>123</sup> Through appointment of ancillary receivers in different federal courts, a federal court receivership could protect and reorganize assets throughout the country.<sup>124</sup> By contrast, state insolvency proceedings and foreclosures could generally only reach assets and creditors within the state.

Such cooperation did not mean that the creditor was giving up his claims, nor that the parties lacked adverse legal interests. As the Court stated in rejecting a challenge to a receivership initiated by a cooperative diverse creditor:

It does appear that the parties to the suit desired that the administration of the railway affairs should be taken in hand by the Circuit Court of the United States, and to that end, when the suit was brought, the defendant admitted the averments in the bill and united in the request for the appointment of receivers. This fact is stated by the Circuit Judge; but there is no claim made that the averments in the bill were untrue, or that the debts, named in the bill as owing to the complainants, did not in fact exist; nor is there any question

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question "cases." *Compare Smith*, 255 U.S. at 195–96 (federal question case in which the facts suggest a genuine disagreement with the directors), *with Cotting v. Kan. City Stock Yards Co.*, 183 U.S. 79, 79, 113 (1901) (holding in a diversity shareholder suit that the directors' agreeing with the shareholders as to the unconstitutionality of the statute, but declining to challenge it based on prudential reasons, did not undermine jurisdiction).

<sup>120</sup> *Cf. Collins*, *supra* note 100, at 1849 & n.80 (noting cases realigning parties after federal question jurisdiction was available).

<sup>121</sup> *See Pfander & Birk*, *supra* note 9, at 1386 (discussing receiverships).

<sup>122</sup> *See supra* text accompanying notes 46–47.

<sup>123</sup> *See Byrne*, *supra* note 48, at 77 (indicating that proceedings were generally initiated by a general creditor, "at the suggestion of the railroad," by filing "a bill in behalf of himself and all other creditors, against the company in the proper" federal court); *id.* at 82 (indicating that a creditor who was not a citizen of the same state as any defendant would file the creditor's bill); *cf. Paul D. Cravath, The Reorganization of Corporations; Bondholders' and Stockholders' Protective Committees; Reorganization Committees; and the Voluntary Recapitalization of Corporations*, in *SOME LEGAL PHASES*, *supra* note 48, at 153, 155 (indicating that corporate reorganizations generally follow and are based on foreclosure of mortgages or enforcement of creditors rights in some form). Alternatively, the corporation itself might initiate the proceeding. *See Byrne*, *supra* note 48, at 82, 85–88 (indicating that beginning in 1884, federal courts allowed corporate initiation, although Byrne thought a creditor's bill preferable).

<sup>124</sup> *See Cravath*, *supra* note 123, at 158–59, 213 (discussing benefits of federal receiverships for preserving property).

made as to the citizenship of the complainants . . . . That the parties preferred to take the subject matter of the litigation into the Federal courts, instead of proceeding in one of the courts of the State, is not wrongful.<sup>125</sup>

The Court's abjuring merits collusion in cases such as *Veazie* and *Heft*,<sup>126</sup> as well as its countenancing a certain amount of jurisdictional collusion in shareholder suits and receiverships, both manifest the need for adverse interests to be at stake.

Some instances where jurisdictional collusion resulted in dismissal further reinforce an adverse interest requirement. In these cases, the parties in some sense had genuine adverse interests and thus were not engaged in merits collusion, but those adverse interests were not directly at stake in the particular case brought before the Court, such that the Court dismissed the cases.

For example, the Court dismissed *San Mateo County v. Southern Pacific Railroad Co.*<sup>127</sup> and *California v. San Pablo & Tulare Railroad Co.*<sup>128</sup> for lack of legal interests that would be affected. In both cases, the taxpayers and tax collectors cooperated in presenting test cases as to the legality of state taxes.<sup>129</sup> The governments sued for taxes in state court, and the railroad defendants removed the cases under then-existing federal question removal provisions. In *San Mateo County*, however, the railroad had unconditionally paid the taxes and agreed that the taxes would not be refunded even if the railroad won, such that there would be no difference in the result of the particular tax collection suit if the law were declared unconstitutional.<sup>130</sup> Similarly, in *San Pablo & Tulare Railroad*, the Court found that the railroad had tendered the tax in such a way as to extinguish the state's claim according to state law.<sup>131</sup> The California Attorney General argued that the case should be decided on the merits because it was a test case implicating several other cases and that the case should not be

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<sup>125</sup> See *In re Metro. Ry. Receivership*, 208 U.S. 90, 110–11 (1908).

<sup>126</sup> *Veazie* was a diversity case. *Lord v. Veazie*, 49 U.S. (8 How.) 251, 252 (1850) (action on a covenant). *Heft* arose under the patent jurisdiction. *Wood-Paper Co. v. Heft*, 75 U.S. (8 Wall.) 333, 334 (1869) (bill to enjoin patent infringement); see *supra* notes 105–11 and accompanying text.

<sup>127</sup> 116 U.S. 138, 141–42 (1885).

<sup>128</sup> 149 U.S. 308, 313–14 (1893).

<sup>129</sup> Federal injunctions against state taxes could be somewhat harder to obtain than other injunctions, see *Woolhandler*, *supra* note 113, at 134, 143, even before the 1937 Tax Injunction Act. 28 U.S.C. § 1341 (2012).

<sup>130</sup> 116 U.S. at 139–41.

<sup>131</sup> 149 U.S. at 313–14; see also *Little v. Bowers*, 134 U.S. 547, 556 (1890) (dismissing a similar case because payment had been “in the nature of a compromise” and extinguished the controversy between the parties).

dismissed because payments were still owed in those other cases.<sup>132</sup> The Court, however, required adverse legal interests to be at stake in the very case.<sup>133</sup>

The Court reached a similar result in *Muskrat v. United States*, holding that Congress improperly authorized particular causes of action to serve as test cases.<sup>134</sup> A 1902 statute provided for the distribution of certain Cherokee lands and funds to those enrolled in the tribe as of September 1, 1902.<sup>135</sup> Subsequent legislation, however, extended the allotment rights to minor children of enrolled tribe members living on the land as of March 4, 1906.<sup>136</sup> In a still-later statute, Congress authorized a suit against the United States by certain named plaintiffs representing those enrolled as of September 1, 1902 to challenge the constitutionality of the law adding to the enrollment.<sup>137</sup> The Court, however, refused to hear the case because the legislatively authorized suit would not affect adverse legal interests:

It is true the United States is made a defendant to this action, but it has no interest adverse to the claimants. The object is not to assert a property right as against the Government, or to demand compensation for alleged wrongs because of action upon its part. . . . Such judgment will not conclude private parties, when actual litigation brings to the court the question of the constitutionality of such legislation.<sup>138</sup>

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<sup>132</sup> *San Pablo*, 149 U.S. at 312–13; *see also San Mateo County*, 116 U.S. at 141 (responding to the objection that it was a test case).

<sup>133</sup> *San Pablo*, 149 U.S. at 314; *see also San Mateo County*, 116 U.S. at 141–42 (dismissing the writ of error for “the reason that there is no longer an existing cause of action in favor of the county against the railroad company,” and noting that the issues could be decided in another pending case). The Court’s current mootness doctrine, however, is often more forgiving than these cases were. *See infra* note 139.

<sup>134</sup> 219 U.S. 346, 360–63 (1911).

<sup>135</sup> Act of Jul. 1, 1902, ch. 1375, § 24, 30, 32 Stat. 716, 720–21.

<sup>136</sup> Act of Apr. 26, 1906, ch. 1876, § 2, 34 Stat. 137, 137–38, *amended by* Act of June 21, 1906, ch. 3504, 34 Stat. 325, 341–42. The April 26, 1906 Act also extended certain prohibitions on alienation. *Id.* § 19, 34 Stat. at 144. Another statute, Act of Mar. 11, 1904, ch. 505, 33 Stat. 65, allowed the Secretary of the Interior to grant rights of way for pipelines over lands allotted to Indians. These additional restrictions on the land were at issue in *Brown v. United States*, which was decided in tandem with *Muskrat v. United States*. *Muskrat*, 219 U.S. at 349.

<sup>137</sup> Act of Mar. 1, 1907, ch. 2285, 34 Stat. 1015, 1028; *Muskrat*, 219 U.S. at 349–51, 360.

<sup>138</sup> *Mustkrat*, 219 U.S. at 361–62. The Court ultimately decided the issues in a suit that sought to enjoin the Secretaries of Interior and Treasury from performing duties under the act. *Gritts v. Fisher*, 224 U.S. 640, 647–48 (1912), *aff’g* 37 App. D.C. 473 (1911); *see* 37 App. D.C. at 476 (noting allegations that the Secretary had allotted and was about to allot lands to persons born since September 1, 1902); *cf. Muskrat*, 219 U.S. at 362 (noting the pendency of the other suit at the time Congress passed the 1907 suit-authorizing legislation, but saying that the suit-authorizing legislation “must depend upon its own terms and be judged by the authority which it undertakes to confer”); *id.* (“The questions involved in this proceeding as to the validity of the legislation may arise in suits between

In summary, the Court's treatment of collusive cases generally demonstrates its insistence that adverse legal interests be at issue in the case. The Court refused to hear merits collusion cases such as *Veazie* where the parties lacked genuinely adverse interests. On the other hand, the Court countenanced much jurisdictional collusion, as in shareholder actions and receiverships, where adverse legal interests were at stake. But even where the parties were innocent of reprobated merits collusion, as in the railroad tax cases, the Court wanted those adverse interests at least to be at stake in the case before it.<sup>139</sup>

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individuals, and when they do and are properly brought before this court for consideration they, of course, must be determined in the exercise of its judicial functions.”)

<sup>139</sup> The mootness doctrine requires, at least in theory, that parties on both sides of a dispute maintain a personal stake throughout the litigation, in addition to having such a stake at the outset as required by standing doctrine. *See, e.g.*, *Camreta v. Greene*, 563 U.S. 692, 709–11 (2011) (holding moot a case challenging the constitutionality of officers' interviewing a child without parental permission or a warrant, because the child was almost eighteen and had moved out of the district); *cf.* *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1975–76 (2016) (holding that a case involving short-term contracts was not moot, in part because there was “a reasonable expectation that the same complaining party [will] be subject to the same action again” (quoting *Spencer v. Kemna*, 523 U.S. 1, 17 (1998))); RICHARD H. FALLON, JR. ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 203 (7th ed. 2015) (suggesting that more recent cases look for recurrence as to the same party). The Court, however, has sometimes allowed even a low probability of the same parties' having the same adverse interests in the future to save a case from mootness. *See, e.g.*, *City of Erie v. Pap's A.M.*, 529 U.S. 277, 287–89 (2000) (finding the case not moot where a nude dancing establishment that had obtained an injunction was now out of business but might possibly resume operation); *Honig v. Doe*, 484 U.S. 305, 318–20 (1988) (as to a question under a federal act entitling handicapped children to an appropriate education, holding the claim moot as to a twenty-four-year-old who had aged out of the act's protections, but not moot as to a twenty-year-old student who was still within the act's protections, although he was not currently in the school system).

Class suits can rely on the interests of class members to keep a case from mootness, but questions remain as to the extent class members' interests count pre-certification. *See, e.g.*, *Gerstein v. Pugh*, 420 U.S. 103, 110–11 n.11 (1975) (holding a case not moot where the named plaintiff's claim was currently moot, and may have been moot prior to certification); *cf.* *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 670–72 (2016) (holding that the named plaintiff's claim in a not-yet-certified class was not mooted by an unaccepted offer of all relief to which he would individually be entitled); Meltzer, *supra* note 8, at 309–11 (discussing whether class status changes justiciability). One might see the federal courts' continuing jurisdiction to entertain cases on the edge of mootness as derivative of the courts' having obtained jurisdiction of a case meeting the more stringent requirements of standing (and hence of adverse interests) at the outset. *See* Sidney A. Diamond, *Federal Jurisdiction to Decide Moot Cases*, 94 U. PA. L. REV. 125, 137–38 (1946) (expressing disfavor as to a public interest factor in mootness, but noting that it is sometimes used “as a ground for retaining a jurisdiction which had properly attached at the commencement of the litigation”); *cf.* Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 59 N.Y.U. L. REV. 1, 26 (1984) (“[T]he personal interest needed to defeat mootness may be different from, and less than, that required initially to establish, standing.”); Henry Paul Monaghan, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665, 668–69 (2012) (indicating that the Supreme Court is more liberal in its justiciability doctrines when its own docket is concerned). *But cf.* Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1384–85 (1973)

## V. PENSIONS AND CITIZENSHIP

A number of Pfander and Birk's examples of non-contentious jurisdiction, as discussed above, in fact manifested adverseness. In rem-type proceedings required the determination of adverse interests in situations where impediments often existed to voluntary extrajudicial resolution. Service or notice in some form was generally provided, which gave opportunities for adverse argument.<sup>140</sup> Warrants similarly affected adverse interests not readily amenable to voluntary extrajudicial resolution, with notice generally occurring upon seizure of the person or thing, and with potential opportunities for adverse argument thereafter.<sup>141</sup> The results in the collusion cases further support the requirement of parties in the action with adverse interests on the merits.<sup>142</sup>

Two of the authors' examples of non-contentious jurisdiction, however, do not so readily suggest adverse interests—*ex parte* determinations of pensions<sup>143</sup> and of citizenship.<sup>144</sup> To be sure, one could argue that in these proceedings the government held the opposing interests and had more or less issued a blanket default on behalf of the government.<sup>145</sup> On the other hand, these cases generally lacked any form of notice or service, even by publication or seizure.<sup>146</sup> Such claims also lacked impediments to a voluntary extrajudicial resolution.<sup>147</sup> The Executive can generally give a claimant a benefit under statutory criteria without obtaining a judgment. If the Executive denies a benefit, an adverse proceeding may then ensue between the claimant and the government.

Nevertheless, the pension and naturalization examples provide little support for doing away with an adverseness requirement. As discussed

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(discussing arguments that the personal stake requirement, or lack thereof, should be the same as to standing and mootness); Lee, *supra* note 8, at 605 (arguing that mootness doctrines are subconstitutional). For further discussions of mootness, see sources cited *supra* note 8.

<sup>140</sup> See *supra* Part II.

<sup>141</sup> See *supra* Part III.

<sup>142</sup> See *supra* Part IV.

<sup>143</sup> Pfander & Birk, *supra* note 9, at 1364.

<sup>144</sup> *Id.* at 1361.

<sup>145</sup> This is Caleb Nelson's view. See *supra* note 31.

<sup>146</sup> Cf. *United States v. Ferreira*, 54 U.S. (13 How.) 40, 49 (1852) (discussing why the district court's determination of certain treaty claims was not Article III business, and noting that the district attorney had no right to appear in the proceedings, although presumably he would have a duty as a public officer to object to the judge if he knew of a problem); Nelson, *supra* note 1, at 1570 ("In personal actions, then, a common-law court could proceed to judgment against a defendant only if the defendant either actually appeared or at least was given a valid command to appear, and was thereby brought within the court's power.").

<sup>147</sup> See *supra* text accompanying notes 34–45 (discussing situations where such impediments exist).

below, the Court treated federal judges' pension determinations as appropriate, if at all, as the work of individual commissioners rather than Article III judges. Naturalization petitions are perhaps Pfander and Birk's best example of non-contentious jurisdiction, but the Court explicitly approved the practice as appropriate under Article III only after provisions for notice to, and potential appearance by, the United States.

#### A. *Revolutionary War Pensions*

1. *Hayburn's Case*.—Under a 1792 statute, Congress gave the federal courts the task of making certain ex parte pension determinations with respect to Revolutionary War veterans which then could be reviewed by the Secretary of War and Congress.<sup>148</sup> Circuit justices and judges complained to the President that the proceedings were not of a judicial nature and that the Secretary of War and Congress could modify the judges' determinations. The court reporter attached these communications to the report of *Hayburn's Case*,<sup>149</sup> but the Court did not decide the merits of these objections in *Hayburn*. For a short time thereafter, some judges continued to perform the work as commissioners rather than as Article III judges. In *United States v. Yale Todd* in 1794, however, the Court, without publishing an opinion, held invalid the judges' work as commissioners under the 1792 Act.<sup>150</sup>

Given that the judges' objected to pension work and claimed to perform such work only as commissioners, the Revolutionary pensions example would seem to provide little support for treating ex parte benefits determinations as Article III cases. Pfander and Birk nevertheless treat the pension example as supporting their claims that Article III judges, as such, can decide non-contentious cases.<sup>151</sup> They argue that the judges' objections were primarily directed to the political branches' review of judges' pension determinations, rather than to the nonadversarial nature of the proceedings.<sup>152</sup>

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<sup>148</sup> Act of Mar. 23, 1792, ch. 11, 1 Stat. 243.

<sup>149</sup> *Hayburn's Case*, 2 U.S. (2 Dall.) 409, 410 n.† (1792).

<sup>150</sup> See *Ferreira*, 54 U.S. (13 How.) at 52–53 (discussing the unreported case of *United States v. Yale Todd*); Wilfred J. Ritz, *United States v. Yale Todd (U.S. 1794)*, 15 WASH. & LEE L. REV. 220, 227–31 (1958) (providing the record); see also Susan Low Bloch & Maeva Marcus, *John Marshall's Selective Use of History in Marbury v. Madison*, 1986 WIS. L. REV. 301, 308–10 (discussing *Todd*). See *infra* text accompanying notes 162–71 for further discussion of judges acting as commissioners.

<sup>151</sup> See Pfander & Birk, *supra* note 9, at 1364.

<sup>152</sup> *Id.* at 1427–29; *id.* at 1429 (“On this account . . . the Pennsylvania circuit viewed the absence of finality as the master objection and identified two other criticisms that we might today characterize as matters of judicial dignity.”); see also Pushaw, *supra* note 9, at 514–16 (making a similar argument);



To be sure, political branch review loomed as a large concern in the judges' objections, and such review alone would be sufficient to keep even determinations of adverse claims from being Article III judicial business.<sup>153</sup> On the other hand, and as others have noted, the *Hayburn* objections encompassed a concern for the nature of the work as a distinct objection from the concern for political branch review.<sup>154</sup> While the Circuit Court for the District of New York seemed to collapse the two concerns,<sup>155</sup> the Circuit Court for the District of Pennsylvania enumerated them separately:

1st. Because the business directed by this act is not of a judicial nature. . . . 2d. Because, if, upon that business, the court had proceeded, its *judgments* (for its *opinions* are its judgments) might, under the same act, have been revised and controuled by the legislature, and by an officer in the executive department.<sup>156</sup>

The Circuit Court for the District of North Carolina also teased out the separate objections:

3. That at the same time such courts cannot be warranted . . . in exercising (even under the authority of another act) any power not in its nature *judicial*, or, if *judicial*, not provided for upon the terms the Constitution requires. 4. That whatever doubt may be suggested, whether the power in question is properly of a judicial nature, yet inasmuch as the decision of the court is not made final, but may be at least suspended in its operation by the Secretary at War . . . this subjects the decision of the court to a mode of revision which we consider to be unwarranted by the Constitution . . . .<sup>157</sup>

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Lee, *supra* note 8, at 645–47 (emphasizing the post-judgment review objection). Pfander and Birk's claim that the objections to the pension work were not based on nonadverseness depends in part on how convincing one finds their other examples of non-contentious jurisdiction. See Pfander & Birk, *supra* note 9, at 1427 ("Perhaps the strongest evidence against an adverse-party reading of *Hayburn's Case* lies in the federal courts' contemporary and subsequent acceptance of ex parte duties of various sorts.").

<sup>153</sup> See, e.g., *Gordon v. United States*, 69 U.S. (2 Wall.) 561, 561 (1864) (without opinion, disallowing Supreme Court review of Court of Claims judgments); *Gordon v. United States*, 117 U.S. 697 (1885) (providing Chief Justice Taney's draft opinion).

<sup>154</sup> Bloch, *supra* note 104, at 592–94 (indicating the concern was both as to political branch review and whether the acts were properly judicial); *id.* at 595 (suggesting it was impossible to know the relative weight of these factors); Wheeler, *supra* note 78, at 136–37 (noting that the objection that decisions were subject to nonjudicial review was distinct from the objection that the matters were not properly judicial).

<sup>155</sup> *Hayburn's Case*, 2 U.S. (2 Dall.) 409, 410 n.† (1792) (reprinting letter to the President from Chief Justice Jay, Justice Cushing, and District Judge Duane).

<sup>156</sup> *Id.* at 411 n.† (reprinting letter to the President from Justices Wilson and Blair, and District Judge Peters).

<sup>157</sup> *Id.* at 412–13 n.† (reprinting letter to the President from Justice Iredell and District Judge Sitgreaves); see also Maeva Marcus & Robert Teir, *Hayburn's Case: A Misinterpretation of Precedent*, 1988 WIS. L. REV. 527, 533–34 (discussing Justice Iredell's objection that the matters were not of a judicial nature, and that the Secretary of War's review power was objectionable); Pfander & Birk, *supra* note 9, at 1430–31 (discussing Justice Iredell's notes, which the authors seem to treat as not particularly

The Court later voiced similar dual objections in *United States v. Ferreira*.<sup>158</sup> Under congressional authority, district judges had determined claims under a Spanish treaty for certain injuries to Spanish officers and inhabitants in Florida caused by the United States Army.<sup>159</sup> In an opinion by Chief Justice Taney, the Court held that it could not review the district court treaty determinations because the district judges were acting as commissioners, not deciding cases.<sup>160</sup> The appellate jurisdiction of the Supreme Court was limited to cases, and the treaty proceedings were not Article III cases:

For there is to be no suit; no parties in the legal acceptance of the term, are to be made—no process to issue; and no one is authorized to appear on behalf of the United States, or to summon witnesses in the case. The proceeding is altogether *ex parte*; and all that the judge is required to do, is to receive the claim when the party presents it, and to adjust it upon such evidence as he may have before him, or be able himself to obtain. But neither the evidence, nor his award, are to be filed in the court in which he presides, nor recorded there; but he is required to transmit, both the decision and the evidence upon which he decided, to the Secretary of the Treasury; and the claim is to be paid if the Secretary thinks it just and equitable, but not otherwise.<sup>161</sup>

Thus, in both *Hayburn* and *Ferreira*, the judges' concerns encompassed both the non-judicial form of the proceedings as well as political branch review.

2. *Judges as Commissioners as Reflected in Hayburn and Other Cases.*—What should one make of the commissioner work that was performed by the district judges in *Ferreira*? This Article's discussion of judges' acting as commissioners is not an argument for the constitutionality of that practice but rather to show that the practice

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helpful to their claim). Pfander and Birk argue that the judges' concerns that the pension determinations were not of a "judicial nature" should not be read as referring to a lack of adverse parties—supposedly a more modern concern—but rather as primarily an objection to viewing wounds. Pfander & Birk Reply, *supra* note 9, at 1078. *But see* James Iredell, *Notes on Hayburn's Case*, in 8 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, at 547, 548–49 (Maeva Marcus ed. 2007) (distinguishing the objection "Not of a Judicial nature" from the objection "Not to be executed in a Judicial way," and providing inspection of wounds as an example of the latter). Given that the grist of judicial work is to decide adverse claims and that the need for adversity is not merely a modern concern, *see supra* notes 1, 3, 10, the "not of a judicial nature" objection would seem to encompass concerns for the lack of adversity. *Cf.* *United States v. Ferreira*, 54 U.S. (13 How.) 40, 46–47 (1852) (quoted as text accompanying *infra* note 161).

<sup>158</sup> 54 U.S. at 47.

<sup>159</sup> *Id.* at 45.

<sup>160</sup> *Id.* at 51–52.

<sup>161</sup> *Id.* at 46–47.

continued after *Hayburn*—as Russell Wheeler has shown.<sup>162</sup> To the extent that lower court judges’ making certain ex parte determinations was treated as commissioner work, the practices do not undermine an adverseness requirement for Article III cases.

In their objections to the pension work under the 1792 Act reported with *Hayburn*, the judges of the Circuit Court for the District of New York concluded they personally could do the work as commissioners.<sup>163</sup> By contrast, the judges of the Circuit Court for the District of North Carolina Circuit concluded that they could not work as commissioners because the Act only assigned the duties to the courts, and not to the judges personally,<sup>164</sup> who arguably could take on the work in a non-Article III capacity. As noted above, the Court in *Todd*, without opinion, held the judges’ work as commissioners under the 1792 Act invalid. Chief Justice Taney in *Ferreira* attributed the *Todd* decision to the statute’s assigning the work to the courts rather than to the individual judges—i.e., the same objection that had been made by the North Carolina federal court.<sup>165</sup>

Pfander and Birk claim support for their reading of *Hayburn* as limited to an objection about political branch review by noting, “In the wake of *Hayburn’s Case*, . . . Congress reassigned pension duties to the district judges on an ex parte basis.”<sup>166</sup> Because the judges only collected evidence that they forwarded to the Secretary of War, the authors claim that the problem of political branch review was gone.<sup>167</sup> They imply that, absent executive or legislative review, the pension determinations were proper for Article III judges as such.

Duties under the 1793 Act, however, were more readily characterized as commissioner work rather than Article III work. The Act provided: “All evidence relative to Invalids shall be taken upon oath or affirmation, before the judge of the district, in which such invalids reside, or before any three

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<sup>162</sup> Wheeler, *supra* note 78, at 131–32.

<sup>163</sup> 2 U.S. (2 Dall.) 409, 410 n.† (1792); Marcus & Teir, *supra* note 157, at 530–31, 531 n.24 (indicating that the judges were making themselves “voluntary agents of the federal government,” and that Congress could have asked citizens to “volunteer to collect names for the invalid pension rolls”).

<sup>164</sup> *Hayburn*, 2 U.S. (2 Dall.) at 413 n.†. The Pennsylvania Circuit judges did not advert to the commissioner option. See Marcus & Teir, *supra* note 157, at 531–32.

<sup>165</sup> See CURRIE, *supra* note 104, at 10 (discussing that *Todd* may have held that judges could not act as commissioners, or may have been based on the statutory ground that the statute authorized “judges to act only as a court, not as commissioners”); Bloch, *supra* note 104, at 612 n.172 (stating it was unclear if *Todd* was based on lack of statutory authorization or a constitutional prohibition on the judges’ processing the applications in any capacity); Wheeler, *supra* note 78, at 138 n.74 (suggesting that *Todd* was based on interpretation of the statute).

<sup>166</sup> Pfander & Birk, *supra* note 9, at 1427; see Act of Feb. 28, 1793, ch. 17, 1 Stat. 324.

<sup>167</sup> Pfander & Birk, *supra* note 9, at 1427 n.380.

persons specially authorized by commission from the said judge.”<sup>168</sup> This provision did not assign the work to the “court,” but rather the judges, thus avoiding the objection that surfaced in the North Carolina court’s letter and that may have played a role in *Todd*. The fact that under the 1793 Act the judges could “authorize[]” others “by commission” to do the work suggests that this was commissioner business rather than Article III cases.<sup>169</sup>

In the statute at issue in *Ferreira*, Congress had similarly assigned certain treaty claims to district judges, not to the courts. Chief Justice Taney, as noted above, treated this work as commissioner work not subject to the Supreme Court’s review, citing both the want of adverseness as well as political branch review.<sup>170</sup> This is not to say Chief Justice Taney was keen on the federal district judges’ acting as commissioners. Rather, he thought the commissioner work raised Appointments Clause issues; presumably he was concerned that appointment as an Article III judge did not encompass appointment as a non-Article III officer of the United States. Because the district courts’ performance of commissioner work was not directly before the Court, however, and would upset determinations assumed to be concluded, the Court declined to address the issue. Chief Justice Taney stated:

And if this be the construction of the Constitution, then as the judge designated could not act in a judicial character as a court, nor as a commissioner, because he was not appointed by the President, every thing that has been done under the acts of 1823, and 1834, and 1849, would be void, and the payments heretofore made, might be recovered back by the United States. But this question has not been made; nor does it arise in the case. . . . and these laws have for so many years been acted on as valid and constitutional we do not think it proper to express an opinion upon it.<sup>171</sup>

In summary, the judges did not perform Revolutionary War pension work as Article III judges. And to the extent the judges performed work as commissioners, that practice does not undermine an adverseness requirement for Article III cases.

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<sup>168</sup> Act of Feb. 28, 1793, § 1, 1 Stat. at 324.

<sup>169</sup> *Cf.* Wheeler, *supra* note 78, at 138 & n.76 (indicating that the 1793 Act was not due to the judges’ objections but rather to the fact that the judges had been too generous). Pfander and Birk seem to reject a distinction between commissioner work and Article III work. Pfander & Birk, *supra* note 9, at 1456–57. One need not accept the propriety of commissioner work, however, to recognize that it was performed, and not treated as Article III work.

<sup>170</sup> *See supra* text accompanying notes 158–61.

<sup>171</sup> *United States v. Ferreira*, 54 U.S. (13 How.) 40, 51–52 (1852). Pfander and Birk argue that *Ferreira* supports their claim that *Hayburn* should be read as a lack-of-finality case. Pfander & Birk, *supra* note 9, at 1432.

### B. Naturalization

Pfander and Birk also rely on citizenship determinations as an instance of non-contentious jurisdiction.<sup>172</sup> From an early date, Congress authorized both state and federal “courts,” not “judges,” to grant naturalization petitions *ex parte* under statutory standards, such as five years’ residence and good character.<sup>173</sup> Granting of citizenship petitions had been sufficiently lax that Congress in 1906 passed a new act.<sup>174</sup> The act, *inter alia*, limited the courts that could grant such petitions<sup>175</sup> and required clerks of court to post notice of any petitions for citizenship<sup>176</sup> and to send copies of petitions to the Bureau of Immigration and Naturalization within thirty days of filing.<sup>177</sup> It also required that such proceedings be on stated days, that at least ninety days elapse after filing and notice of the petition,<sup>178</sup> and

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<sup>172</sup> Pfander & Birk, *supra* note 9, at 1361.

<sup>173</sup> *See, e.g.*, Act of Jan. 29, 1795, ch. 20, § 1, 1 Stat. 414, 414.

<sup>174</sup> Naturalization Act of 1906, Pub. L. No. 59-338, 34 Stat. 596. The Report to the President of the Commission on Naturalization that preceded the legislation recounted the laxity of practices even in many federal courts. *See* MILTON D. PURDY ET AL., REPORT TO THE PRESIDENT OF THE COMMISSION ON NATURALIZATION, H.R. DOC. NO. 59-46, at 20–22 (1905); *see also id.* at 86–87 (excerpting a 1904 report from the Special Examiner of the Department of Justice, which criticized the practices of federal courts in some cities). The naturalization example thus does not suggest the wisdom of committing such non-contentious matters to the federal courts.

<sup>175</sup> Naturalization Act of 1906 § 3, 34 Stat. at 596.

<sup>176</sup> *Id.* § 5, 34 Stat. at 598.

<sup>177</sup> *Id.* § 12, 34 Stat. at 599 (“It shall also be the duty of the clerk of each of said courts . . . to furnish to said Bureau duplicates of all petitions within thirty days after the filing of the same, and certified copies of such other proceedings and orders instituted in or issued out of said court affecting or relating to the naturalization of aliens as may be required from time to time by the said Bureau.”); *see also* PURDY ET AL., *supra* note 174, at 27 (noting that the provisions of a proposed bill were defective, “in that there was no requirement that the Federal Government should receive notice of pending naturalizations, and such notice is absolutely necessary if the conferring of naturalization is to be effectively safeguarded”); *id.* (recommending that an alien make a formal petition to the court at least three months prior to hearing, and “it should be required that a duplicate of this petition should be sent as soon as it is made to the bureau of naturalization”). The Nationality Act of 1940 similarly required notice to the government. Nationality Act of 1940, Pub. L. No. 76-853, § 337(b), 54 Stat. 1137, 1158 (“It shall be the duty of the clerk of each and every naturalization court to forward to the Commissioner a duplicate of each petition for naturalization within thirty days after the close of the month in which such petition was filed . . . .”); *id.* § 333(a), 54 Stat. at 1156 (“The Commissioner . . . shall designate members of the Service to conduct preliminary hearings upon petitions for naturalization to any naturalization court and to make findings and recommendations thereon to such court.”). The courts increasingly came to rely on agency recommendations, and the Immigration Act of 1990 removed “the courts from any involvement in cases in which the agency is prepared to award citizenship.” Nancy Morawetz, *Citizenship and the Courts*, 2007 U. CHI. LEGAL F. 447, 452–54; *see* Immigration Act of 1990, Pub. L. No. 101-649, § 407(d)(13), 104 Stat. 4978, 5043 (codified as amended at 8 U.S.C. § 1446 (2012)).

<sup>178</sup> Naturalization Act of 1906 § 6, 34 Stat. at 598.

that the United States have the right to appear and to be heard in opposition.<sup>179</sup>

The United States thereafter opposed a good many naturalization petitions.<sup>180</sup> Parties who lost in the lower federal courts sought review in the Circuit Courts of Appeals. While most of the appeals apparently involved petitions that the United States had contested in the lower courts,<sup>181</sup> sometimes even unopposed petitions that the lower court denied showed up in the appellate courts.<sup>182</sup> Some Courts of Appeals declined to review the immigration determinations, whether or not in opposed proceedings, on the ground that the petitions did not present “cases” as required for appellate review.<sup>183</sup>

The Supreme Court considered the question of whether the citizenship petitions presented Article III cases that could be reviewed in the Courts of Appeals in *Tutun v. United States*.<sup>184</sup> *Tutun* was under the 1906 Act, which gave the United States notice and an opportunity to be heard.<sup>185</sup> If the government failed to appear in order to oppose the petition, the case resembled a default in which parties with adverse legal interests may choose not to assert their rights.<sup>186</sup> The Court concluded that the proceedings were sufficiently adverse to be Article III cases for appellate review,<sup>187</sup> reasoning that the “United States is always a possible adverse

<sup>179</sup> *Id.* § 11, 34 Stat. at 599.

<sup>180</sup> *See, e.g., In re Centi*, 217 F. 833 (W.D. Tenn. 1914) (opposed petition); *see also infra* note 181 (citing other opposed cases).

<sup>181</sup> *See, e.g., United States v. Poslusny*, 179 F. 836 (2d Cir. 1910) (opposed); *United States v. Balsara*, 180 F. 694 (2d Cir. 1910) (opposed); *United States v. Rodiek*, 162 F. 469 (9th Cir. 1908) (opposed).

<sup>182</sup> *See, e.g., Harmon v. United States*, 223 F. 425 (1st Cir. 1915) (not apparently opposed).

<sup>183</sup> *See Tutun v. United States*, 270 U.S. 568, 574–75, 574 n.1, 575 n.2 (1926) (discussing the disagreement among the circuits); *see also* Act of Mar. 3, 1891, ch. 517, § 6, 26 Stat. 826, 828 (“That the circuit courts of appeals established by this act shall exercise appellate jurisdiction to review by appeal or by writ of error final decision [sic] in the district court and the existing circuit courts in all cases other than those provided for in the preceding section of this act . . . .” (emphasis added)). This provision was reenacted in 1925. Act of Feb. 13, 1925, ch. 229, § 128(a), 43 Stat. 936, 936; *see also Tutun*, 270 U.S. at 575–76 (recognizing the 1925 reenactment).

<sup>184</sup> 270 U.S. at 574. *Tutun* may have involved denial of an unopposed petition. *See* DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY 1888–1986*, at 182 (1990). The companion case, *United States v. Neuberger*, apparently involved an unopposed petition. *In re Neuberger*, 6 F.2d 387 (S.D.N.Y. 1925).

<sup>185</sup> *See supra* notes 174–79.

<sup>186</sup> *Cf. Johannessen v. United States*, 225 U.S. 227, 237 (1912) (suggesting that the government participation permitted by the 1906 provisions was more likely to make the proceedings adversarial).

<sup>187</sup> *See Wheeler, supra* note 78, at 134 n.61 (indicating that by the time of *Tutun*, the government was a potential adverse party).

party. By § 11 of the Naturalization Act [of 1906] the full rights of a litigant are expressly reserved to it.”<sup>188</sup>

In dicta, however, the Court suggested that pre-1906-Act determinations were also cases. Justice Louis Brandeis stated,

The federal district courts, among others, have performed that function since the Act of January 29, 1795 . . . . The constitutionality of this exercise of jurisdiction has never been questioned. If the proceeding were not a case or controversy within the meaning of Art. III, § 2, this delegation of power upon the courts would have been invalid.<sup>189</sup>

One may view Justice Brandeis’s statement as somewhat analogous to Chief Justice Taney’s failure to disturb the district judges’ treaty commissioner work in *Ferreira*. In both the citizenship and treaty claims cases, lower court judges had performed a somewhat anomalous function for an extended period;<sup>190</sup> the practice had been treated as constitutional, people had relied on the determinations, and their legality was not at issue in the case.<sup>191</sup>

To be sure, Chief Justice Marshall in *Spratt v. Spratt* characterized a citizenship conferral as a “judgment” that could not be collaterally attacked by private parties in a dispute about the descent of real estate.<sup>192</sup> A matter, however, could result in a “judgment”<sup>193</sup> and be “judicial in [its] nature”

<sup>188</sup> *Tutun*, 270 U.S. at 577.

<sup>189</sup> *Id.* at 576 (citing *Hayburn’s Case*, 2 U.S. (2 Dall.) 409 (1792); *United States v. Ferreira*, 54 U.S. (13 How.) 40 (1852); *Muskrat v. United States*, 219 U.S. 346 (1911)).

<sup>190</sup> As noted in *supra* text accompanying notes 169–73, however, the citizenship determinations had been assigned to the courts and the treaty determinations to the judges.

<sup>191</sup> See *Morley*, *supra* note 7, at 668–69 (finding *Tutun* out of sync with the Court’s main adversity cases, and suggesting that it may have been influenced by historical practice); cf. *Wheeler*, *supra* note 78, at 132–34 (treating the pre-1906 cases as an instance of extrajudicial business assigned to judges, analogous to commissioner cases). A Fifth Circuit decision noted that “never until the act of 1906 has it been suggested that the special proceedings authorized constituted a case, action, or cause that could be reviewed on writ of error under any judiciary act, state or federal.” *United States v. Dolla*, 177 F. 101, 104–05 (5th Cir. 1910) (a pre-*Tutun* decision rejecting appeals from citizenship petitions even under the 1906 Act). In an unreported 1800 case, *Ex parte Fitzbonne*, a party denied citizenship obtained a mandamus from the Supreme Court. See *Pfander & Birk*, *supra* note 9, at 1363 (citing 8 THE DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 157, at 389–90).

<sup>192</sup> 29 U.S. (4 Pet.) 393, 408–09 (1830). Chief Justice Marshall’s statement arose in the context of a dispute between private parties as to descent of real estate. One side argued that the decedent, contrary to the citizenship determination, had acquired the land while still an alien, which would lead to that side’s succeeding to the land. *Id.* at 400–03; see also *Campbell v. Gordon*, 10 U.S. (6 Cranch) 176, 182 (1810) (holding in an inheritance dispute that if the naturalization oath were administered, it must be assumed the court made proper findings, and that the oath “amounts to a judgment of the court”).

<sup>193</sup> Cf. *Gordon v. United States*, 69 U.S. (2 Wall.) 561, 561 (1864) (without opinion, disallowing Supreme Court review of Court of Claims judgments); *Gordon v. United States*, 117 U.S. 697, 699 (1885) (providing Chief Justice Taney’s draft opinion in *Gordon*, stating that the fact that the tribunal

without being an Article III case, as Chief Justice Taney pointed out with respect to the commissioner determinations in *Ferreira*.<sup>194</sup> Insulation from collateral attack by private parties, moreover, was not a characteristic only of full-fledged judgments but could also attend executive grants of interests that initially belonged to the body politic rather than to discrete individuals.<sup>195</sup> In a 1912 case, the Court allowed the government to attack collaterally a pre-1906 naturalization both because the government was more directly interested than third parties and because the pre-1906 naturalization proceedings lacked some of the attributes of normal judicial proceedings.<sup>196</sup> The Court stated:

An examination of this [pre-1906] legislation makes it plain that while a proceeding for the naturalization of an alien is in a certain sense a judicial proceeding, being conducted in a court of record and made a matter of record therein, yet it is not in any sense an adversary proceeding. It is the alien who applies to be admitted, who makes the necessary declaration and adduces the requisite proofs . . . . But he is not required to make the Government a party nor to give any notice to its representatives.

The act of June 29, 1906 . . . declares that the United States shall have the right to appear in naturalization proceedings for the purpose of cross-examining the petitioner and the witnesses produced in support of his petition, and shall have the right to call witnesses, produce evidence, and be heard in

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was “called a court and its decisions called judgments” did not change the character of the Court of Claims, which did not possess “judicial power in the sense in which those words are used in the Constitution”); *id.* at 704 (“[The Supreme] Court has no jurisdiction in any case where it cannot render judgment in the legal sense of the term, and when it depends upon the legislature to carry its opinion into effect or not, at the pleasure of Congress.”).

<sup>194</sup> 54 U.S. (13 How.) at 48 (“The powers conferred by these acts of Congress upon the judge as well as the Secretary, are, it is true, judicial in their nature. For judgment and discretion must be exercised by both of them. But it is nothing more than the power ordinarily given by law to a commissioner appointed to adjust claims to lands or money under a treaty . . .”).

<sup>195</sup> “Public rights are those that belong to the body politic,” while private rights belong to discrete individuals. *See* Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 693 (2004). For example, disposing of public lands is a matter of public right, and the Land Office’s grant of a land patent could be difficult to attack in actions between private parties. *See* Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 577 (2007) (indicating that state and federal courts would have to accept certain land office determinations in later litigation); *id.* at 578 (noting that a claim that the United States did not own the land it had granted would not be foreclosed); *see also* Woolhandler & Nelson, *supra*, at 705–06 (noting limitations on allowing private parties to enforce limits on alien landholding, although the government could raise such claims).

Public acts embodying status determinations such as marriage may also be substantially insulated from collateral attacks. *Cf.* *V.L. v. E.L.*, 136 S. Ct. 1017, 1021–22 (2016) (adoption decree was entitled to full faith and credit). Status determinations are sometimes treated as in rem. *See* FLEMING JAMES, JR., CIVIL PROCEDURE § 12.7, at 633 (1964) (“[C]ourts often reify status and give it a fictional situs.”).

<sup>196</sup> *Johannessen v. United States*, 225 U.S. 227, 236–37 (1912).



opposition to the granting of naturalization. No such provision was contained in the act as it formerly stood.<sup>197</sup>

Citizenship petitions, nevertheless, are Pfander and Birk's strongest example of non-contentious jurisdiction. The Court referred to the determinations as judicial, and the matters were not easily characterized as commissioner work, at least if one assumes commissioner work had to be assigned to judges instead of courts.<sup>198</sup> The Court's upholding the practice under Article III, however, was only after the 1906 Act bolstered notice and opportunity to be heard for the government. Overall, one would be inclined to join other scholars in treating the practice as an outlier.<sup>199</sup>

### CONCLUSION

Pfander and Birk have contributed to the appreciation of the many *ex parte* matters performed by the federal courts. Their examples of in rem-type proceedings and warrants, however, present a need to make conclusive determinations of adverse legal interests that cannot readily be adjusted by voluntary extrajudicial action. Such notice as procedural due process required was provided, generally giving opportunities for adverse argument. In addition, the cases involving collusion reinforce a need for adverse interests by prohibiting merits collusion but countenancing some forms of jurisdictional collusion so long as the parties' genuine adverse interests would be affected. Adverse interests are more attenuated for pension determinations, but the federal judges objected to such work as inconsistent with Article III, and the evidence does not support reading those objections as limited to political branch review. Naturalization is the authors' strongest precedent, but the Court only explicitly approved the courts' performing naturalization determinations under Article III after Congress provided for notice and opportunity to be heard by the government. The case, therefore, has not been made for reconceptualizing the adversity requirement for Article III cases.

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<sup>197</sup> *Id.* at 236–37. The 1906 Act expressly gave the government power to seek such revocation, and the question in *Johannessen* was whether the United States could seek revocation even with respect to a pre-1906 grant of citizenship. *Id.* at 232. The particular grant had been made by a state court. *Id.* The Court held that the United States was not foreclosed from seeking revocation: “Sound reason, as we think, constrains us to deny to a certificate of naturalization, procured *ex parte* in the ordinary way, any conclusive effect as against the public.” *Id.* at 238.

<sup>198</sup> *But cf.* Wheeler, *supra* note 78, at 134 (treating the citizenship petitions as not involving cases or controversies).

<sup>199</sup> See FALLON ET AL., *supra* note 139, at 86 (“When, if ever, should a deep historical pedigree sustain a practice if the Court would otherwise find it unconstitutional?”); Morley, *supra* note 7, at 668–69 (treating naturalization proceedings as an anomaly that may have been influenced by historic practice).

