

## NON-CONTENTIOUS JURISDICTION AND CONSENT DECREEES

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*This essay by Professor Michael T. Morley is a follow-up to his article published in the print version of the University of Pennsylvania Journal of Constitutional Law, “Consent of the Governed or Consent of the Government? The Problems with Consent Decrees in Government-Defendant Cases” (16 U. Pa. J. Const. L. 637 (2014)). The article was recently discussed by Professor James E. Pfander and Daniel D. Birk in a Yale Law Journal article, “Article III Judicial Power, the Adverse-Party Requirement, and Non-Contentious Jurisdiction” (124 Yale L. J. 1345 (2015)). Pfander and Birk’s proposed re-interpretation of Article III provides a new basis for allowing federal courts to issue consent decrees.*

*Building on the author’s analysis in “Consent of the Governed,” this essay explains why requests for consent decrees are non-justiciable under Article III, and Pfander and Birk’s thesis unnecessarily overbroad. When parties have reached accord in a lawsuit, they may enter into a settlement agreement—a private contract—to dismiss the case, rather than seeking a consent decree. The author explains that, while Pfander and Birk provide numerous historical examples of federal courts engaging in *ex parte*, uncontested proceedings, none provides a basis for allowing them to enter binding orders in civil cases where the parties have affirmatively reached an agreement. The author further argues that courts should be cautious in relying on Founding Era practices and precedents in construing Article III, since many early interpretations and applications of Article III were either erroneous, or at the very least fundamentally irreconcilable with modern practice.*

### INTRODUCTION

In 2014, Volume 16 of the University of Pennsylvania Journal of Constitutional Law published *Consent of the Governed or Consent of the Government? The Problems with Consent Decrees in Government-Defendant Cases*.<sup>1</sup> The article argued that federal courts lack jurisdiction under Article III to enter consent decrees:<sup>2</sup>

When parties have reached accord as to the proper disposition of a lawsuit, there is no longer a live controversy for a court to resolve. Rather than entering a consent decree, the court should require the parties to memorialize their understanding in a settlement agreement—*i.e.*, a private contract—and dismiss

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<sup>1</sup> Michael T. Morley, *Consent of the Governed or Consent of the Government? The Problems with Consent Decrees in Government-Defendant Cases*, 16 U. PA. J. CONST. L. 637 (2014).

<sup>2</sup> *Id.* at 675.

the case without entering a substantive order that specifies or alters the parties' legal rights and obligations.<sup>3</sup>

Recently, Professor James E. Pfander and Daniel D. Birk offered a bold reinterpretation of Article III's justiciability requirements.<sup>4</sup> Their article is breathtaking in its scope and rigorous in its analysis. Surveying both historical and current practice, Pfander and Birk challenge the widely accepted principle—frequently explained as constitutional,<sup>5</sup> though recently recharacterized as prudential<sup>6</sup>—that federal courts may adjudicate only live disputes between adverse parties.

Pfander and Birk convincingly demonstrate that federal courts, like English chancery courts and Roman courts before them,<sup>7</sup> have long entertained “a variety of non-adverse or ex parte proceedings.”<sup>8</sup> Building primarily on this analysis, they suggest that Article III's use of two different terms—“cases” and “controversies”—to delineate the federal judiciary's jurisdiction suggests that federal courts “may constitutionally exercise not *one* but *two* kinds of judicial power.”<sup>9</sup>

They maintain that Article's III grant of authority over “controversies” confers upon federal courts “contentious jurisdiction,” or the “power to resolve disputes between adverse parties.”<sup>10</sup> Article III's grant of jurisdiction over “cases,” in contrast, allows federal courts to exercise “voluntary” or “non-contentious” jurisdiction, by “entertain[ing] applications from parties seeking to assert, register, or claim a legal interest under federal law.”<sup>11</sup> A federal court may exercise non-contentious jurisdiction over a case even when “a genuine dispute between adversaries” does not exist.<sup>12</sup> Thus, in Pfander and Birk's view, the Supreme Court may generate crucial constitutional precedents in the absence of either a live dispute or adversarial test-

<sup>3</sup> *Id.* at 644.

<sup>4</sup> James Pfander & Daniel D. Birk, *Article III Judicial Power, the Adverse-Party Requirement, and Non-Contentious Jurisdiction*, 124 *YALE L.J.* 1346 (2015).

<sup>5</sup> *See, e.g.*, *Poe v. Ullman*, 367 U.S. 497, 505 (1961) (discussing “the Court's refusal to entertain cases which disclosed a want of a truly adversary contest, of a collision of actively asserted and differing claims”); *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937) (holding that a “controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests”).

<sup>6</sup> *United States v. Windsor*, 133 S. Ct. 2675, 2695-96 (2013). *But see id.* at 2702 (Scalia, J., dissenting) (stating that adverseness is “an essential element of an Article III case or controversy”); Morley, *supra* note 1, at 659-60 (“Notwithstanding *Windsor*, it is likely that Article III's adverseness requirement remains at least partly jurisdictional.”).

<sup>7</sup> Pfander & Birk, *supra* note 4, at 1403-16.

<sup>8</sup> *Id.* at 1349.

<sup>9</sup> *Id.* at 1355-57, 1424 (emphasis in original).

<sup>10</sup> *Id.* at 1355, 1424.

<sup>11</sup> *Id.* at 1355.

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

ing,<sup>13</sup> although they propose some guidelines to which Congress and federal courts should adhere in determining when the exercise of non-contentious jurisdiction is appropriate.<sup>14</sup>

Pfander and Birk's compelling intervention provides a fascinating analysis of the various roles that federal judges and courts have played throughout American history. They also offer an elegant reinterpretation of the distinction between cases and controversies under Article III.<sup>15</sup> Their proposed new conception of Article III's justiciability requirements calls into question the arguments set forth in *Consent of the Governed*.<sup>16</sup> While Pfander and Birk's argument is well-reasoned and appealing, this Essay contends that their proposed reinterpretation of Article III goes too far. Even assuming that Article III grants federal courts non-contentious jurisdiction to hear certain ex parte or uncontested matters, it should not extend so far as to allow federal courts to become or remain involved in matters where all interested parties affirmatively agree and seek the same relief. In other words, Article III should not be read as conferring non-contentious jurisdiction upon federal courts to enter consent decrees, despite their historical pedigree.

Part I begins by questioning the utility of Pfander and Birk's primary methodology—a largely historical analysis—in the context of Article III. This Part argues that, while deference to the practices of early Congresses and Presidential Administrations is generally helpful in resolving separation-of-powers disputes, it might be a less accurate guide in interpreting Article III.

Part II contends that Pfander and Birk erred in concluding that consent decrees are justiciable under Article III. The historical and current practices from which Pfander and Birk derive their conception of non-contentious jurisdiction are susceptible to an alternate analysis: for a case or controversy to exist, the interested parties must not have not reached an affirmative agreement on all issues. Indeed, Supreme Court precedents rejecting Article III jurisdiction over feigned and collusive cases counsel strongly in favor of prohibiting consent decrees. This Part goes on to demonstrate that, even if one accepts Pfander and Birk's arguments, consent decrees are not justiciable under their proposed conception of non-contentious jurisdiction.

Part III briefly outlines some of the profound effects that Pfander and Birk's proposed distinction between "cases" and "controversies" can have

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13 Indeed, *Windsor* itself is arguably an example of constitutional interpretation in a non-adversarial, advisory context.

14 Pfander & Birk, *supra* note 4, at 1358.

15 Cf. 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 (1994) (arguing that "[a] dispute between parties" is an essential ingredient of "controversies," but not "cases," under Article III).

16 See Morley, *supra* note 1, at 637.

on the Supreme Court's jurisdiction that may present substantial difficulties for their proposal. The last Part briefly concludes, reiterating the compelling justiciability issues consent decrees raise.

### I. HISTORICAL PRACTICE AND ARTICLE III

Pfander and Birk begin their illuminating article by cataloging the various types of non-adversarial matters over which federal courts have exercised jurisdiction.<sup>17</sup> They maintain that “the widespread appearance of ex parte and non-contentious proceedings on the docket of the federal courts,” particularly during the Founding Era, constitutes persuasive evidence that federal courts may properly exercise jurisdiction over such matters.<sup>18</sup> In a footnote, Pfander and Birk disclaim “follow[ing] a self-consciously originalist line of argument.”<sup>19</sup> They instead claim that “the lessons of history” more generally “provide a framework for a contemporary understanding of the ex parte cases currently heard by federal courts.”<sup>20</sup>

Historical practice, especially that of the first Congress and Presidential Administration, can be helpful in determining the Constitution's meaning, particularly for issues relating to separation of powers.<sup>21</sup> Many early interpretations of Article III, however, even by the Framers themselves, are either inaccurate or untenable in the modern world.<sup>22</sup> For example, one of the first laws enacted by Congress was the Judiciary Act of 1789, establishing the federal court system.<sup>23</sup> In *Marbury v. Madison*, the Supreme Court invalidated § 13 of that Act, which purported to allow the Supreme Court to exercise original jurisdiction over matters beyond those set forth in Article III.<sup>24</sup> Though some have questioned whether *Marbury* interpreted § 13

17 Pfander & Birk, *supra* note 4, at 1359-91.

18 *Id.* at 1391.

19 *Id.* at 1359 n.37.

20 *Id.*

21 *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2594 (2014) (Scalia, J., concurring); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring).

22 Early Congresses acted in ways that, in the modern era, would generally be regarded as unconstitutional in areas outside of Article III, as well. The Sedition Act “made it a crime, among other things, to ‘defame’ the Government, the President, or either House of Congress; ‘bring them . . . into contempt or disrepute’; or ‘excite . . . hatred’ against them through ‘false, scandalous and malicious’ writings.” Michael T. Morley, *Reverse Nullification and Executive Discretion*, 17 U. PA. J. CONST. L. 1283, 1289 (2015). These provisions unquestionably violate most modern understandings of the First Amendment.

Likewise, President George Washington vetoed a reapportionment bill passed by the Second Congress on the grounds that it violated the Apportionment Clause, U.S. CONST. art. I, § 2, cl. 3, by allotting certain states more than one Representative for every 30,000 people, George Washington, Veto Message (Apr. 5, 1792), in 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897, at 124 (James D. Richardson ed., 1896).

23 Judiciary Act of 1789, ch. 20, 1 Stat. 73 (Sept. 24, 1789).

24 *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174-76 (1803).

correctly,<sup>25</sup> the fact remains that either the Framers in the first Congress or Chief Justice John Marshall (himself a delegate to the Virginia ratifying convention) was wrong about the meaning of Article III's Original Jurisdiction Clause.<sup>26</sup>

*Marbury* also calls into question the wisdom of following Chief Justice Marshall's views on constitutional restrictions on federal judges in another way. Marshall not only adjudicated, in his capacity as Chief Justice, the effects of his own actions as Secretary of State,<sup>27</sup> but he simultaneously served as both Chief Justice and Secretary of State from January 27, 1801 until March 4, 1801.<sup>28</sup> Similarly, Chief Justice John Jay simultaneously held both positions for six months.<sup>29</sup> While the Constitution does not expressly prohibit such dual officeholding,<sup>30</sup> it violates the Constitution's structural separation-of-powers protections<sup>31</sup> and few today would regard it as constitutionally permissible.<sup>32</sup>

In *Chisholm v. Georgia*, the Supreme Court held that Article III's grant of jurisdiction to federal courts over controversies between "a State and citizens of another State"<sup>33</sup> not only allowed states to initiate federal litigation as plaintiffs, but also permitted them to be sued in federal courts.<sup>34</sup> Over two centuries later, the Supreme Court declared that *Chisholm* was directly contrary to "the persuasive assurances of the Constitution's leading advocates and the expressed understanding of the only state conventions to address the issue in explicit terms."<sup>35</sup> *Chisholm* "fell upon the country with a profound shock," leading state legislatures to "respond[] with outrage."<sup>36</sup> The modern Court concluded that *Chisholm* is not "a correct interpretation

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25 See, e.g., Michael Stokes Paulsen, *Marbury's Wrongness*, 20 CONST. COMMENT. 343, 354-55 (2003). Cf. James E. Pfander, *Marbury, Original Jurisdiction, and the Supreme Court's Supervisory Powers*, 101 COLUM. L. REV. 1515 (2001) (arguing that Marshall interpreted § 13 correctly, but chose to interpret the Original Jurisdiction Clause narrowly for political reasons).

26 U.S. CONST. art. III, § 2, cl. 2.

27 See Letter from John Marshall to James M. Marshall (Mar. 18, 1801), in 6 THE PAPERS OF JOHN MARSHALL 90 (Charles F. Hobson et al. eds., 1990).

28 Louis Michael Seidman, *Acontextual Judicial Review*, 32 CARDOZO L. REV. 1143, 1149 n.28 (2011).

29 *Id.*

30 Cf. U.S. CONST. art. I, § 6, cl. 2 ("[N]o Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.").

31 See *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 515 (2010) (Breyer, J., dissenting); see also *Miller v. French*, 530 U.S. 327, 350 (2000).

32 But see Paulsen, *supra* note 25, at 350 n.27 ("[T]here is no . . . prohibition on dual office-holding with respect to judicial officers.").

33 U.S. CONST. art. III, § 2, cl. 6.

34 *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 476-77, 479 (1793).

35 *Alden v. Maine*, 527 U.S. 706, 720 (1999).

36 *Id.*

of the constitutional design.”<sup>37</sup> The Eleventh Amendment was adopted shortly after *Chisholm* to effectively reverse the decision.<sup>38</sup>

*Hayburn’s Case* is another example of Congress’s misapprehension of Article III restrictions on the judiciary in the Founding Era.<sup>39</sup> As Pfander and Birk explain,<sup>40</sup> Congress enacted a law authorizing disabled revolutionary war veterans to file petitions with federal courts to request pensions.<sup>41</sup> The court would review each petition and supporting evidence in an ex parte, uncontested proceeding to determine whether the veteran was entitled to relief. It would then forward its recommendations to the Secretary of War and Congress, which would determine whether the court had made an “imposition or mistake,” and decide whether to add the petitioner to the pension list.<sup>42</sup> Even if one accepts Pfander and Birk’s argument that such ex parte proceedings are a constitutionally valid exercise of non-contentious jurisdiction,<sup>43</sup> the act was still unconstitutional because it rendered federal courts’ rulings subject to review by both the legislative and executive branches.<sup>44</sup> Thus, in its very first session, Congress blatantly abrogated the cornerstone principle of judicial finality.<sup>45</sup>

The Circuit Court for New York, which included Chief Justice John Jay and Justice William Cushing, opined that circuit judges could continue processing veterans’ claims and generating recommendations to the Secretary of War in their private capacity as “commissioners.”<sup>46</sup> The Government sued to determine the validity of pension determinations made by judges in their personal capacities. In an unreported ruling without opinion, *United States v. Yale Todd*, the Court unanimously held that this alternate procedure was not statutorily authorized, and therefore impermissible.<sup>47</sup>

<sup>37</sup> *Id.* at 721.

<sup>38</sup> James E. Pfander, *Rethinking the Supreme Court’s Original Jurisdiction in State-Party Cases*, 82 CALIF. L. REV. 555, 651 (1994).

<sup>39</sup> *Hayburn’s Case*, 2 U.S. (2 Dal.) 409 (1792).

<sup>40</sup> Pfander & Birk, *supra* note 4, at 1364.

<sup>41</sup> Act of Mar. 23, 1792, ch. 11, §§ 2-3, 1 Stat. 243, 244.

<sup>42</sup> *Hayburn’s Case*, 2 U.S. at 410 n.2.

<sup>43</sup> Pfander & Birk, *supra* note 4, at 1346.

<sup>44</sup> *Hayburn’s Case*, 2 U.S. at 410 n.2 (quoting opinions and letters to the President from three circuit courts, in which five of the six sitting Supreme Court Justices joined, declaring the Act unconstitutional).

<sup>45</sup> *Plaut v. Spendthrift Farm*, 514 U.S. 211, 218 (1995) (“Congress cannot vest review of the decisions of Article III courts in officials of the Executive Branch.”); see also William Baude, *The Judgment Power*, 96 GEO. L.J. 1807, 1809 (2008) (“That judgments are constitutionally final has recently been reaffirmed by the Supreme Court in *Plaut v. Spendthrift Farm*.”).

<sup>46</sup> *Hayburn’s Case*, 2 U.S. at 410 n.\*.

<sup>47</sup> Minutes of the Supreme Court (Feb. 17, 1794) (noting that the Court ruled in favor of the Government and against the veteran claimant), in 6 DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES 1789-1800, at 381 (Maeva Marcus, ed. 1998); see also *United States v. Ferreira*, 54 U.S. 40, 53 (1851) (discussing unreported ruling in *United States v. Todd* (U.S. 1794)).

The Pension Act was by no means an anomaly. As Pfander and Birk recognize, the revenue laws enacted by the First Congress also imposed quintessentially non-judicial responsibilities on federal courts.<sup>48</sup> The Secretary of the Treasury was authorized to remit penalties and forfeitures imposed against importers who, without “willful negligence or any intention of fraud,” failed to accurately declare their cargoes.<sup>49</sup> Federal courts were required to entertain petitions for such relief and transmit their findings of fact to the Secretary, who would decide whether to grant remission.<sup>50</sup> Again, this statute effectively transformed the federal courts into a proto-bureaucracy to conduct initial hearings and make recommendations to executive officials, who alone were empowered to make binding determinations. This understanding is likely an incorrect interpretation of the Article III judicial power *ab initio*, and is certainly an untenable interpretation today.

Similarly, “general law” is a longstanding concept embraced by the federal judiciary that can be traced back to the Founding Era,<sup>51</sup> yet flatly violates Article III. The Rules of Decision Act was part of the Judiciary Act of 1789, through which the First Congress breathed life into Article III.<sup>52</sup> The Act specified that, unless federal law requires otherwise, “[t]he laws of the several States . . . shall be regarded as rules of decision in trials at common law” in federal courts.<sup>53</sup> Early federal courts, as exemplified by *Swift v. Tyson*,<sup>54</sup> generally construed this provision to mean that they were bound to follow state statutes, but not state court rulings, in most diversity cases (except those dealing with “local” issues, such as land). This left federal courts free to craft their own “general law” to apply in common-law diversity cases.<sup>55</sup>

In *Erie Railroad v. Tompkins*, the Supreme Court famously held that this approach was unconstitutional, holding that “no clause in the Constitution purports to confer” upon federal courts the “power to declare substantive rules of common law applicable in a State whether they be local in

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48 Pfander & Birk, *supra* note 4, at 1366.

49 Act of May 26, 1790, ch. 12, § 1, 1 Stat. 122, 122-23.

50 *Id.* at 122.

51 See William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513, 1516-17 (1984) (discussing early conceptions of general law); see also Charles E. Clark, *Professor Crosskey and the Brooding Omnipresence of Erie-Tompkins*, 21 U. CHI. L. REV. 24, 31 (1953) (tracing the Supreme Court’s endorsement of general law back to *Huidekoper’s Lessee v. Douglass*, 7 U.S. 1 (1805)).

52 Rules of Decision Act, ch. 20, § 34, 1 Stat. 73, 92.

53 *Id.*

54 *Swift v. Tyson*, 41 U.S. 1, 18-19 (1842).

55 See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 72 (1938) (noting the power of the federal courts over general law).

their nature or ‘general.’”<sup>56</sup> Despite ongoing debates over *Erie*, few today would dispute its holding that Article III does not empower federal courts to generate their own freestanding body of substantive law (outside the few well-defined pockets of federal common law<sup>57</sup>).

Though it may be possible to quibble with particular examples, statutes, Supreme Court rulings, and other acts of the Framers from the Founding Era collectively prove to be a surprisingly unreliable guide in interpreting Article III. Given the numerous fundamentally important ways in which such authorities are inconsistent with Article III—and particularly with any tenable present-day construction of Article III—it is unclear why early practice with regard to non-contentious jurisdiction should be given much deference.

## II. THE CONSTITUTIONALITY OF CONSENT DECREES

If one does not accept Founding Era practice and longstanding tradition as dispositive in construing Article III,<sup>58</sup> the constitutionality of consent decrees becomes suspect. A consent decree is a court order that terminates a lawsuit (or certain claims in a lawsuit) and imposes obligations on one or both litigants based on their consent, without the court reaching the merits of the underlying claims.<sup>59</sup>

Although the Supreme Court has adjudicated numerous cases involving consent decrees, it has not directly affirmed their justiciability. Citing *Swift & Co. v. United States*,<sup>60</sup> Pfander and Birk repeat the common misconception that “[t]he Supreme Court has . . . found that the lower federal courts have the power to enter consent decrees.”<sup>61</sup> The *Swift* Court, however, never actually ruled on the justiciability of consent decrees or their propriety under Article III. In *Swift*, a party to a consent decree collaterally attacked it, arguing that the federal court which entered it lacked Article III power to do so. The Supreme Court refused to consider the issue, holding that, even

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<sup>56</sup> *Id.* at 78. Charles Warren contended that the federal courts had misinterpreted the Rules of Decision Act, as well. Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 81-88 (1923). Reviewing the Act’s legislative history, he argued that the phrase “laws of the several states” included state-court rulings, as well. *Id.* at 86-88. *But see* Henry J. Friendly, *In Praise of Erie—and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 390 (1964) (arguing that the *Erie* Court “[t]oo quickly accept[ed] Warren’s thesis”).

<sup>57</sup> Paul Mishkin, *The Variousness of “Federal Law”: Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797, 799 (1957).

<sup>58</sup> *See supra* Part I (offering evidence that Founding Era practices and interpretations cannot be treated as a definitive guide for interpreting Article III in the present day).

<sup>59</sup> *Local No. 93, Int’l Assoc. of Firefighters v. City of Cleveland*, 478 U.S. 501, 519 (1986).

<sup>60</sup> 276 U.S. 311, 326 (1928).

<sup>61</sup> Pfander & Birk, *supra* note 4, at 1387.



if the lower court had “erred in deciding that there was a case or controversy, the error is one which could have been corrected only by an appeal.”<sup>62</sup>

Pfander and Birk contend that their theory of non-contentious jurisdiction provides a new constitutional basis for consent decrees. They explain that federal courts may exercise two types of non-contentious jurisdiction: “original jurisdiction” over any matters (including uncontested or ex parte proceedings) in which a litigant asserts a claim of right, and “ancillary jurisdiction” over uncontested issues “in a dispute between actual or potential adversaries.”<sup>63</sup> Consent decrees, they maintain, are a valid exercise of ancillary non-contentious jurisdiction because they “settle disputes between contending parties.”<sup>64</sup> They explain that courts’ power to issue consent decrees “grows out of their duty, in any case properly before them, to provide parties with the relief to which the applicable law entitles them.”<sup>65</sup>

Despite Pfander and Birk’s powerful argument, consent decrees violate Article III. When litigants in a case agree on all issues, and are jointly seeking the same relief from a court in all respects, a live dispute no longer exists between them. A federal court therefore lacks Article III authority to remain involved. The litigants instead may embody their understanding in a settlement agreement.<sup>66</sup>

Part II.A offers an alternate conception of non-contentious jurisdiction that is consistent with most of the historical practices that Pfander and Birk discuss. This Part contends that, for a case or controversy to exist, the interested parties must not have reached an affirmative agreement on all issues. Under this competing conception of non-contentious jurisdiction, consent decrees are impermissible. Supreme Court precedents rejecting feigned or collusive jurisdiction counsel strongly in favor of this proposed re-interpretation. Part II.B demonstrates that, even if one accepts Pfander and Birk’s conception of non-contentious jurisdiction, consent decrees still likely run afoul of it.

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62 *Id.* *Pope v. United States*, 323 U.S. 1, 12 (1944), is the closest the Court has come to directly affirming the validity of consent decrees. *Pope* held, “It is a judicial function and an exercise of the judicial power to render judgment on consent. A judgment upon consent is a ‘judicial act.’” *Id.* *Pope*, however, did not involve a consent decree, and none of the cases it cited for this proposition (including *Swift*) considered or ruled upon consent decrees’ justiciability. *Id.* Moreover, *Pope* stated that a case is justiciable if a court is required to “determine[] that the unchallenged facts shown of record establish a legally binding obligation” and “adjudicate[] the plaintiff’s right of recovery and the extent of it.” *Id.* When litigants jointly agree to a consent decree and submit it for judicial approval, the court performs neither function. *Local No. 93*, 478 U.S. at 519.

63 Pfander & Birk, *supra* note 4, at 1440-41.

64 *Id.* at 1441.

65 *Id.*

66 Morley, *supra* note 1, at 675.

### A. *An Alternate Interpretation of the History*

Based primarily on their exhaustive survey of *ex parte* and other uncontested matters in federal courts, Pfander and Birk conclude that Article III confers non-contentious jurisdiction upon federal courts. This jurisdiction empowers them to adjudicate or administer claims on a “consensual basis,” despite the absence of a “genuine dispute between adversaries.”<sup>67</sup> This Part distills a slightly different principle from the practices upon which Pfander and Birk rely. Most of these practices instead may be read as allowing federal courts to exercise jurisdiction, including on an *ex parte* basis, over matters that require governmental intervention because the interested parties have not reached an affirmative agreement on all issues.

In some of their 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. In prize and salvage cases,<sup>68</sup> for example, claimants sought *ex parte* relief from federal district courts to obtain a legal interest in the ships they captured or rescued. If the ships’ owners consented to transferring title, or were willing to pay the money the claimants sought, judicial proceedings would be unnecessary; the parties themselves could handle such transfers privately. *Ex parte* prize and salvage cases were necessary precisely because the ship owners neither consented nor cooperated.

The same is true of bankruptcy cases<sup>69</sup> (as well as the forerunner to modern bankruptcy law, uncontested equity receiverships<sup>70</sup>) and default judgments.<sup>71</sup> When a bankruptcy petition is uncontested, it does not suggest that the creditors agree to the reduction or elimination of the debtor’s obligations. To the contrary, if creditors were individually or collectively willing to renegotiate or waive a debtor’s debts, there would be no need for bankruptcy proceedings.<sup>72</sup> Likewise, if a defendant who fails to file an answer actually recognized the plaintiff’s right to relief, it could simply pay the plaintiff the damages she seeks or enter into a contract promising to perform (or refrain from performing) conduct the plaintiff seeks to enjoin. Thus, a meaningful distinction exists between mere lack of opposition and affirmative consent.

*Ex parte* applications for seizures of counterfeit goods that infringe on trademarks, search warrants, and FISA warrants are subject to a similar analysis.<sup>73</sup> If the plaintiff or Government had, or was likely to obtain, the target’s consent to the search or seizure, court orders would be unneces-

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<sup>67</sup> Pfander & Birk, *supra* note 4, at 1355.

<sup>68</sup> *Id.* at 1367-70.

<sup>69</sup> *Id.* at 1371-74.

<sup>70</sup> *Id.* at 1386.

<sup>71</sup> *Id.* at 1384.

<sup>72</sup> Morley, *supra* note 1, at 671.

<sup>73</sup> Pfander & Birk, *supra* note 4, at 1370-71, 1375-79.

sary. Some other examples that Pfander and Birk discuss, such as initial judicial screening of certain post-conviction prisoner filings,<sup>74</sup> similarly arise in a context where the parties dispute the underlying legal issues.

Even court orders granting witness immunity<sup>75</sup> are necessary only when a witness refuses to voluntarily accept immunity in exchange for his testimony. When a witness is amenable to providing immunized testimony, the Government may unilaterally confer legally binding “letter immunity” or “informal immunity” without a court order.<sup>76</sup> It should be noted that, even under Pfander and Birk’s understanding of non-contentious jurisdiction, the constitutionality of judicial proceedings for the sole purpose of conferring immunity is questionable, since the court’s role is purely “ministerial”<sup>77</sup> and there are no substantive statutory criteria the court must ensure have been satisfied.<sup>78</sup>

This Part’s proposed re-interpretation of non-contentious jurisdiction is insufficient to explain two main practices: guilty pleas and consent decrees. Guilty pleas arise in criminal cases, however, and it is not clear that Article III’s justiciability principles apply equally in that context. In any event:

[T]he practice of accepting guilty pleas may be justified by compelling considerations that do not apply to consent decrees in civil cases . . . . Having courts accept guilty pleas and enter judgments of conviction protects the constitutional rights of the defendant; ensures that waivers of those rights are knowing, intelligent, and voluntary; allows courts to maintain at least a degree of oversight over the executive branch’s prosecutorial power; and places a judicial imprimatur on convictions.<sup>79</sup>

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<sup>74</sup> *Id.* at 1381-83.

<sup>75</sup> *Id.* at 1380-81.

<sup>76</sup> U.S. DEP’T OF JUSTICE, CRIMINAL RESOURCE MANUAL § 719 (“Testimony given under informal immunity is not compelled testimony, but is testimony pursuant to an agreement and thus voluntary.”). The main distinction between letter immunity and formal immunity is that the former protects against only subsequent federal prosecutions, whereas the latter protects against state prosecutions, as well.

<sup>77</sup> *Id.* at § 723; *see also* *Ullmann v. United States*, 350 U.S. 422, 432-33 (1956) (holding that a court lacks “discretion to deny the [immunity] order on the ground that the public interest does not warrant it”); *cf.* Pfander & Birk, *supra* note 4, at 1447 (“[T]he federal courts may accept non-contentious assignments only where the task at hand involves the exercise of judicial, rather than ministerial, judgment.”).

Pfander and Birk cite *Ullmann* for the proposition that courts may issue immunity orders not only to unwilling witnesses, but also where the witness is willing to accept the Government’s grant of immunity. Pfander & Birk, *supra* note 4, at 1381. *Ullmann* did not actually address that question, however, since the witness in that case strenuously opposed the judicial grant of immunity that the Government was attempting to procure. *Ullmann*, 350 U.S. at 425. Thus, despite longstanding practice, it appears that the Supreme Court has never squarely addressed whether an uncontested application to a federal court for immunity—particularly outside the context of some ongoing case, and in light of the ministerial nature of the task—constitutes a “case or controversy” over which it may exercise Article III jurisdiction.

<sup>78</sup> *See* 18 U.S.C. § 6003(a).

<sup>79</sup> Morley, *supra* note 1, at 672.

No such compelling institutional reasons justify the use of consent decrees. When litigants have reached accord on all outstanding legal issues in a case, they may reduce their understanding to a legally binding settlement agreement. The fact that the litigants may desire the ability to enforce their agreement through contempt, rather than traditional breach-of-contract remedies, does not entitle them to judicial relief. When all parties to a dispute have reached complete agreement on the matter, a “case” or “controversy” ceases to exist, the court has no further role to play, and a resolution may be achieved through private ordering.<sup>80</sup>

As the Supreme Court held in *Lord v. Veazie*, “It is the office of courts of justice to decide the rights of persons and of property, when the persons interested cannot adjust them by agreement between themselves[]—and to do this upon the full hearing of both parties.”<sup>81</sup> A ruling entered in the absence of such adverseness is not a “judgment,” but “a nullity.”<sup>82</sup> It is one thing for federal courts to entertain non-contentious jurisdiction over uncontested *ex parte* matters where adverse litigants have not reached an agreement, and the court’s involvement is necessary to effectuate some change in legal status or rights. It is quite another for the court to do so where such an affirmative, express agreement exists, and litigants simply want the court to place its imprimatur on their arrangement. By the time a dispute reaches that stage, any “case” or “controversy” has evaporated, and the parties are fully capable of adjusting their legal rights or status among themselves.<sup>83</sup>

### B. Consent Decrees and Non-Contentious Jurisdiction

Even if one accepts Pfander and Birk’s conception of non-contentious jurisdiction, consent decrees still likely remain non-justiciable, for at least two reasons. First, they maintain that non-contentious jurisdiction—in particular, what they term “ancillary” non-contentious jurisdiction—grows out of the duty of federal courts “to provide parties with the relief to which applicable law entitles them.”<sup>84</sup> When a court enters a consent decree, however, it does not determine whether any law was violated<sup>85</sup> or “the plaintiff established his factual claims and legal theories.”<sup>86</sup> Instead, the court puts

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<sup>80</sup> HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 76 (2006).

<sup>81</sup> 49 U.S. 251, 255 (1850).

<sup>82</sup> *Id.*; see also *Moore v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 47, 47-48 (1971) (holding that, where “both litigants desire precisely the same result,” there is “no case or controversy”).

<sup>83</sup> See *Morley*, *supra* note 1, at 666 n.164 (collecting cases).

<sup>84</sup> Pfander & Birk, *supra* note 4, at 1441.

<sup>85</sup> *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 389 (1992).

<sup>86</sup> *United States v. Armour & Co.*, 402 U.S. 673, 682 (1971). See generally *Local No. 93, Int’l Assoc. of Firefighters v. City of Cleveland*, 478 U.S. 501, 519 (1986) (establishing standards for approval of consent decrees).

its prestige and authority behind a private settlement between the parties, without assessing the extent to which it correctly embodies the parties' respective rights and obligations. Although a consent decree assumes the trappings of judicial power, in many respects it represents the abrogation of such power. The court is primarily enforcing the wishes of the parties, not the demands of the law.<sup>87</sup>

Second, consent decrees do not appear to fall within Pfander and Birk's conception of either "cases" or "controversies." In their view, Article III permits courts to hear a case, even on an *ex parte* and uncontested basis, where a party asserts its rights, without regard to the presence of an adversary.<sup>88</sup> Consent decrees cannot be considered a valid exercise of jurisdiction over "cases" because, as discussed above, they do not purport to determine or enforce a party's legal rights, but rather reflect the private ordering of formerly adverse litigants.

Under Pfander and Birk's view, a "controversy," in contrast, requires adverse litigants. By the time a dispute reaches the stage where the parties ask the court to enter a proposed consent decree, an underlying controversy no longer exists. Moreover, unlike other examples of ancillary non-contentious jurisdiction that Pfander and Birk discuss, such as default judgments and even guilty pleas,<sup>89</sup> consent decrees are unnecessary to adjust the legal rights or status of formerly adverse litigants because the parties can embody their understanding in a settlement agreement. The fact that the parties may wish their settlement agreement to be backed by different or stronger remedies (for example, contempt sanctions) does not entitle them to invoke the jurisdiction of federal courts any more than parties entering into any other type of contract. Thus, even those persuaded by Pfander and Birk's compelling conception of non-contentious jurisdiction need not embrace consent decrees as a valid exercise of the Article III judicial power.

### III. IMPLICATIONS FOR SUPREME COURT JURISDICTION

Pfander and Birk's argument also has implications for the jurisdiction of the Supreme Court that their article does not touch upon. After identifying the three different types of "cases" and six types of "controversies" to which the federal judicial power extends, Article III goes on to specify:

In all *cases* affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the *other cases before mentioned*, the Supreme Court shall

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<sup>87</sup> *Local No. 93*, 478 U.S. at 522.

<sup>88</sup> Pfander & Birk, *supra* note 4, at 1346; *see also id.* at 1357, 1439-40.

<sup>89</sup> *Id.* at 1441.

have appellate jurisdiction . . . with such exceptions . . . as the Congress shall make.<sup>90</sup>

Pfander and Birk contend that the terms “case” and “controversy” in Article III bear very different meanings, and that the Framers’ use of two distinct terms was deliberate and meaningful.<sup>91</sup> If that view is accurate, then Article III’s exclusive use of the term “cases” in the very next clause, which sets forth the scope of the Supreme Court’s jurisdiction, is consequential. Their interpretation suggests that the Supreme Court lacks jurisdiction, either original or appellate, over any of the “controversies” identified in Article III that do not also qualify as “cases.”<sup>92</sup> In other words, lower federal courts would be authorized to hear many types of “controversies” over which the Supreme Court lacks appellate jurisdiction, such as state-law disputes between U.S. and foreign citizens.<sup>93</sup>

Moreover, under Pfander and Birk’s proposed definitions, the Supreme Court’s jurisdiction would include potentially non-contentious matters (cases), while excluding categorically adversarial matters (controversies). This may be the opposite of the jurisdictional restrictions one would expect for the Court.

Finally, there is a textually reasonable argument that Article III actually uses the terms “cases” and “controversies” interchangeably. The provision quoted above grants the Supreme Court original jurisdiction over “cases . . . in which a state shall be a party.”<sup>94</sup> Article III also provides, however, that federal courts may exercise jurisdiction over various types of “controversies” in which a state is a party.<sup>95</sup> One possible implication of these provisions is that the Framers treated the terms “case” and “controversy” as synonymous.<sup>96</sup> In any event, Article III’s provisions concerning the Su-

90 U.S. CONST. art. III, § 2, cl. 1-2 (emphasis added).

91 Pfander & Birk, *supra* note 4, at 1417-18.

92 For example, Article III allows federal courts to exercise jurisdictions over “controversies to which the United States shall be a party.” U.S. CONST. art. III, § 2, cl. 1. Most such matters, however, would likely arise under federal law, and therefore also constitute federal question cases over which a federal court may exercise jurisdiction. *Id.*

93 Pfander and Birk’s view also resolves the question of whether the Supreme Court can hear appeals of state supreme court rulings adjudicating issues under the U.S. Constitution or federal law, when those cases could not have been initially brought in federal court due to non-justiciability. Cf. William A. Fletcher, *The “Case or Controversy” Requirement in State Court Adjudication of Federal Questions*, 78 CAL. L. REV. 263, 265 (1990) (arguing that state courts should be limited by Article III justiciability requirements when adjudicating federal question cases). Pfander and Birk’s theory would allow the Supreme Court to exercise non-contentious jurisdiction over many such cases, despite the absence of a justiciable controversy.

94 U.S. CONST., art. III, § 2, cl. 2.

95 *Id.* art. III, § 2, cl. 1.

96 Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 244 n.128 (1985) (pointing out that, in the Original Jurisdiction Clause, “the several categories of ‘Controversies’ to which a state is party in the jurisdictional menu are referred to as ‘Cases,’ thus suggesting that the two words are legally synonymous”). Of course, it could be argued instead that the Original Jurisdiction Clause allows the

preme Court's jurisdiction present potentially substantial obstacles to Pfander and Birk's theory of non-contentious jurisdiction and the interpretation of Article III upon which it rests.

#### CONCLUSION

Consent decrees pose a largely unrecognized challenge to Article III's justiciability requirements. The Supreme Court has never squarely addressed their constitutionality,<sup>97</sup> and several of its rulings concerning Article III's adverseness requirement raise serious problems for their validity.<sup>98</sup> Even under Pfander and Birk's proposed new theory of non-contentious jurisdiction under Article III, consent decrees still likely fall outside the federal judicial power.

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Supreme Court to hear only disputes in which a state is a party that also qualify as cases. Under this reading, the Court would possess original jurisdiction over any federal-question, admiralty, or ambassador-related cases in which a state is a party. *See* U.S. CONST., art. III, § 2, cl. 1.

<sup>97</sup> *Cf. Swift & Co. v. United States*, 276 U.S. 311, 313-15 (1928) (refusing to adjudicate Article III challenge to validity of consent decree because the issue had not been raised on direct appeal); *see also Pope v. United States*, 323 U.S. 1, 3-5 (1944) (asserting, incorrectly, that *Swift & Co.* established the constitutional validity of consent decrees).

<sup>98</sup> *See, e.g., Moore v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 47, 47 (1971) (holding that "no case or controversy within the meaning of Article III" exists where "both litigants desire precisely the same result"); *Lord v. Veazie*, 49 U.S. 251, 255 (1850) ("It is the office of courts of justice to decide the rights of persons and of property, when the persons interested cannot adjust them by agreement between themselves - and to do this upon the full hearing of both parties."); *see also Vermont v. New York*, 417 U.S. 270, 271, 274, 276 (1974). *But see United States v. Windsor*, 133 S. Ct. 2675, 2687 (2013) (characterizing the adverseness requirement as prudential rather than constitutionally mandated).