ARTICLE III STANDING — SEPARATION OF POWERS — FOURTH CIRCUIT REJECTS JURISDICTION TO ENFORCE NLRB CONSENT ORDER. — *NLRB v. Constellium Rolled Products Ravenswood, LLC*, 43 F.4th 395 (4th Cir. 2022), *reh'g denied* No. 20-2140 (4th Cir. Nov. 9, 2022).

Section 10(e) of the National Labor Relations Act[1] (NLRA) requires that the National Labor Relations Board (NLRB or Board) petition a court of appeals if it seeks enforcement of its orders,[2] which include "consent orders" reflecting settlement agreements.[3] Recently, in *NLRB v. Constellium Rolled Products Ravenswood, LLC*,[4] the Fourth Circuit held that it did not have jurisdiction to enforce a Board consent order because the parties lacked "adverse interests."[5] An adverseness requirement — as one consideration of a litigant's standing to proceed in federal court — is grounded in separation of powers.[6] But in suits against private parties "arising under . . . the Laws of the United States,"[7] including *Constellium*, those separation of powers concerns are inverted. By refusing to exercise its statutorily granted authority to enforce the Board order, the Fourth Circuit interfered with Congress's ability to determine the contours of the labor law regime, paradoxically engaging in the very judicial overreach that standing is meant to protect against.

In early 2020, United Steelworkers, Local 5668 (the Union) submitted four charges against Constellium Rolled Products (Constellium) to the NLRB.[8] In each, the Union alleged that Constellium violated the NLRA by withholding requested documentation that was necessary for bargaining.[9] The NLRB's General Counsel found merit in the charges and issued a complaint against Constellium.[10] After Constellium filed an answer, it reached a formal settlement with the Union in which Constellium agreed to furnish the requested information.[11] The Board approved the settlement, ordered Constellium to fulfill the agreement, and petitioned the Fourth Circuit to enforce its order through a consent judgment pursuant to section 10(e) of the NLRA.[12]

The Fourth Circuit dismissed the Board's petition.[13] Writing for the majority, Judge Richardson[14] began by explaining the well-established

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1 29 U.S.C. §§ 151–169.
2 *Id.* § 160(e); *see In re* NLRB, 304 U.S. 486, 495 (1938).
3 *See* NLRB v. Ochoa Fertilizer Corp., 368 U.S. 318, 318–20 (1961).
4 43 F.4th 395 (4th Cir. 2022).
5 *Id.* at 400 (quoting Lord v. Veazie, 49 U.S. (8 How.) 251, 255 (1850)); *see id.* at 398.
6 *See infra* notes 36–38 and accompanying text.
7 U.S. CONST. art. III, § 2, cl. 1.
8 *Constellium*, 43 F.4th at 398.
9 *Id.*
10 *Id.*
11 *See id.* at 398–99.
12 *Id.* at 399; 29 U.S.C. § 160(e).
13 *Constellium*, 43 F.4th at 409.
14 Judge Richardson was joined by Judge Quattlebaum.

rule that a finding of "sufficient adverseness" between the parties is necessary "to confer an 'adequate basis for jurisdiction'" under Article III.[15] Interpreting *United States v. Windsor*[16] and other Supreme Court precedents,[17] the majority concluded that, though Article III does not require the parties to make adverse *arguments*, it does require them to have adverse *interests* "when federal jurisdiction [is] invoked."[18] And these interests have to have "real-world consequences."[19] Since the court's judgment "would merely reiterate Constellium's obligations under the Board's order," there was insufficient adverseness to hear the case.[20]

The majority addressed three objections. First, it responded to the dissent's position that enforcing the order *would* have real-world consequences given that under section 10(e), Board orders are not self-executing and require a court judgment to give them meaning.[21] If Board orders were "meaningless," Judge Richardson countered, they would not create "the kind of injury that confers standing" for appellate review — yet the courts of appeals regularly review such challenges.[22] Second, the majority rejected the contention that the longstanding "practice of courts blessing consent decrees" called its determination into question[23]: whereas consent decrees end an ongoing dispute in the federal courts, the controversy in *Constellium* ended before any litigation commenced.[24] Third, the majority addressed the fact that the Supreme Court has exercised jurisdiction and approved Board orders without raising the adverseness issue.[25] Judge Richardson reasoned that, because the Supreme Court has not addressed the question of adverseness in these cases head-on, its "'[d]rive-by jurisdictional rulings' are not precedential."[26]

Judge Harris dissented.[27] She observed that the "paradigm concerns animating" any Article III adverseness requirement — such as avoiding

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[15] *Constellium*, 43 F.4th at 401 (quoting United States v. Windsor, 570 U.S. 744, 759 (2013)).

[16] 570 U.S. 744.

[17] Perhaps most notably apart from *Windsor*, the court considered *Lord v. Veazie*, 49 U.S. (8 How.) 251, 255 (1850). *See Constellium*, 43 F.4th at 400.

[18] *Constellium*, 43 F.4th at 401 (citing *Windsor*, 570 U.S. at 755, 757–58). In distinguishing between "adverse arguments" and "adverse interests," the court adopted the same position that Professors Caleb Nelson and Ann Woolhandler articulate. *See* Ann Woolhandler, *Adverse Interests and Article III*, 111 NW. U. L. REV. 1025, 1032–33, 1033 n.31 (2017) (citing Webcast: Commentary by Caleb Nelson on "The Contested History of Article III's Case-or-Controversy Requirement" by James Pfander (University of San Diego School of Law, Center for the Study of Constitutional Originalism 2015)).

[19] *Constellium*, 43 F.4th at 402 (quoting Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2196 (2020)).

[20] *See id.* at 404.

[21] *See id.*

[22] *Id.* at 405; *see also* 29 U.S.C. § 160(f) (providing for judicial review of Board orders).

[23] *Constellium*, 43 F.4th at 405.

[24] *Id.* at 406.

[25] *See id.* at 407 (citing NLRB v. Ochoa Fertilizer Corp., 368 U.S. 318, 322 (1961)).

[26] *Id.* at 408 (quoting Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 91 (1998)).

[27] *Id.* at 409 (Harris, J., dissenting).

friendly suits — were not present in this case.[28] Moreover, Judge Harris argued, "Article III does not require adverseness."[29] Rather, after *Windsor*, adverseness is merely a *prudential* concern — not a limit on the court's "*power*."[30] Further, Judge Harris contended that the court's "adverse interest" requirement is as much about mootness as it is about standing.[31] And because an NLRB order has no binding legal effect without a federal court judgment, the NLRB maintained a live interest in the enforcement of its order to prevent further labor law violations.[32] Judge Harris also rejected the majority's argument that consent decrees are different because they end an ongoing controversy, noting that they are sometimes sought without any remaining dispute.[33] Finally, Judge Harris criticized the majority for "creating costly doubt about the permissibility of a whole swath of long-accepted judicial practices" and for failing to articulate the limits of its holding.[34]

"[T]hough one might not know it"[35] after reading both opinions in *Constellium*, the Supreme Court has emphasized that separation of powers is the chief concern underlying the doctrine of standing.[36] Usually, more stringent standing requirements "prevent the judicial process from

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[28] *Id.* at 411.

[29] *Id.*

[30] *Id.* (citing United States v. Windsor, 570 U.S. 744, 759–60 (2013)).

[31] *Id.* at 412–13.

[32] *Id.* at 413–14. Judge Harris also analogized to the Federal Arbitration Act, 9 U.S.C. §§ 1–16, where Congress has similarly left arbitral awards unenforceable until they are blessed by a court. *Constellium*, 43 F.4th at 414 (Harris, J., dissenting). In that context, the Third Circuit reached a similar conclusion on standing to the one that Judge Harris espoused. *Id.* (citing Teamsters Local 177 v. United Parcel Serv., 966 F.3d 245, 248 (3d Cir. 2020)).

[33] *See Constellium*, 43 F.4th at 415.

[34] *Id.* at 416. In the final section of her dissent, Judge Harris offered strong limits on the court's holding and suggested how the Board could issue consent orders that courts could still enforce under her interpretation of the majority opinion. *See id.* ("On my read, the court's *holding* . . . is limited to cases in which (1) the parties settle before the Board issues an order; (2) that settlement includes a promise not to contest enforcement of the resulting order; (3) the parties abide by that promise; (4) the parties do not otherwise violate the order and have no dispute about its terms; and (5) the agreement does not depend on our enforcement of the order."). For example, the Board could make settlement agreements conditional on judicial enforcement. *Id.*

[35] *Id.* at 410.

[36] *See, e.g.*, TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2203 (2021) ("The 'law of Art. III standing is built on a single basic idea — the idea of separation of powers.'" (quoting Raines v. Byrd, 521 U.S. 811, 820 (1997))). This is a premise that even thoroughly originalist Justices on the Roberts Court have accepted, although they may look to history to determine the appropriate separation of powers as understood at common law. *See, e.g.*, John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219, 1229 (1993); Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 894 (1983) ("[T]he law of standing roughly restricts courts to their traditional undemocratic role of protecting individuals and minorities against impositions of the majority, and *excludes them from the even more undemocratic role of prescribing how the other two branches should function* in order to serve the interest of the majority itself." (emphasis added and omitted)).

being used to usurp the powers of the political branches,"[37] as they limit the occasions for judicial review to "the determination of real, earnest and vital controversy between individuals."[38] But this is not always so. Rather, this comment proposes that a determination of "sufficient adverseness" grounded in separation of powers considerations should depend on which of the following five categories the lawsuit falls into: (1) lawsuits arising under state law; (2) lawsuits arising under the Constitution; (3) administrative lawsuits challenging the Executive; (4) lawsuits against state and local governments arising under federal law; and (5) lawsuits against private parties arising under federal law (as in *Constellium*). While a stringent adverseness requirement might be justified by separation of powers principles in the first four categories, the application of those same principles leads to the opposite conclusion in the fifth. In these category-five lawsuits, far from promoting judicial restraint, an adverseness requirement creates a separation of powers paradox by "do[ing] violence to the scheme Congress chose to put into place."[39]

Diversity cases are the one realm in which the requirement of adverseness has been least questioned[40] — for good reason. As Justice Story explained in *Martin v. Hunter's Lessee*,[41] the Constitution's grant

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[37] Clapper v. Amnesty Int'l USA, 568 U.S. 398, 408 (2013) (citing Summers v. Earth Island Inst., 555 U.S. 488, 492–93 (2009)); *see also, e.g.*, Lujan v. Defs. of Wildlife, 504 U.S. 555, 577 (1992) (arguing that upholding the rights of all individuals with or without a concrete injury to sue a government official would make the courts "virtually continuing monitors of the wisdom and soundness of Executive action" (quoting Allen v. Wright, 468 U.S. 737, 760 (1984))); GEOFFREY R. STONE, CONSTITUTIONAL LAW 86, 114 (8th ed. 2018); Martin H. Redish & Sopan Joshi, *Litigating Article III Standing: A Proposed Solution to the Serious (but Unrecognized) Separation of Powers Problem*, 162 U. PA. L. REV. 1373, 1384 (2014) ("[S]tanding doctrine limits the unelected judiciary's ability to interfere with . . . decisions made by the democratically elected political branches.").

[38] Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 346 (1936) (Brandeis, J., concurring).

[39] Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 191 (2001) (Stevens, J., dissenting). Even if one were to reject the framework proposed by this comment, one could argue that the majority's conclusion should not follow under its own test: that the consent order, the petition for its enforcement, and Constellium's acquiescence are all a product of "adverse interests" between the two parties playing out in a litigation process that began when charges were filed at the NLRB. The court posits that adverseness is not sufficient where it was "extinguished before the case got to federal court." *Constellium*, 43 F.4th at 403. But court enforcement of consent decrees, which the majority does not question, *id.* at 405–08, is often justified on the grounds that it is "'reasonably ancillary to the primary, dispute-deciding function' of the federal courts," 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, 590 (2006) (quoting U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship, 513 U.S. 18, 22 (1994)). *But see* Michael T. Morley, *Non-contentious Jurisdiction and Consent Decrees*, 19 U. PA. J. CONST. L. ONLINE 1, 13 (2016) (arguing against this justification). And the only distinction between enforcement of consent decrees and the Board's consent order is that, in the latter, the controversy began before an administrative board rather than a court. Yet this distinction is immaterial: the Board is simply the first stage in a larger judicial process. *Cf.* B&B Hardware, Inc. v. Hargis Indus., Inc., 575 U.S. 138, 148 (2015) (holding that, where "Congress has authorized agencies to resolve disputes," courts should presumptively give preclusive effects to the agency's decision).

[40] That is, cases that give federal courts subject matter jurisdiction under 28 U.S.C. § 1332. *See* JAMES E. PFANDER, CASES WITHOUT CONTROVERSIES 73–75 (2021).

[41] 14 U.S. (1 Wheat.) 304 (1816).

of power to federal courts to hear diversity cases was based on a presumption that, in contentious litigation between two opposing parties, the partiality of the forum state could "obstruct, or control, or be supposed to obstruct or control, the regular administration of justice."[42] In noncontentious litigation, this concern is absent, and the constitutional scheme thus requires that such cases be litigated in state court.

Suits that turn on the constitutionality of an act by the legislative or executive branch should also require party adverseness. In *Raines v. Byrd*,[43] the Court noted that its "standing inquiry has been especially rigorous" in such cases.[44] Why? Because, given the nonreviewability of its constitutional decisions,[45] the Court should be especially cautious in taking up a case that could permanently limit the powers of another branch. This logic also extends to constitutional suits against state and local governments where the Court's determination both irreversibly constrains the powers of the states and forestalls Congress from regulating state activity through its own interpretation of the Constitution.[46]

In administrative lawsuits seeking review of agency decisions under federal law — such as suits charging that agencies have acted in excess of their statutory authority or that they have violated the Administrative Procedure Act[47] — the concerns about judicial reach are more ambiguous. They are not as potent as in constitutional cases because Congress can overrule the courts' interpretations. Because it is impracticable for Congress to review every agency decision, courts can play a useful role in making reversible determinations that either best match the preferences of the current Congress, match the preferences of the Congress that enacted the legislation, or are most likely to elicit a response from the legislature.[48] At the same time, judicial restraint leaves some breathing room for the executive branch to function.[49]

The concerns are also ambiguous in suits against state and local governments under federal law, where Congress can once again override the court's determination but where federalism concerns might similarly suggest the need for judicial restraint. Ultimately, an adverseness requirement may be desirable in such cases to prevent friendly suits from

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[42] *Id.* at 347.

[43] 521 U.S. 811 (1997).

[44] *Id.* at 819–20.

[45] *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507, 519 (1997) (implying that the Court's interpretation of the meaning of the Fourteenth Amendment must always supersede Congress's).

[46] It is thus not surprising that the Supreme Court recently affirmed, in a case assessing the constitutionality of state law, that "Article III . . . affords federal courts the power to resolve only 'actual controversies arising between adverse litigants.'" Whole Woman's Health v. Jackson, 142 S. Ct. 522, 532 (2021) (quoting Muskrat v. United States, 219 U.S. 346, 361 (1911)).

[47] 5 U.S.C. §§ 551, 553–559, 701–706.

[48] *See generally* EINER ELHAUGE, STATUTORY DEFAULT RULES (2008).

[49] *See supra* notes 37–38 and accompanying text.

setting binding precedents that restrict the powers of other states.[50]

Finally, we have claims under federal law against private parties. The majority involve adverseness. But some are "noncontentious," such as those involving naturalization proceedings,[51] consent decrees,[52] and NLRB consent orders. In such cases, the court is doing a job that Congress is asking it to do: enforcing a federally created right. The usual separation of powers concerns justifying an adverseness requirement[53] do not apply. Instead, in these category-five suits, separation of powers counsels against reading an adverseness requirement into Article III.

Section 10(e) of the NLRA specifically calls for petitions to federal courts for enforcement of Board orders. The Seventh Circuit explained that "the denial of teeth to the agency's orders was a swap for procedural informality," and "[d]istrust of the [NLRB], or perhaps disagreement with the laws it administers or the substantive positions it takes — or perhaps sheer inertia — has prevented Congress from making the Board's orders self-executing."[54] To be sure, this comment welcomes statutory reform empowering Board orders, which would make court enforcement unnecessary.[55] But where "Congress has carefully set up"[56] a statutory scheme and enforcement mechanism that allows for the litigation of nonadversarial claims,[57] courts should respect it.[58]

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[50] Imagine that Texas wants to enjoin California's Fast Food Accountability and Standards Recovery Act (FAST Act), Assembl. 257, 2021–2022 Leg., Reg. Sess. (Cal. 2022) (codified at CAL. LAB. CODE §§ 96, 1470–1473), which creates a Fast Food Sector Council to set minimum workplace standards in the fast-food industry. Without an adverseness requirement, Texas could enact an equivalent "SLOW Act," ask the National Right to Work Legal Defense Foundation to challenge the SLOW Act as being preempted by the NLRA, and then cede the challenge in court. If a federal court then strikes down the SLOW Act, it would set a binding precedent that could then make it easier to enjoin California's FAST Act.

[51] *See* PFANDER, *supra* note 40, at 33–40, 76–77, 107–10.

[52] *See id.* at 119–23.

[53] *See, e.g.*, Redish & Joshi, *supra* note 37, at 1385 ("Article III standing prevents courts from exercising an otherwise unchecked and freewheeling power to review legislative and executive action untethered from actual litigants bearing concrete grievances.").

[54] NLRB v. P*I*E Nationwide, Inc., 894 F.2d 887, 892 (7th Cir. 1990).

[55] *See* Protecting the Right to Organize Act of 2021, H.R. 842, 117th Cong. § 107 (2021).

[56] *Constellium*, 43 F.4th at 414 (Harris, J., dissenting).

[57] Because section 10(e) does not mention consent orders, one might wonder whether Congress was thinking about settlements when it crafted section 10(e). But the text of section 10(e) encompasses all Board orders, including those reflecting the terms of a settlement. And insofar as the Board's practice of issuing orders reflecting settlements has arisen out of the Board's practices rather than by explicit mandate from the NLRA, courts must respect Congress's ability to delegate the procedures of adjudication — including processes for parties to reach settlement — to executive agencies like the NLRB. *See* 29 U.S.C. § 156 (granting the Board rulemaking authority); Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 524 (1978) (suggesting courts should not regulate agencies' procedures beyond what is mandated by legislation). These elements together — the nonenforceability of Board orders and the Board's ability to issue consent orders — make up the statutory scheme that Congress created: one that at least accounts for the possibility of noncontentious litigation.

[58] In *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), the Court held that Congress cannot

Even though the Supreme Court rarely cites justifications other than separation of powers as guiding its Article III standing jurisprudence,[59] other grounds have been raised. One is the concern that nonadverse litigants may fail to protect the rights of affected third parties. In *Constellium*, this was not an issue — the NLRB consent order does not, unlike written-opinion rulings that mark changes in the Board's interpretation of the NLRA, alter the rights of unrepresented parties. And even in matters like settlement class actions, where third-party rights are at issue, the problem may be adequately solved through procedural safeguards and "a more searching form of inquisitorial judging."[60]

A freestanding adverseness requirement might also be justified on judicial economy grounds: to "ensur[e] that courts' limited resources are dedicated to parties that actually require judicial intervention."[61] But if Congress thinks it is worth the judiciary's time to bless NLRB orders or naturalize new citizens, that is its prerogative. The tradeoff between vindicating statutory rights and husbanding judicial resources is a policy judgment. Once Congress has struck its preferred balance, a court should not turn litigants away because it would have made a different choice.

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invite the courts to "ignor[e] the [Article III] concrete injury requirement." *Id.* at 576; *see also* TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2205 (2021). Of course, *Lujan* speaks to the Article III injury requirement, rather than the doctrinally separate requirement of adverseness between parties. *See* United States v. Windsor, 570 U.S. 744, 785 (2013) (Scalia, J., dissenting) (distinguishing whether a party "retains a stake sufficient to support Article III jurisdiction" (the injury requirement) from "whether there is any controversy (which requires *contradiction*) between" the two parties (the adverseness requirement)). And under the injury requirement, the Court has never questioned whether injuries resolved by settlement raise an issue. One might nonetheless wonder whether this line from *Lujan* challenges the position that the courts should respect Congress's statutory scheme when determining whether parties have standing *in general*.

First, this comment does not argue that Congress's wishes should be able to supersede Article III's requirements. Rather, it argues that Article III itself requires respect for Congress as another branch of government and that such separation of powers considerations should affect the understanding — at least for purposes of adverseness — of what constitute "cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process." Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 102 (1998) (citing Muskrat v. United States, 219 U.S. 346, 356–57 (1911)).

Second, when the Court has proscribed congressional diminutions of the Article III injury requirement, it has expressed a worry that "[a] regime where Congress could freely authorize *unharmed* plaintiffs to sue defendants who violate federal law . . . would infringe on the Executive Branch's Article II authority." *TransUnion*, 141 S. Ct. at 2207. Unlike the Executive, "[p]rivate plaintiffs are not accountable to the people and are not charged with pursuing the public interest in enforcing a defendant's general compliance with regulatory law." *Id.*; *see also Lujan*, 504 U.S. at 576. This concern does not carry over to the adverseness context. In a case like *Constellium*, because the party bringing suit has satisfied the Article III *injury* requirement, they are by definition seeking redress for the violation of their private rights. Banishing the *adverseness* requirement in private suits under federal law, therefore, contains no analogous worry of congressional interference with the executive branch under even a formalist conception of separation of powers.

[59] *See* Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 459 (2008).

[60] PFANDER, *supra* note 40, at 123. *But see* Redish & Kastanek, *supra* note 39, at 609.

[61] 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, 664 (2014).

A final justification for the adverseness requirement is that it improves judicial decisionmaking.[62] Nonadverse proceedings might lead to the creation of bad law because "when all litigants desire the same result, they have little incentive to highlight defects in their arguments or present adverse considerations persuasively."[63] Some commentators disagree and point to the many advantages of nonadverse, inquisitorial legal systems.[64] But the meta question is not which balance of adversarial and inquisitorial judicial flavors would be preferable, but rather, who should get to decide this question about the power and scope of the federal courts. And if separation of powers and judicial restraint are to mean anything, the answer should not be the federal courts themselves.

When Justice Powell wrote that the "[r]elaxation of standing requirements is directly related to the expansion of judicial power,"[65] he was mostly correct. As was Justice Scalia, when he wrote that a diminutive view of standing requirements "envisions a Supreme Court standing (or rather enthroned) at the apex of government, empowered to decide all constitutional questions, always and everywhere 'primary' in its role."[66] But this character of standing is not absolute. In *Constellium*-type suits — those against private actors under federal law — adverseness should not be a precondition for justiciability. It is neither clearly in the text of the Constitution[67] nor required by good reason. Instead, in such lawsuits, the separation of powers principles that undergird the doctrine of standing require that the federal courts respect Congress's power to prescribe noncontentious litigation.

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[62] *See id.* at 664 (citing Poe v. Ullman, 367 U.S. 497, 503 (1961)).

[63] *Id.*; *see also* Redish & Kastanek, *supra* note 39, at 551–52.

[64] *See, e.g.*, John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 841–48 (1985). Even if one prefers adversarial proceedings in most settings, "across-the-board restrictions" might "unduly narrow the judicial function in more mundane matters." PFANDER, *supra* note 40, at 103.

[65] United States v. Richardson, 418 U.S. 166, 188 (1974) (Powell, J., concurring).

[66] United States v. Windsor, 570 U.S. 744, 779 (2013) (Scalia, J., dissenting).

[67] Whether adverseness is required by the Constitution remains a contested issue. The Court has given inconsistent answers. *Compare Windsor*, 570 U.S at 759–60 (2013) (majority opinion) (prudential requirement only), *with* Whole Woman's Health v. Jackson, 142 S. Ct. 522, 532 (2021) (constitutional requirement). And scholars have debated the history of traditional forms of adjudication: Do they sufficiently include noncontentious adjudication so as to challenge the idea that Article III requires adverseness? *Compare* PFANDER, *supra* note 40, at 73–75 (providing a historical account of uncontested adjudication in federal courts to suggest that Article III does not preclude noncontentious adjudication outside of diversity cases), *with* Woolhandler, *supra* note 18, at 1032–33, 1033 n.31 (disputing Professor James Pfander's account). Without taking a stance on these historical debates, this comment's suggested reading of Article III is based on the simpler premise that, without an explicit limitation in the Constitution of what counts as a case or controversy, courts should not invalidate the works of Congress "by reading abstract notions of the separation of powers into those otherwise open-ended clauses." *See* John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1948 (2011). Instead, specific separation of powers concerns should be evaluated in their context to determine whether a case or controversy exists.