“ORIGINALIST” JUSTICES AND THE MYTH THAT ARTICLE III “CASES” ALWAYS REQUIRE ADVERSARIAL DISPUTES

CASES WITHOUT CONTROVERSIES: UNCONTESTED ADJUDICATION IN ARTICLE III COURTS. By James E. Pfander.* New York: Oxford University Press, 2021. Pp. ix + 263. $99.00 (Hardcover).

Robert J. Pushaw, Jr.[1]

James Pfander provides voluminous historical evidence to support a thesis that shatters the modern Supreme Court’s critical assumption, shared by almost all scholars, that federal litigation always must be adversarial. As Professor Pfander graciously acknowledges, he is building upon an idea that I originally proposed in a lengthy 1994 article (pp. 14 n.3, 149–150, 172 n.24).[2] Therefore, summarizing it will help place into context his important contributions to our understanding of federal court jurisdiction.

I. ARTICLE III’S CASE/CONTROVERSY DISTINCTION AND THE DUAL FUNCTIONS OF FEDERAL COURTS

The modern Court has asserted that Article III, as originally understood, used the words “Cases” and “Controversies” synonymously to establish a requirement of “justiciability”—

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1. James Wilson Endowed Professor, Pepperdine University, Caruso School of Law. J.D., Yale, 1988. Jim Pfander has been my trusted friend and scholarly interlocutor since we both started writing about federal jurisdiction in the early 1990s. Although I feel obliged to disclose this personal relationship, I do not believe it has affected my candor in critiquing his work. That objectivity may not be apparent in this review, because Professor Pfander and I have independently reached remarkably similar conclusions about Article III’s original meaning.

2. Citing Robert J. Pushaw, Jr., *Article III’s Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447 (1994).

doctrines such as standing, ripeness, and mootness that "limit federal courts to adjudicating only concrete disputes between directly adverse parties."[3] All commentators accepted the Court's premise that "Cases" and "Controversies" were equivalent terms, even as they criticized the justiciability doctrines as incoherent and politically manipulable.[4] Rejecting the conventional wisdom, I made the following argument.

Initially, Article III's text suggests that the different words "Cases" and "Controversies" must have been chosen to convey two distinct meanings, as becomes clear upon examining standard seventeenth- and eighteenth-century English legal dictionaries, abridgements, treatises, and judicial opinions.[5] Most obviously, a "controversy" is a dispute—a definition that has not changed for many centuries.[6] More technically, in 1787 a "case" referred to a court action requesting a remedy to vindicate a legal right.[7]

Structurally, in Article III, "Cases" and "Controversies" introduce two separate categories of federal jurisdiction.[8] First, Article III lists three types of "Cases" (a word repeated three times), which are defined by subject matter: federal law, admiralty and maritime, and the international law affecting foreign ministers.[9] Second, the language shifts to "Controversies" to denote disputes involving specific parties (e.g., the United States, states, foreign nations, or citizens of those governments) in six situations, with no mention of the applicable law.[10]

Historically, the Framers and Ratifiers, and the Constitution's early implementers in all three branches, perceived that this distinction highlighted the primary function that federal courts were expected to perform.[11] In "Controversies,"

3. *See* Pushaw, *supra* note 2, at 447, 472; *see also id.* at 450–57 (summarizing the modern Court's approach to justiciability).

4. *Id*. at 448, 457–59.

5. *Id*. at 466–67, 470–84.

6. *Id*. at 450, 482–84.

7. *Id*. at 449, 472–73.

8. *Id*. at 449, 471–72, 494–95.

9. *Id*. at 447, 449, 471–72.

10. *Id*. at 447, 449–50, 472. Relatedly, the Court and scholars failed to notice that the relevant justiciability precedent concerned only "Cases" arising under federal (especially constitutional) law—not any other "Cases" or "Controversies." *Id*. at 447–48.

11. *Id*. at 449–50, 467–70, 472–517. A detailed analysis of the evolution of Article III at the Convention and the accompanying debate reveals that the delegates deliberately used the word "Cases" to denote proceedings involving legal subjects of national and international significance that fell within the special expertise of Article III courts, then

independent Article III judges would mainly focus on resolving a dispute between adverse parties, such as citizens of different states, who could not trust politically dependent state tribunals to be neutral arbiters.[12] Any legal exposition—ascertaining and interpreting the law and applying it to the facts—would be merely incidental (indeed, state rather than federal law often governed).[13] An adversarial contest, then, was the *sine qua non* of a "Controversy."

By contrast, a "Case" could involve—but did not require—a dispute.[14] Rather, a "case" arose whenever a "subject [was] submitted . . . by a party who assert[ed] his rights in the form prescribed by law," as recognized by Chief Justice Marshall and Justice Story[15] (who in turn relied on English luminaries such as Lord Mansfield and Blackstone).[16] One Anglo-American form

switched to "Controversies" to signify party-based disputes of unique federal concern that would be umpired by neutral federal judges. *Id*. at 484–95. The Marshall Court repeatedly stressed this distinction. *See id*. at 495–96 (citing Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 809, 812, 818–22 (1824); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 378, 393 (1821); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 333–36, 347–48 (1816); and Bank of the United States v. Deveaux, 9 U.S. (5 Cranch) 61, 85 (1809)). Professor Pfander's thesis also relies heavily on these landmark decisions differentiating "Cases" from "Controversies" (pp. 73–77).

12. Pushaw, *supra* note 2, at 450, 483–84, 504–11. Professor Pfander endorses my analysis: "Article III defines controversies by reference to the alignment of the adversaries; it provides a neutral forum for disputes between opponents, one of whom might face a risk of partiality if consigned to state courts" (p. 10). Again, his principal support consists of the Marshall Court's decisions cited *supra* note 11—*Martin*, *Cohens*, and *Osborn* (pp. 73–75).

13. Pushaw, *supra* note 3, at 450, 504–11.

14. *Id*. at 448–50, 495–504 (describing the many leading American legal figures who shared this understanding). For instance, Edmund Randolph—one of the committee members who drafted Article III—became America's first Attorney General and acted on his opinion that a "Case" could be presented in an *ex parte* petition for federal statutory benefits and did not require a dispute between adverse parties. The Justices unanimously agreed with Randolph, but invalidated an Act of Congress authorizing federal courts to determine disabled veterans' applications for pension benefits on separation-of-powers grounds: the courts' judgments were not final (a requisite of Article III "judicial power") and could be reviewed by the political branches. *See id*. at 514–16 (citing Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792)); *see also* Robert. J. Pushaw, Jr., *Why the Supreme Court Never Gets Any "Dear John" Letters: Advisory Opinions in Historical Perspective*, 87 GEO. L. J. 473, 478–87, 492, 494–97 (1998) (demonstrating that the Constitution, as originally understood, demanded such finality). Professor Pfander reinforces my conclusion in arguing that *Hayburn's Case* nowhere states or implies that Article III requires adverse parties pp. 158–60).

15. Pushaw, *supra* note 3, at 475 (citing *Osborn*, 22 U.S. (9 Wheat.) at 819 (Marshall, C.J.); *see also id*. at 474 n.138 (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137, 169 (1803) (Marshall, C.J.)); *id*. at 472 n.131, 474 n.138 (citing *Martin*, 14 U.S. (1 Wheat.) at 304, 334 (Story, J.)); *id.* at 496–97 (citing Marshall, Story, and Wilson).

16. *See id*. at 473 n.134 (citing *Cohens*, 19 U.S. (6 Wheat.) at 408 (noting Blackstone's

was a plaintiff's claim of legal right in a private, common law suit against an adversarial defendant.[17] But other actions were "public"—brought pursuant to (1) a prerogative writ, which enabled courts to define the scope of government power, or (2) a statute authorizing an "informer" or "relator" to sue on the government's behalf to enforce a law, the violation of which had not individually affected the plaintiff, and to receive part of any resulting monetary judgment.[18] Thus, "cases" centered on law, not parties. Accordingly, Article III contemplated that in federal question, admiralty, and foreign minister "Cases"—subjects of unique national and international importance—a judge's principal function would be to expound the law.[19]

Wholly absent in the Convention and Ratification debates, and in opinions during the Court's first century, was any mention that Article III "Cases" required an adversarial dispute. On the contrary, federal courts routinely decided uncontested claims in areas like naturalization, bankruptcy, consent decrees, default petitions, and criminal pleas—a practice that has continued to this day.[20] The Court has never satisfactorily explained how this unbroken line of practice and precedent can be squared with its justiciability decisions.

My proposed distinction between "Cases" and "Controversies" supported a new approach.[21] Modern doctrines of standing, ripeness, and mootness confine federal courts to resolving live, concrete disputes, and therefore make sense as applied to Article III "Controversies."[22] Conversely, the

conception of lawsuits as "all cases where the party suing claims to obtain something to which he has a right"). Professor Pfander also relies heavily on the Marshall/Story definition of "case" in decisions like *Cohens*, *Osborn*, *Martin*. and *Marbury* (pp. 2, 6–7, 73–77, 81, 182, 193–94, 215 n.1).

17. Pushaw, *supra* note 2, at 476–79.

18. *See id*. at 480–82 (describing these British forms of action); *id*. at 498, 526 (noting that early Congresses continued this tradition of authorizing public law cases, which the Court decided without ever questioning their constitutionality).

19. Leading Federalists such as James Wilson, Alexander Hamilton, John Marshall, and Joseph Story adopted the view of English luminaries like Mansfield, Blackstone, Coke, Bacon, and Hale that "Cases" presented in a proper form required courts to answer a legal question by expounding the law in light of precedent. *Id*. at 447, 474–79, 495–96. Although Wilson as a Justice died too soon to develop a comprehensive jurisprudence, Chief Justice Marshall and Justice Story enjoyed long tenures, and they repeatedly expressed this understanding of the judicial role in "Cases." *See id*. at 496–504.

20. *Id*. at 526.

21. *Id*. at 450, 518–32.

22. *Id*. at 450, 459, 519–23.

justiciability doctrines should be reformulated as to "Cases" to capture their essential law-based nature.[23]

II. PFANDER'S "LITIGABLE INTEREST" APPROACH

Professor Pfander's independent research has confirmed two of my key insights. First, as originally understood and long implemented, Article III distinguished "Cases" from "Controversies" to convey important differences in meaning (pp. 5–12, 18–19, 23–25, 61–83, 143, 148–49). Second, "Controversies" were disputes between parties (pp. 5, 9–10, 12, 73–79, 148–49). We diverge only insofar as he "takes [my] suggested definition of 'cases' in a new direction, emphasizing less the power of federal courts to expound the law than their power to adjudicate claims of right assigned to them by Congress despite the lack of a controversy" (p. 150). Pfander supports this conclusion from an original historical angle.

A. UNCONTESTED ADJUDICATION IN ANGLO-AMERICAN HISTORY BEFORE 1887

Pfander demonstrates that English, Colonial, and early state and federal courts could adjudicate a plaintiff's claim of any legal right—a "litigable interest"—which could, but need not, involve a dispute with an adverse defendant (pp. 1–11, 19, 181–82). Accordingly, jurisdiction could be either "contentious" or "noncontentious" (pp. 4–5, 19–23). The paradigm of the former was English common law, in which a plaintiff sought a judicial remedy for violation of a contract, tort, or property right by a defendant who contested the claim (p. 19). However, England also incorporated elements of the European civil law system, tracing back to Roman law, which recognized several types of noncontentious jurisdiction (pp. 17–24, 166). In such cases, a court decided a petitioner's request (typically *ex parte*) for a "constitutive" order, which recognized either a legal right or a new legal status or relationship in areas such as family law, property registration, probate, bankruptcy, naturalization, admiralty (particularly the condemnation of prizes taken by licensed privateers), and various equity matters (pp. 4–12, 19–23, 42, 61–64, 182). In the other main type of nonadversarial proceeding, judges often entertained *ex parte* petitions for

23. *Id*. at 450, 523–31.

prerogative writs (pp. 110–13).

Finally, British courts recognized two kinds of public law actions in which plaintiffs did not have to show that a defendant's legal violation had caused them an individual physical or monetary injury. The first were informer and relator suits (pp. 224–25). Second, courts allowed private parties to bring public actions to enforce rights shared by the entire community if a violation might otherwise not be adequately remedied (pp. 176–81).[24]

American colonial and state courts adopted, and adapted, all of these forms of action (pp. 5, 18–19, 23–25). Hence, by extending "judicial power" to "Cases" (particularly those arising under federal statutes and in admiralty), the Constitution's drafters almost surely intended to continue to permit plaintiffs with a "litigable interest" to sue, regardless of whether they had suffered a particularized injury inflicted by an adverse defendant (pp. 5–6, 18, 25, 73, 166–68). Of course, many "Cases" would be contentious. So would all "Controversies," which were disputes between opposed parties (pp. 5, 9–10, 12, 73–75, 148–49, 165, 168, 193, 238).

The First Congress, which included many prominent Framers and Ratifiers, removed any doubt about the validity of uncontested adjudication by routinely authorizing federal courts to engage in it to secure petitioners' federal law rights (pp. 5–6, 25, 33–59). Moreover, the Court never questioned the constitutional propriety of such proceedings, which culminated in constitutive decrees that established new legal rights in individuals or new relationships (pp. 8–9, 33, 148–49, 164–65).

Four kinds of early federal statutes are illuminating. First, successful naturalization petitions, in which judges applied federal legal standards to the facts presented by an applicant *ex parte*, resulted in a new legal status of citizenship (pp. 5, 12, 33–40).[25] Second, a government official could request a warrant *ex parte* to perform an arrest or a "search or seizure" of property, which, if granted, had the legal effect of immunizing him from civil liability

24. Pfander supports this point primarily through an original and detailed account of "popular" actions in Scottish courts (pp. 178–85).

25. The Marshall Court rejected the argument that such naturalization decrees were merely administrative and should not be accorded respect as final judgments in "Cases" (pp. 37, 76–77, citing Spratt v. Spratt, 29 U.S. (4 Pet.) 393, 408 (1830)).

(pp. 12, 40–42).[26] Third, federal courts' exercise of their *in rem* admiralty and maritime jurisdiction, which routinely occurred *ex parte*, could result in the transfer of property title based on claims to captured enemy prizes or found maritime property or treasure (pp. 12, 42–47, 147).[27] Fourth, Congress authorized federal judges to hear pension applications from disabled veterans, which would have been a permissible exercise of "judicial power" if the court's judgment had been final, but that ran afoul of Article III and separation of powers because such judgments could be reviewed and revised by the legislative and executive branches (pp. 47–48).

In addition to the foregoing original petitions for constitutive orders in uncontested proceedings, federal courts often decided cases that had commenced with an adversarial dispute which, over time, had become nominal. Examples included default judgments, equity receiverships, and guilty pleas (pp. 48–50, 192–94, 200–02). Finally, Congress authorized prerogative writs, informer and relator suits, and certain public actions to enforce widely shared federal rights (pp. 175, 178–85, 223–32).

Professor Pfander emphasizes that antebellum federal courts exercised noncontentious jurisdiction only in Article III "Cases" in law and equity arising under federal statutes or federal admiralty and maritime jurisdiction—not in Article III "Controversies" that raised questions of state law (pp. 61–83, 148, 165). Most tellingly, the Court has always interpreted the constitutional and statutory grant of jurisdiction over "Controversies . . . between citizens of different states" as excepting petitions in probate and domestic relations proceedings, which involved state law issues—including uncontested matters—that were the exclusive province of state tribunals (pp. 10, 61–68, 78–79, 148, 168, 182, 208–10, 213).[28]

26. Again, the Court concluded that uncontested warrant proceedings were an appropriate exercise of Article III judicial power (p. 42 n.20, citing United States v. Lawrence, 3 U.S. (3 Dall.) 42, 53 (1795)).

27. Joseph Story, America's leading judicial and scholarly authority on admiralty law, and second only to Marshall as a constitutional interpreter, did not perceive any Article III problems with such adjudications (pp. 43–45). Of special relevance, Congress provided that federal courts should apply inquisitorial "civil law" procedures, not adversarial common law processes, in federal court admiralty and equity cases (p. 43).

28. U.S. CONST. art. III, § 2. Thus, state courts alone could issue constitutive orders that established new legal rights (such as entitlement to a decedent's property under a will) or a new legal status like divorce (pp. 63–65). In the rare situation where a state court did so and a dispute then arose between citizens of different states over the newly declared legal rights or relationships, a federal court could exercise diversity jurisdiction, as the

Accordingly, Article III's fundamental division between "Cases" and "Controversies," which the Marshall Court repeatedly stressed, had special salience in the realm of uncontested adjudication (pp. 5–7, 9–12, 73–83, 143, 148–49, 165, 168–69, 181, 193, 225–33, 238).[29]

In short, from the inception of the Republic, federal courts routinely exercised noncontentious jurisdiction as an ordinary part of their "judicial power" to decide "Cases."

B. The Modern "Case or Controversy" Requirement

I agree with Professor Pfander's account of the Court's reinterpretation of Article III, starting in the late nineteenth century, which can be briefly summarized.[30] In 1887, Justice Field made the novel assertion that Article III's reference to "Cases" and "Controversies" implied that courts could adjudicate only genuine disputes between adverse parties (pp. 12, 87–91, 157–58, 163–65). This idea gradually gained momentum (pp. 91–94).

It was then coopted by Progressives led by Justice Brandeis and his collaborator Justice Frankfurter (pp. 12, 84, 86–87, 99–106). They sought to restrict federal court jurisdiction to prevent private parties (especially corporations) from attacking liberal regulatory legislation—challenges based on *Lochner*'s ruling that state economic regulations (such as those protecting workers) violated contractual "liberty" under the Fourteenth Amendment Due Process Clause (pp. 12, 86–87, 92–94, 99–102). Most importantly, Brandeis and Frankfurter developed various "justiciability" doctrines, such as standing, to confine federal court access to plaintiffs who could show a live, concrete dispute with an adverse defendant (pp. 100–102). Brandeis characterized these doctrines as prudential matters of self-restraint that enabled courts to avoid exercising judicial review too frequently (pp. 100–01, 109–10). By contrast, after being appointed a Justice in 1939, Frankfurter maintained that Article III's "Cases" and "Controversies" language had incorporated traditional English

Court acknowledged (pp. 66–68, 78–80).

29. *See supra* notes 11–19 and accompanying text (summarizing the relevant Marshall Court jurisprudence).

30. Pfander's historical analysis generally accords with mine. *See* Pushaw, *supra* note 2, at 450–57; Robert J. Pushaw, *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 395–96, 399, 454–463 (1996) [hereinafter, Pushaw, *Justiciability*]. The groundbreaking scholarship on this subject is Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV 1371 (1988).

practices that compelled these doctrines, and the Court gradually accepted this notion (pp. 101–02).

Whereas Frankfurter's standing inquiry focused on whether a plaintiff had suffered an injury recognized by *law*, the Court in 1970 changed that requirement to a particularized "injury in *fact*," and over the next few years added that this injury had to be caused by the defendant and could likely be redressed judicially (pp. 143–44, 166–67).[31] The idea that the Constitution limited courts to resolving disputes between adverse parties has led to many challenges to the legal validity of traditional forms of uncontested adjudication, such as naturalization, various bankruptcy and trust proceedings, warrants, consent decrees, and prerogative writs like habeas corpus (pp. 12, 86, 104, 108–38). The Court has almost always rejected such arguments and concluded that historical practice, *stare decisis*, and pragmatism counseled acceptance of these supposed deviations from the Article III norm (pp. 107–29, 225–33, 237–38).[32]

Nonetheless, the Court's increasingly rigorous application of the constitutional "case or controversy" requirement, spearheaded by Justice Scalia, could potentially invalidate other types of noncontentious jurisdiction (pp. 11–12, 104, 129, 143,

31. As Pfander notes, I have refuted the Court's claim that Article III, as historically understood, imposed a requirement that plaintiffs have standing only if they can show an "injury in fact" inflicted by an adverse defendant (pp. 172–73 n.27, citing Pushaw, *Justiciability*, *supra* note 30, at 485–90).

32. In the seminal case of *Tutun v. United States*, 270 U.S. 568 (1926), Justice Brandeis wrote the Court's opinion holding that a petition properly presented under federal naturalization law was a "case" within the meaning of Article III because the plaintiff had asserted a claim of legal right that courts had to adjudicate, regardless of the absence of an adverse defendant. The conventional wisdom among scholars (including me) is that the Court simply deferred to longstanding congressional practice and judicial precedent, despite tension with the burgeoning "adversarial dispute" requirement. *See* Pushaw, *Justiciability*, *supra* note 30, at 458. However, Pfander convincingly argues that Brandeis's conclusion about the validity of an uncontested application under a federal *statute* was not necessarily inconsistent with his position that courts should exercise prudential self-restraint in avoiding *constitutional* decisions (pp. 107–10, 146–47, 157–58, 182, 197, 237–38).

Moreover, reliance on history and precedent is of no avail when Congress creates new forms of noncontentious jurisdiction, such as secret *ex parte* FISA proceedings, settlement class actions, trademark seizure orders, witness immunity grants, and applications for certain government benefits. In sustaining such statutes, which Congress deemed necessary to address novel problems, courts have struggled to find historical analogues (pp. 118–29). Similarly, almost all scholars have treated the many types of uncontested adjudication as aberrations from the Article III adverseness requirement that modern courts have tolerated only because of historical lineage (pp. 162–64, 167, 223–26).

223–26).[33] To illustrate, a foreigner petitioning for citizenship has not suffered any factual injury, and in many similar cases there is no adverse defendant (pp. 144–48). Injury and adverseness are analytically distinct. For instance, in *Spokeo v. Robins* (2016), the Court held that Article III standing obliged plaintiffs to prove not merely that defendants had violated a federal consumer-protection statute which granted private parties a cause of action to recover penalties for such noncompliance, but also that this violation had caused them a concrete "injury in fact"[34] (pp. 176, 227). Justice Thomas concurred, but argued that eighteenth century Anglo-American law recognized the standing of plaintiffs who merely alleged that their own *private* rights (e.g., under trespass or copyright law) had been violated, whereas one who asserted *public* rights (those possessed by citizens generally) also had to show that the violation inflicted an actual individual injury.[35]

Professor Pfander applauds Thomas for questioning the Court's across-the-board application of "injury in fact," but contends that his narrow focus on adversarial common law proceedings ignored that England had (1) incorporated civil law in equity and admiralty (including many forms of uncontested adjudication), and (2) allowed private parties to mount public actions, even though their injuries were commonly shared, to ensure that violations would be adequately remedied (pp. 176–81).

As Professor Pfander recognizes, however, the Court is unlikely to reverse a century of case law. Furthermore, the Court created the rules requiring an adversarial dispute in the early 1900s in response to real-world problems (such as feigned or collusive suits and growing federal dockets) that persist (pp. 9–13, 191–92). Thus, Pfander proposes a "constructive constitutional history" methodology to integrate Article III's text, history, and practice with modern precedent to develop a coherent, practical doctrine (pp. 223–33).

33. Most importantly, Justice Scalia and many scholars have maintained that pedigree alone cannot save historical practices, such as informer and relator actions, that do not satisfy modern justiciability rules—particularly the standing requirement of individualized "injury in fact" (pp. 223–26, 229–32).

34. 136 S. Ct. 1540 (2016).

35. *Id.* at 1550–51 (Thomas, J., concurring).

C. PFANDER'S "LITIGABLE INTEREST" APPROACH

Specifically, he recommends limiting federal court access to plaintiffs who have a "litigable interest"—a valid individual claim of a legal right presented in a form prescribed by law (pp. 9–11, 175, 181–85, 192, 229, 232–33, 237–38). When such a claim is made in any Article III "Controversy" or in a "Case" that features an adversarial clash, courts can require not only a "litigable interest" but also a concrete dispute—thereby retaining modern justiciability rules (pp. 9–11, 143, 182, 229, 232, 238). Requiring a plaintiff to demonstrate an "injury in fact" inflicted by an adverse defendant, however, makes little sense as applied to "Cases" in which (1) jurisdiction is noncontentious, (2) a plaintiff brings an appropriate suit on behalf of the public, or (3) a statutory bounty is sought (pp. 10–11, 143, 175, 182–85, 223–33, 238).

Furthermore, the Court insists that standing is based on separation of powers, which is hardly promoted by allowing Justices to second-guess Congress's policy judgment to create private legal interests (e.g., in consumers) and determine that such interests can best be vindicated by a specific combination of government enforcement and private suits (pp. 183–84). Similarly, Congress should have broad discretion to authorize citizens to bring public lawsuits in areas like environmental law. The Article III inquiry should be whether the plaintiff will pursue the claim effectively in a case that will adequately protect the public interest, thereby avoiding idiosyncratic or duplicative litigation (pp. 184–85).

Nonetheless, Pfander recognizes three constitutional limitations on uncontested adjudication (pp. 9–10, 192). First, a plaintiff must bring an Article III "case" based on a "litigable interest" grounded in federal, not state, law (pp. 192–94, 208–15). Second, district courts must exercise "judicial power"—rendering a final judgment after applying the law to the facts—followed by appellate court review to ensure accuracy (pp. 192, 194–98, 200–05, 215). Third, due process demands that any third parties whose interests might be adversely affected by the proceeding (such as in bankruptcy) receive notice and the opportunity to be heard (pp. 192, 199–200).

III. A CRITIQUE: THE POSSIBILITY OF APOLITICAL ORIGINALISM

Cases Without Controversies is insightful, exhaustively researched, and crisply written. On three fundamental points, Professor Pfander and I are on the same page. First, Article III's distinction between "Cases" and "Controversies" has significant legal implications, which the modern Court and scholars have overlooked.[36] Second, "Controversies" were disputes between parties that could fairly be resolved only by independent federal judges. Third, "Cases" were court proceedings in which a party asserted his rights in a form prescribed by law, which could—but did not have to—involve a dispute with an adverse defendant.

Although Pfander concurs with my definition of "Cases," he disagrees with my conclusion that the Constitution's drafters inserted that word mainly to signify that the federal courts' primary role would be to expound federal law. Rather, he contends that the Framers thereby intended to convey that "Cases," consistent with established Anglo-American practice, included judicial power to decide plaintiffs' petitions to claim legal rights granted to them by Congress regardless of whether any adversarial dispute existed.

Even on this score, we are not that far apart. For example, I did note that federal courts from their inception have determined uncontested claims in "Cases" concerning naturalization, bankruptcy, consent decrees, default petitions, criminal pleas, prerogative writs, and relator and informer actions.[37] Professor

36. As of 1994, a few commentators (including Pfander) contended that the sole historical difference between these two words was that "Controversies" included only civil suits, whereas "Cases" also encompassed criminal actions. *See* Pushaw, *supra* note 2, at 460–64 (challenging this argument by showing that the Court pragmatically created this distinction in the 1790s to avoid federal judicial interference with state criminal proceedings, that no one had previously mentioned this distinction, and that therefore the Framers likely intended to incorporate the familiar legal usage of those words as of 1787).

Professor Pfander now maintains that this distinction is consistent with his overarching theme: Uncontested "Cases" include both civil and criminal matters such as warrants and agreed-upon pleas, whereas "Controversies" exclusively involve disputes between adverse parties in civil actions (pp. 149–50, 165). The latter conclusion is open to doubt, as English authorities, Founders like James Wilson, and the First Congress all viewed certain "Controversies" as criminal. *See* Pushaw, *supra* note 2, at 460–61. Moreover, Article III grants federal courts jurisdiction over "controversies to which the United States shall be a party," and the United States is always a party in criminal prosecutions. U.S. CONST. art. III, § 2.

37. *See* Pushaw, *supra* note 2 at 498, 526; *see also id*. at 480–82 (describing how English courts expounded the law in cases that did not involve adversarial controversies,

Pfander has masterfully traced such noncontentious jurisdiction back to Roman law and demonstrated how England retained this civil law mechanism alongside its dominant common law system.

Moreover, such research has led him to intelligently refine my sharp "Case"/"Controversy" dichotomy by more subtly subdividing "Cases" into two distinct categories: (1) common law-style complaints alleging a violation of federal rights—whether granted by the Constitution, a statute, a treaty, admiralty and maritime law, or international law—by an adverse defendant, and (2) traditional one-party claims of legal rights authorized by federal statute. Although I continue to believe that federal courts' chief function in "Cases" is interpreting and applying the law,[38] Pfander has persuaded me that in the first category the justiciability doctrines retain utility.[39]

Unlike many law-office historians, he faithfully characterizes his sources and presents opposing arguments fairly.[40] Indeed, my only quibble is Pfander's acceptance of the orthodox view that "the Court's iconic defense of judicial review in *Marbury v. Madison* turned on the claim that such review was essential to enable the Court to decide a litigated dispute" (p. 146).[41] In fact, Chief Justice Marshall's rationale for judicial review did not mention dispute resolution.[42]

Except for a few minor details, then, Professor Pfander and I reach the same conclusions about the historical meaning of

such as petitions for prerogative writs, informer and relator actions, and advisory opinions).

38. Pfander, "in contrast to Pushaw's account, . . . suggests that cases, unlike controversies, contemplate forms of uncontested adjudication in which the federal judiciary functions as an inquisitorial fact-finding and law-application body. While federal courts might expound the law in such uncontested proceedings, this book suggests that they should proceed cautiously when asked to do so" (p. 153 n.15). Again, we are not very far apart here. Judicial "exposition" consists of interpreting the law and applying it to the facts, and that process is the dominant feature of all Article III "Cases," whether adversarial or not.

39. *See* Robert J. Pushaw, Jr., *Limiting Article III Standing to "Accidental" Plantiffs: Lessons from Environmental and Animal Law Cases*, 45 Ga. L. Rev. 1, 11–17, 66–105, (2010) (contending that such "Cases" can be brought only by a plaintiff who can show that her federal legal rights have been violated fortuitously).

40. Most notably, he carefully summarizes Ann Woolhandler's subtle argument that Article III requires not opposed *parties* but rather adverse *interests* that can be resolved through litigation or settlement. He then demonstrates that her thesis cannot be squared with the weight of historical evidence, particularly in cases such as naturalization where adverse interests are absent (pp. 155–73).

41. Pp. 152 n.8 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178–80 (1803)).

42. *See* Pushaw, *supra* note 2, at 499–501.

Article III. As we are on opposite sides of the political and ideological spectrum, we show that originalism can be objective, contrary to the dominant view of liberal scholars. They have long decried originalism as a pretext for conservative Republican judges to impose their political views under the guise of faithfully interpreting the Constitution's text as understood by its ratifiers. Alas, that criticism is valid as to the Court's Article III jurisprudence. Self-styled "originalists," most notably Justice Scalia, have applied the justiciability doctrines—based on the notion that "Cases" require an adversarial dispute—with increasing stringency. The result has been to disproportionately shut out plaintiffs who seek remedies for violation of federal laws perceived as liberal, such as those protecting civil rights, the environment, and consumers. The "originalist" Justices have ignored the overwhelming evidence that contradicts their historical vision of Article III—perhaps because it has typically been set forth almost entirely by scholars who are liberals, such as Pfander, Steven Winter, and William Fletcher.

Yet the historical record need not be distorted to serve partisan politics. Most importantly, Justice Thomas has recently followed up his *Spokeo* opinion by breaking with his conservative colleagues on standing. In *TransUnion LLC v. Ramirez*,[43] Justice Kavanaugh and four other Republicans repeated the canard that Article III's extension of "judicial Power" to "Cases" and "Controversies," consistent with English practice circa 1787, limited federal courts to resolving disputes brought by a plaintiff who has suffered a concrete "injury in fact" inflicted by an adverse defendant.[44] The Court acknowledged that Congress had created a private cause of action against defendants who had infringed plaintiffs' statutory rights—here, credit reporting agencies that failed to ensure the accuracy of the information of consumers, who had mistakenly been flagged as terrorists and drug traffickers.[45] However, the Court held that most of those class action plaintiffs could not satisfy the requirement that this statutory violation also resulted in a concrete "injury in fact"—a harm closely related to a traditional common law injury, such as physical or monetary damage or an intangible harm like defamation. In dissent, Justice Thomas (joined by the three

43. 141 S. Ct. 2190 (2021).
44. *Id.* at 2203–14.
45. *Id*. at 2200–03.

Democratic Justices) argued that Article III, as understood by the Founders and the early Congresses and Court, extended federal "judicial power" to any "case" in which a plaintiff alleged that his own private rights, whether derived from common law or statute, had been violated.[46] By contrast, in a suit based on breach of a legal duty owed broadly to the public, a plaintiff generally had to establish both such an injury at law (*injuria*) and actual damages[47]—although he acknowledged some historical exceptions.[48] Thomas chided the Court for "rejecting this history" and instead applying the concrete "'injury in fact' (as opposed to injury at law) concept of standing" that had been introduced in 1970—and in a case that concerned statutory rather than Article III standing.[49] Moreover, he emphasized that the post-1970 Court had held in several cases that a federal statute creating a *public* right plus a cause of action for citizens to sue over its violation did not suffice for standing, absent an additional showing that the violation had actually injured the plaintiff.[50] However, the Court had never before applied the latter requirement to a statute that created *private* rights, as doing so would interfere with Congress's legislative power.[51] Applying historically rooted rules, Thomas

46. *Id.* at 2216–17 (Thomas, J., dissenting) (citing Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 405 (1821)). For example, the First Congress created copyright and patent rights and authorized holders to sue statutory violators without also showing actual injury or damages, and the Court sustained such laws. *Id.*

47. *Id.* at 2217. Justice Thomas notes that the word "injury" derives from the Latin *injuria*, which means "against law." *Id*. at 2218. I believe I was the first legal scholar to point out that this historical focus on *injuria* ("injury at law") conflicted with the modern Court's invention of the "injury in fact" standard. Pushaw, *supra* note 2, at 530 n.397.

48. *TransUnion*, 141 S. Ct. at 2220 n.4 (Thomas, J., dissenting) (citing (1) Evan Caminker's article compiling six statutes enacted by the First Congress authorizing private informers to sue to collect damages for violation of specified conduct deemed injurious to the public, and (2) *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 317, 321–22 (1819), in which the Court allowed a case brought by a party who sought to recover penalties for both himself and the state).

49. *Id.* at 2219 (Thomas, J., dissenting). Moreover, when the Court grafted this "injury in fact" requirement onto its Article III analysis during the 1970s, it was to enable plaintiffs to get standing *in addition to* the traditional "injury at law" statutory route. *Id*. Justice Kavanaugh weakly responded that the Court did not mention this Article III requirement before the mid-twentieth century because Congress had almost never previously authorized private citizens who had not experienced a concrete factual injury to sue private or government defendants. *Id*. at 2206 n.1. Yet Congress from the beginning has provided for such "citizen suits"—not to mention a host of *ex parte* federal court actions where there was no defendant at all—and the Court upheld such statutes without ever suggesting that they ran afoul of Article III. *See supra* notes 25–28 and accompanying text.

50. *TransUnion*, 141 S. Ct. 2190, 2219–20 (Thomas, J., dissenting).

51. *Id*. at 2220–21.

concluded that all class members had established a violation of their individual statutory rights and thus had Article III standing.[52]

Professor Pfander would undoubtedly agree with me that Justice Thomas has taken a big step in exposing the *faux* "originalism" underlying "injury in fact." We can only hope that Thomas will also acknowledge that other elements of modern Article III standing doctrine, such as the invariable presence of an adverse defendant, belie the historical record.

IV. CONCLUSION

Any serious student of federal jurisdiction should read Jim Pfander's superb book. In particular, judges and scholars who identify as originalists should stop mindlessly repeating Justice Frankfurter's unfounded assertion that Article III courts can properly hear "Cases" only in the context of an adversarial dispute. Instead, they must grapple with Pfander's massive historical evidence proving that federal courts have always had "judicial power" to decide all "Cases" in which a plaintiff presents a claim of legal right in a form prescribed by law.

52. *Id.* at 2217, 2223–25.