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Maritime Removal: An Unlikely Heuristic for Anchoring Three Non-Textual Principles of Original Federal Jurisdiction

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ABSTRACT

This article uses maritime law as a heuristic for identifying and explaining three broad, non-textual interpretive principles essential to understanding statutory and constitutional grants of original federal jurisdiction. Initially, the article demonstrates the pitfalls of textual statutory isolationism when trying to interpret federal jurisdictional statutes by examining non-textual restrictions on the removal of Jones Act civil actions. Next the article explains how federalism modifies the plain meaning of the text of constitutional and statutory grants of jurisdiction by examining the removal of common law maritime claims. Tangentially, this examination also reveals the pivotal role admiralty and maritime law played in the ratification of the Constitution. Finally, by exploring the recent and controversial removal of admiralty actions pursuant to federal arbitration law, the article tangibly demonstrates that identical text often has a very different meaning when used in the Constitution and in statutory jurisdictional grants.

I
INTRODUCTION

The original jurisdiction of the inferior federal courts is complex and wholly dependent on federal statutes permitting its exercise.[1] However, understanding this jurisdiction involves more than formalistic, textual statutory interpretation. Rather, because the constitutional grants of jurisdiction and jurisdictional statutes were not drawn on a blank historical canvas, their functional meanings become clear only when non-textual interpretive principles are considered simultaneously with the statutory text. This article demonstrates that surprisingly, the law governing maritime removal, more specifically the removal of the civil actions seamen often bring against their employer is an especially good heuristic for contextualizing three of these non-textual principles.[2]

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[1]See infra Part I.B.

[2]I say surprisingly because "It is often thought, mistakenly, that admiralty and maritime law is a narrow area of specialization." Martin J. Davies, *Teaching Admiralty Requires Dismissing Important Subjects*, 55 ST. LOUIS U. L.J. 483, 483 (2011). But in reality nothing is further from the truth. Id. In fact,

> Admiralty is potentially one of the richest subjects in the law school curriculum. This claim may be received skeptically by those who have neither taught nor taken the course. Yet my experience as a student in, and teacher of, the course confirms my belief that Admiralty holds that promise, especially if it is presented not simply as a vehicle to train the relatively few who hope to become maritime lawyers, but as an opportunity for students with different aspirations to explore some of the most interesting issues in law. As a crosscutting course, Admiralty offers a chance to integrate materials and concepts from other classes, including civil procedure, torts, contracts, property, constitutional law, choice of law, and federal courts. It offers a comparative lens through which to view rules and principles in land law and accordingly achieve a better understanding of doctrine explored in earlier courses.

Joel K. Goldstein, *Beyond the Tide, Beginning Admiralty with the Steamboat Magnolia*, 55. ST. LOUIS U. L.J. 521, 521 (2011).

Removal of Jones Act causes of action demonstrates the first of these non-textual principles-jurisdictional statutes must be read in tandem with other facially unrelated jurisdictional statutes and relevant court decisions rather than in isolation.[3]

Another of these principles is that the text of constitutional and statutory grants of jurisdiction must be interpreted in light of the federalism based restrictions implicit in the decision to ratify the Constitution. In Part IV, I demonstrate the application of this principle by examining the removal of general maritime law or maritime common law causes of action.[4]

Finally, the article examines an especially troubling, non-textual principle necessary to understanding original federal jurisdiction; the notion that Article III's jurisdictional grants are not self executing, such that in order for a federal court to exercise jurisdiction there must be both a constitutional and statutory grant of jurisdiction. A related consideration of this dual constitutional/statutory requirement is that constitutional grants of jurisdiction are not necessarily coextensive with the relevant statutory grants of jurisdiction even though the constitutional and statutory language may be identical. In fact, jurisdictional statutes typically provide less than the jurisdiction provided by the corresponding constitutional grants of jurisdiction. Part V of this piece suggests that the doctrinal justification of a recent and controversial phenomenon in admiralty and maritime law - the removal of admiralty claims pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards-effectively illustrates the principle that textual equivalency between constitutional and statutory grants of jurisdiction is not functional equivalence.[5]

II
PREFATORY DOCTRINAL CONSIDERATIONS

A. Admiralty and Maritime Law

The terms "admiralty and maritime," "maritime" and "admiralty" are synonymous with each other and refer to the body of law which governs "contracts, torts, and workplace injuries occurring in the course of maritime commerce and other maritime activities."[6] The terms accordingly are used interchangeably in this article.

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[3]See infra Part I.B.

[4]See infra Part III.

[5]See infra Part V.

[6]FRANK L. MARAIST, ET. AL. CASES AND MATERIALS ON MARITIME LAW, 1 (2003); DAVID W. ROBERTSON, ADMIRALTY AND MARITIME LAW IN THE UNITED STATES, 4 (2d. ed. 2008).

B. Original Jurisdiction

When I refer to original federal jurisdiction in this article I am referring to any federal subject matter jurisdiction that is not federal appellate jurisdiction. Therefore a federal district court has original federal jurisdiction over a case it is empowered to hear if that case is originally filed in the federal court or if the case arrives in the federal court via the procedure of removal.

As early as 1850, the Supreme Court in *Sheldon v. Sill* announced that in order for a federal court to exercise subject matter jurisdiction there must be both a constitutional and statutory basis of jurisdiction.[7] *Sheldon v. Sill* was a diversity action commenced by the assignee of a debt.[8] A citizen of Michigan owed a debt to another citizen of Michigan.[9] The debt was then assigned to a citizen of New York after which the citizen of New York sued the debtor citizen of Michigan pursuant to diversity jurisdiction.[10] The diversity jurisdiction statute forbade jurisdiction where diversity was based on an assignment if diversity jurisdiction did not exist without the assignment.[11] Therefore according to the statute, there would not be jurisdiction here with-

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[7]See Sheldon v. Sill, 49 U.S. 441 (1850).

[8]Id. at 442 explaining

> The appellee was the complainant in the court below. The bill was filed to procure satisfaction of a bond, executed by the appellant, Thomas C. Sheldon, and secured by a mortgage on lands in Michigan, executed by him and Eleanor his wife, the other appellant. The bond and mortgage were dated on the 1st of November, 1838, and were given by the appellants, then, and ever since, citizens of the state of Michigan, to Eurotas P. Hastings, President of the Bank of Michigan, in trust for the President, Directors, and Company of the Bank of Michigan.
>
> The said Hastings was then and ever since has been a citizen of the state of Michigan, and the Bank of Michigan was a body corporate in the same state.
>
> On the 3d day of January, A. D. 1839, Hastings, President of said bank, under the authority and direction of the Board of Directors, 'sold, assigned, and transferred, by deed duly executed under the seal of the bank, and under his own seal, the said bond and mortgage, and the moneys secured thereby, and the estate thereby created,' to said Sill, the complainant below, who was then and still is a citizen of New York.

[9]Id.

[10]See id. at 440, explaining the "complainant . . . was then and still is a citizen of New York."

[11]See id. explaining

> With regard to the first point, the objection is based upon the act of Congress, which provides that the Circuit Court shall not have cognizance of any suit to recover the contents of any promissory note or other chose in action, in favor of an assignee, unless such suit might have been prosecuted in such court to recover said contents if no assignment had been made, except in cases of a foreign bill of exchange.

Congress has said, by the provision referred to above, that there are certain controversies between citizens of different states which the United States courts shall not take cognizance of; yet the judicial power of the court extends to those controversies by the Constitution, and citizens of the different states have the right to have that power exercised in their controversies. Where does Congress get the power or authority to deprive the courts of the United States of the judicial power with which the Constitution has invested them?

out the assignment because the suit involved two citizens of Michigan. However, the constitutional grant of diversity jurisdiction in Article III contained no such restriction on the existence of diversity jurisdiction.[12]

In concluding that the restriction in the diversity jurisdiction statute was valid, *Sheldon* in a sense was the flip side of the *Hodgson*[13] coin. *Hodgson v. Bowerbank* established that Congress could not give more than the jurisdiction provided for in Article III[14] while *Sheldon* concluded Congress could give the federal courts less than the entire jurisdiction contained in Article III.[15]

The scholarly consensus accepted for the purpose of this article is that the Article III grants of federal jurisdiction relevant to the inferior federal courts are not self executing and that Congress needs to enact legislation authoriz-

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[12]Id.

> The Constitution of the United States (§ 2 of article 3) says the judicial power shall extend to controversies between citizens of different states, and, in section one of the same article, it says that this judicial power shall be vested in one Supreme Court, and such inferior courts as Congress shall from time to time establish. Now we would remark, first, that the case before the Circuit Court was a controversy between citizens of different states, and to such a controversy the judicial power of the courts of the United States extends by the Constitution, and by the same Constitution that power is vested, except where the Supreme Court has original jurisdiction by the Constitution, in the inferior courts created by Congress. This judicial power, therefore, to take cognizance of this case, is, by the Constitution, vested in the Circuit Court, and the plaintiff claims the constitutional right to have his controversy with Mr. Sheldon, living in Michigan, decided by that court.

[13]Hodgson v. Bowerbank, 9 U.S. 303 (1809).

[14]See id. (discussing a jurisdictional statute's validity and concluding "the statute cannot extend jurisdiction beyond the limits of the Constitution.).

[15]Sheldon, 49 U.S. at 442, 448-49 (1850).

> A considerable portion of the judicial power, placed at the disposal of Congress by the Constitution, has been intentionally permitted to lie dormant, by not being called into action by law . . . .
>
> It must be admitted, that if the Constitution had ordained and established the inferior courts, and distributed to them their respective powers, they could not be restricted or divested by Congress. But as it has made no such distribution, one of two consequences must result,—either that each inferior court created by Congress must exercise all the judicial powers not given to the Supreme Court, or that Congress, having the power to establish the courts, must define their respective jurisdictions. The first of these inferences has never been asserted, and could not be defended with any show of reason, and if not, the latter would seem to follow as a necessary consequence. And it would seem to follow, also, that, having a right to prescribe, Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies. Courts created by statute can have no jurisdiction but such as the statute confers. No one of them can assert a just claim to jurisdiction exclusively conferred on another, or withheld from all.

Id. at 448.

ing the inferior federal courts to hear the types of cases described in Article III Section 2.[16]

For example Article III of the Constitution describes the judicial power as extending "to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority."[17] Yet, before federal courts could hear this type of case Congress needed to pass a statute granting the federal courts jurisdiction over these types of cases. Congress did so in 1875, and the modern statutory expression of that grant is the familiar federal question jurisdictional statute, which provides, "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."[18] This particular species of original jurisdiction is alternatively described as "arising under" or "federal question" jurisdiction and the terms are used interchangeably in this article.[19]

Likewise, Article III of the Constitution describes the judicial power as extending to diversity cases by extending it to, "controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects."[20] In order for the federal courts to hear diversity cases Congress passed the first statute granting jurisdiction over diversity cases in the first judiciary act of 1789.[21] The modern statutory expression of this grant is the diversity jurisdictional statute found at 28 U.S.C. §1332.[22]

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[16]See id. Much academic debate exists on whether this is the correct rationale. Perhaps the dominant theory for this view that Congressional action, in addition to the Constitution language is required for original jurisdiction to exist in the inferior federal courts is based upon the constitutional language in Art III §1, "The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." Since Congress has plenary power to create the Art III courts then Congress should be given the power to also decide what they hear. Of course there are implied restrictions on this omnipotent view of Congress, based on Mculloch v. Maryland and on Art III §2's command that the judicial power "shall extend." This might mean that once Congress creates the courts the full judicial power resides in their creation. Also if Congress had absolute power to destroy what they created then the federal courts would not be a coequal branch because of the limited original jurisdiction of the Supreme Court.

[17]U.S. CONST. art. III, §2.

[18]28 U.S.C. §1331 (2006).

[19]See, e.g., Blake Sparrow, *Should the Scope of Work Product Immunity and the Duty to Preserve be Coextensive?: Anticipating Litigation in a World of Electronically Stored Information*, 53 HOW. L.J. 467, 506 (2010) (using the terms "arising under" and "federal question" interchangeably).

[20]U.S. CONST. art III, §2.

[21]See Judiciary Act of 1789, ch. 20, §11, 1 Stat. 73, 78-79 (repealed 1948).

[22]See 28 U.S.C. §1332 providing,

> **(a)** The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—

Finally, Article III extends the federal judicial power to "all cases of admiralty and maritime jurisdiction."[23] Again, in order to establish inferior federal court jurisdiction over these cases, Congress in the judiciary act of 1789, enacted legislation providing for jurisdiction over admiralty and maritime cases.[24] The modern admiralty jurisdiction statute is found at 28 U.S.C. §1333.[25] Of significant import later in the article,[26] is that statutory diversity jurisdiction and admiralty and maritime jurisdiction existed since 1789. However, Congress did not provide for federal question or arising under statutory jurisdiction until almost 100 years later, in 1875.[27]

C. Removal

The United States has a federal court system and each state of the union also has a state court system.[28] State trial courts are typically courts of general jurisdiction while federal courts are courts of limited jurisdiction.[29]

> **(1)** citizens of different States;
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> **(2)** citizens of a State and citizens or subjects of a foreign state, except that the district courts shall not have original jurisdiction under this subsection of an action between citizens of a State and citizens or subjects of a foreign state who are lawfully admitted for permanent residence in the United States and are domiciled in the same State;
>
> **(3)** citizens of different States and in which citizens or subjects of a foreign state are additional parties; and
>
> **(4)** a foreign state, defined in section 1603 (a) of this title, as plaintiff and citizens of a State or of different States.

[23]U.S. CONST. art III, §2.

[24]See Judiciary Act of 1789 §9.

[25]28 U.S.C. §1333 provides: "The district courts shall have original jurisdiction, exclusive of the courts of the States, of: **(1)** Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled."

[26]See infra notes 93-109 and accompanying text.

[27]*Compare* Judiciary Act of 1789 §§9, 11 (providing for admiralty and diversity jurisdiction respectively) *with* the Jurisdiction and Removal Act of 1875, ch. 137 §1, 18 Stat. 470 (repealed 1948) first providing for original federal question jurisdiction

> That the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority. . . .

[28]http://www.uscourts.gov/EducationalResources/FederalCourtBasics/CourtStructure/UnderstandingFederalAndStateCourts.aspx ("The judicial system in the United States is unique insofar as it is actually made up of two different court systems: the federal court system and the state court systems.").

[29]Id. "Trial courts of general jurisdiction are the main trial courts in the state system." By contrast "Federal courts are courts of limited jurisdiction because they can hear only [the types of cases permitted under Article III]." Id. These cases include diversity cases, federal question cases, suits between states, cases involving ambassadors and other high-ranking public figures, federal crimes, bankruptcy, patent, copyright, and trademark cases, admiralty, antitrust, securities and banking regulation and other cases

What this means is that the original jurisdiction of the state courts is broader than the original jurisdiction of the federal courts.[30] In other words, a state court may typically hear any type of action except those prohibited by a specific statute.[31] For example the patent jurisdictional statute, 28 U.S.C. §1338, forbids state court jurisdiction and creates exclusive federal jurisdiction such that only federal courts may hear patent cases.[32]

Exclusive federal jurisdiction is the exception rather than the norm.[33] By and large state courts can hear any type of case including federal cases, while federal courts can hear only those types of cases described in Article III Section 2 and for which a corresponding federal statutory grant of jurisdiction exists.[34]

For example, a Title VII plaintiff may initiate his or her action in state court even though it is a federal cause of action. Because it is a federal cause of action, however, the federal court also has original jurisdiction pursuant to Article III and 28 U.S.C. §1331 so the plaintiff could also initiate the case in federal court. In situations such as this where a plaintiff chooses to bring a cause of action in state court, for which both the federal courts and the state courts have original jurisdiction the defendant may remove the case to the federal court because it could have originally been brought there.

Removal is largely a creature of statute and the main statute governing removal is 28 U.S.C. §1441, which was amended on December 7, 2011.[35] Section (a) of the statute basically allows a defendant to remove a civil action from state court to federal court if the federal court would have had

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specified by federal statute. See id. Interestingly the uscourts.gov web site is incorrect in listing admiralty and maritime claims as an example of federal question claims. See infra Part IV. A.2, explaining why admiralty and maritime claims are not federal question claims.

[30]See, e.g., ERWIN CHEMERINSKY, FEDERAL JURISDICTION 41, 265 (Vicki Been et al. eds., 5th ed. 2007) hereinafter CHEMERINSKY

State judiciaries have general jurisdiction and may therefore hear all causes of action unless there is a statute denying them subject matter jurisdiction. But federal courts have limited subject matter jurisdiction; that is they are restricted in what cases they may adjudicate and may exercise jurisdiction only if it is specifically authorized.

[31]Id.

[32]See 28 U.S.C. §1338(a) (2006).

The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, plant variety protection, copyrights and trademarks. Such jurisdiction shall be exclusive of the courts of the states in patent, plant variety protection and copyright cases.

[33]See, e.g.,Tad Macfarlan, *Investigating 40 C.F.R. § 124.55(b): State-Court Review of NPDES Permit Certifications*, 44 U. MICH. J.L. REFORM 699, 720 (2011) (explaining that jurisdictional analysis "begins with the presumption that state courts have inherent authority to adjudicate claims arising under federal law," and describing this presumption as the "presumption of concurrent jurisdiction.").

[34]See CHEMERINSKY, supra note 30.

[35]http://www.whitehouse.gov/briefing-room/signed-legislation

original jurisdiction of the civil action, or in other words if the civil action could have been filed in the federal court originally.[36]

After that broad grant of removal in (a), section (b) of the statute establishes an additional condition precedent before removal of civil actions where original jurisdiction is based solely on diversity may be removed. In addition to satisfying (a) diversity cases may only be removed if none of the properly named defendants is a resident of the forum state.[37]

Because there is both state and federal original jurisdiction over a seaman's personal injury action these actions should be removable but rules restricting their removability exist. It is the genesis and operation of these rules which this article explores to illustrate the non-textual components of original federal jurisdiction.

III
THE TYPICAL SEAMAN'S INJURY ACTION

In order to understand the removal mechanics of the typical seaman's injury action it is necessary to first explore the claims which typically constitute these actions. As I explained in a previous publication, seamens' personal injury actions typically contain three claims:[38] Jones Act Negligence, Maintenance and Cure, and Unseaworthiness.[39] The Jones Act negligence claim is a statutorily created claim.[40] It is made possible pursuant to the Jones Act, a federal statute enacted in 1920 to give seamen a cause of action against their employers when the employer's negligence caused harm to the

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[36]See 28 U.S.C. §1441 (a)

> **Generally.** — Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

[37]See 28 U.S.C. §1441(b)(2))"A civil action otherwise removable solely on the basis of the jurisdiction under section 1332(a) of this title may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.").

[38]See Rory Bahadur, *Protecting Cruise Line Employees' Rights to Maintenance and Cure: The Need for Pre-Trial Adjudication*, 18 USF MAR L.J. 221, 228-232 (describing the paradigmatic lawsuit of the seaman seeking recovery for personal injury); see also American Dredging v. Miller, 510 U.S. 443, 457 (1994) (explaining, "that for practical reasons, a seaman will almost always combine in a single action claims for relief under the Jones Act and the general maritime law.")

[39]See id.

[40]See Stewart v. Dutra Const Co., 543 U.S. 481, 487 (2005) (explaining that "Congress enacted the Jones Act . . . .").

seaman during the course of the seaman's employment.[41] The statutory genesis of the Jones Act claim means that jurisdictionally it arises under the laws of the United States for the purposes of 28 U.S.C. § 1331.[42]

Unseaworthiness is a strict liability claim available to a seaman against the vessel or its owners where the seaman alleges that he was harmed because the vessel was not reasonably fit for its intended use.[43] Maintenance and cure is available to seamen who are injured in the service of the ship.[44] When a seaman is injured in the service of the ship, the ship is responsible for providing room and board and medical treatment[45] until the seaman is at maximum medical improvement or until no further improvement is possible with continued medical care.[46]

Lane v. Tripp[47] provides a good example of how these three claims are often brought in one civil action. The basic facts of *Lane* are:

> The plaintiff, a seaman, was employed by the defendant, Jane Tripp, as a crew member on her 90-foot yacht. On July 14, 1994, during the course of a voyage to Maine, the vessel stopped in Atlantic City, New Jersey. The crew start-

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[41]See id. (further explaining that the purpose of the congressional enactment was to remove the "bar to negligence suits by seamen."). The Jones Act, by its terms, permits the suit when the seaman is injured in the course of his employment. Id. (quoting from the Jones Act as follows: "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury. . . ."); See also Jones Act, at 46 USCS app §688-(a) (2006)(recodified in 2006 at 46 U.S.C. §30104).

(a) Application of railway employee statutes; jurisdiction. Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

[42]Ford v. Woods Hole, 141 F. 3d 1149, 2 (1st Cir. 1998) (unpublished table decision) (explaining "[a] claim under the Jones Act provides federal question jurisdiction under 28 U.S.C. §1331. . . ."

[43]Mitchell v. Trawler Racer Inc., 362 U.S. 539, 550 (1960) (describing unseaworthiness as an absolute duty to "furnish a vessel and appurtenances reasonably fit for their intended use."); see also Taylor v. TECO Barge Line Inc. 517 F.3d 372, 383 (6th Cir. 2008) (affirming "there is strict liability for unseaworthiness . . . .")

[44]Atlantic Sounding Co., v. Townsend, 129 S. Ct. 2561, 2565 (2009) ("A claim for maintenance and cure concerns the vessel owner's obligation to provide food, lodging, and medical services to a seaman injured while serving the ship.").

[45]Id.

[46]Vaughan v. Atkinson, 369 U.S. 527, 531(1962). "Maintenance and cure is designed to provide a seaman with food and lodging when he becomes sick or injured in the ship's service; and it extends during the period when he is incapacitated to do a seaman's work and continues until he reaches maximum medical recovery." See also Louisiana Ins. Guarantee Ass'n v. Abbott, 40 F.3d 122, 126 (1994) (defining maximum medical improvement).

[47]788 So. 2d 351 (2001).

ed to clean the vessel. After cleaning the Eisen glass, the plaintiff attempted to dismount the console, slipped on the wet footrest, and severely injured his knee.[48]

The plaintiff sued the employer alleging that the wet footrest was due to negligence and further alleging unseaworthiness against the owner because the wet footrest rendered the vessel not fit for its intended purpose.[49] Had the owner failed to provide the seaman with maintenance and cure he could have brought a claim for this as well.[50]

Unlike the Jones Act which is a statutory claim, unseaworthiness and maintenance and cure are general maritime law claims. This means they are federal common law claims or judge made claims.[51]

IV
JONES ACT REMOVAL AND THE PITFALLS OF INTERPRETIVE STATUTORY ISOLATIONISM

The restrictions on Jones Act removal illustrate the shortcomings of attempting to comprehend a federal statute's jurisdictional grant without considering facially unrelated statutes and precedent. Again, since the Jones Act is a federal statutory claim, federal question jurisdiction exists pursuant to Article III and 28 U.S.C. §1331.[52] As a result, Jones Act claimants may bring their claims originally in federal court.[53] Additionally, because Jones

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[48]Id. at 352.

[49]Id.

[50]See Godbold v. Maersk Line Ltd., No. 07-5263 2009 WL 701711, at *1 (E.D. La Mar. 13, 2009) (explaining that a maritime plaintiff who is denied maintenance and cure may sue to recover for maintenance and cure benefits and any damages caused by the denial of maintenance and cure.).

[51]See American Dredging v. Miller, 510 U.S. 443, 446 (1994) (describing the respondents maintenance and cure claims as relief requested under the general maritime law.); see also Saratoga Fishing Co. v. J.M. Martinac & Co., 520 U.S. 875, 878 (1997) (defining the general maritime law as "an amalgam of traditional common-law rules, modifications of those rules, and newly created rules," drawn from both state and federal sources.").

Initially, it is worth noting that this variety of federal common law is vibrant, robust and unaffected by the oft repeated *Erie* mantra that there is no federal common law. See Erie R.R. v. Tompkins, 304 U.S. 64 (1938); see also Doug Rendleman, *Collecting a Libel Tourist's Defamation Judgment?*, 67 Wash. & Lee L. Rev. 467, 476 n. 46 (2010) (interpreting *Erie* as "invalidating the theory of a body of federal common law."). Rather, the Supreme Court has said that in the case of admiralty claims the existence and development of this body of federal common law is essential to achieving the *Erie* goal of reducing forum shopping. Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 410-11 (1953) (explaining that even in cases involving general maritime law claims that also qualify as diversity claims under 28 U.S.C. §1332, substantive federal common law must displace state substantive law in order to satisfy the aims of the *Erie* decision.).

[52]Ford v. Woods Hole, 141 F. 3d 1149, 2 (1st Cir. 1998) (unpublished table decision) (explaining "[a] claim under the Jones Act provides federal question jurisdiction under 28 U.S.C. §1331. . . .").

[53]See infra Part I.B. explaining that federal jurisdiction is proper when there is both a constitutional and statutory basis for jurisdiction

Act claims are not claims for which exclusive federal jurisdiction exists, they may also be initiated in state court.[54] Because it could originally be brought in federal court, there should be no bar to removal of a Jones Act civil action if the plaintiff brings the Jones Act claim originally in state court, because 28 U.S.C. §1441(a) generally permits removal whenever an action filed in state court is one which could originally have been brought in the federal court.[55] Textually, nothing in the removal statute hints at the unremovability of Jones Act civil actions because the only restriction on removability in 28 U.S.C. §1441(a), of a claim for which original federal question jurisdiction exists, is where an act of Congress expressly provided the civil action was unremovable.[56]

Furthermore, a perusal of the federal judicial code reveals no express congressional exception rendering Jones Act claims "immune" from the removability provided in 28 U.S.C. §1441. There simply is no statutory textual basis for concluding that Jones Act claims are not removable under 28 U.S.C. §1441(a) yet Jones Act civil actions are not so removable.

Beyond textualism, however, it becomes clear that 28 U.S.C. §1445(a) which bars removal of suits brought by railroad employees also bars the removal of a Jones Act civil action. 28 U.S.C. §1445(a) provides. "[a] civil action in any State court against a railroad or its receivers or trustees, arising under sections 1–4 and 5–10 of the Act of April 22, 1908 (45 U.S.C. 51–54, 55–60), may not be removed to any district court of the United States."[57]

The 1908 act referred to in 28 U.S.C. §1445 is the Federal Employees Liability Act ("FELA"), which provided a negligence cause of action for railroad employees against their employers.[58] This provision therefore prevents removal from state court of a negligence action against an employer by a railroad employee even though the federal court would have original jurisdiction pursuant to 28 U.S.C. §1331.[59]

However, 28 U.S.C. 1445(a)'s ban on removal of FELA claims pursuant to 28 U.S.C. §1441 also applies to Jones Act cases. This is because, as the

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[54]See CHEMERINSKY, supra note 30 and accompanying text.

[55]"If a civil action filed in state court satisfies the requirements original federal jurisdiction, the defendant may invoke 28 U.S.C. § 1441(a) to remove the action to the federal district court "embracing the place where such action is pending." Zufelt v. Isuzu Motors Am., L.C.C. 727 F. Supp. 2d 1117, 1121 (D.N.M. 2009).

[56]28 U.S.C. §1441(a)'s broad grant of removability of civil actions for which original federal jurisdiction exists is tempered by the first nine words of the statute "Except as otherwise expressly provided by Act of Congress . . . ."

[57]28 U.S.C. §1445(a).

[58]See Feichko v. Denver & Rio Grande W. R.R. 213 F.3d 586 (10th Cir. 2000) (explaining that "28 U.S.C. §1445(a) prohibits the removal of FELA claims filed in state court.").

[59]Id.

case law makes clear, the Jones Act incorporates FELA by reference and therefore any precedent or statute applicable to FELA also applies to Jones Act civil actions.[60]

The Supreme Court has recently reaffirmed that 28 U.S.C. §1445(a) provides a Jones Act plaintiff with a choice of forum between state and federal court.[61] This choice of forum cannot be disturbed by 28 U.S.C. §1441(a) because that statute operates only where an act of Congress does not prevent its operation.[62] In the case of Jones Act cases, 28 U.S.C. §1445(a), though not by its literal terms, prevents the operation of 28 U.S.C. §1441(a).[63]

The limits on Jones Act removal therefore provide an excellent example of the shortcomings of statutory interpretive isolationism. Although nothing in the text of the removal statute, 28 U.S.C. §1441, prevents a federal court from exercising original jurisdiction over a Jones Act claim originally filed in state court, facially unrelated statutes and the judicial gloss on the Jones Act incorporation by reference of FELA prevents removal of these claims.

V
THE *ROMERO* DECISION, GENERAL MARITIME REMOVAL AND FEDERALISM BASED RESTRICTIONS ON ORIGINAL JURISDICTION

The removal of general maritime law causes of action acutely illustrates how the principles of power sharing between the states and the federal government or federalism,[64] essential to the Constitution's ratification, must be read into both statutory and constitutional grants of original jurisdiction.

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[60]Butynski v. Springfield Terminal R.Co, 592 F.3d 272, 277 (1st Cir. 2010); see also, Am. Dredging v. Miller, 510 U.S. 443, 456 (1994)("the Jones Act adopts "the entire judicially developed doctrine of liability" under the Federal Employers' Liability Act (FELA).); Pate v. Standard Dredging Corp., 193 F.2d 498, 500 (5th Cir. 1952).

[because] Title 28, United States Code, Sec. 1445(a), now bars removal to the federal courts of any action brought under the Federal Employer's Liability Act; and the pertinent provisions of the Jones Act, incorporating by reference all statutes of the United States modifying or extending a common-law right or remedy in cases of personal injuries to railway employees, is still in full force and effect. It follows that actions brought by seamen in the state courts under the Jones Act are not removable to the federal courts.

[61]Lewis v. Lewis and Clark Marine, 531 U.S. 438, 455 (2001) (explaining that because the Jones Act incorporates 28 U.S.C. §1445(a), a Jones Act claim filed in state court is not removable).

[62]See supra note 36 and accompanying text paying particular attention to the first nine words of 1441(a)'s statutory text.

[63]See supra note 61 and accompanying text

[64]Federalism also plays an important role in the discretionary aspects of federal original jurisdiction. For example federalism is at the core of the abstention doctrines, whereby a federal court will exercise its discretion to not hear a case for which it has original jurisdiction if it determines that notions of comity establish it is better for the state court to hear the case. See, e.g., Kathryn A. Watts, Constraining Certiorari

Unlike the Jones Act, there is no applicable statutory bar to removal of general maritime claims pursuant to 28 U.S.C. §1441(a). Instead the current bar to removal of general maritime claims or maintenance and cure and unseaworthiness claims is based purely on the federalism principles developed in the *Romero* decision.[65]

In *Romero* a seaman brought Jones Act and common law or general maritime law claims against varying defendants.[66] When the case eventually reached the Supreme Court the pertinent question was whether general maritime law claims were considered "laws of the United States" for the purpose of the relatively new federal question jurisdiction statute.[67] The United States Supreme Court concluded that they were not.[68]

The result of this pronouncement is that general maritime law claims may not be removed from state court unless there is an independent basis of jurisdiction present other than admiralty and maritime jurisdiction.[69]

In order to understand the significance of the decision it is worth remembering that the Constitution was ratified in 1788. A year later, Congress, via

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Using Administrative Law Principles, 160 U. Pa. L. Rev. 1, 41-42 (2011) ("[C]ourts sometimes invoke abstention doctrines rooted in notions of comity and federalism to avoid deciding cases that fall within the jurisdiction conferred upon them by Congress.").

[65]Romero v. Int'l. Terminal Operating Co., 358 U.S. 354 (1959).

[66]See David J. Bederman, *Romero's Enduring Legacy*, 39 J. MAR L. & COM . 27 describing the facts of *Romero* as follows

> Francisco Romero was a Spanish seaman on a Spanish ship temporarily berthed in New York harbor at Hoboken, New Jersey, and was severely injured while engaged in his duties aboard the vessel as it was being prepared to receive its cargo of wheat. Romero lawsuit asserted that his injury entitled him to compensation from one or more of four defendants: (1) a Spanish corporation which owned the ship; (2) a New York corporation alleged to be operating, controlling, and managing the ship; (3) a Delaware corporation which was the stevedoring contractor; and (4) another New York corporation, also a contractor, engaged in the installation of boards to receive the cargo. Against the first defendant Romero asserted claims under the Jones Act, for unseaworthiness, and for maintenance and cure. Against the second defendant he asserted all of these claims plus one based on general maritime tort. The third and fourth defendants were sued only for maritime tort.

[67]*Romero*, 358 U.S. at 359-60.

> Petitioner, a Spanish subject, asserts claims under the general maritime law against Compania Trasatlantica, a Spanish corporation. The jurisdiction of the Federal District Court, sitting as a court of law, was invoked under the provisions of the Judiciary Act of 1875 which granted jurisdiction to the lower federal courts 'of all suits of a civil nature at common law or in equity, * * * arising under the Constitution or laws of the United States, * * *.' (now 28 U.S.C. § 1331, 28 U.S.C.A. § 1331). Whether the Act of 1875 permits maritime claims rooted in federal law to be brought on the law side of the lower federal courts has recently been raised in litigation and has become the subject of conflicting decisions among Courts of Appeals.

[68]Bederman, supra note 66 at 29-30 (explaining as *per Romero*, "general maritime law claims could not be considered as "arising under the Constitution or law of the United States," under section 1331. . . .").

[69]In re Chimenti, 79 F.3d 534, 537 (6th Cir. 1996). ("Courts have consistently interpreted the "saving clause" to preclude removal of maritime actions brought in state court and invoking a state law remedy, provided there is no independent federal basis for removal, such as diversity jurisdiction.").

the first Judiciary Act, empowered the inferior federal courts to hear maritime cases and diversity cases.[70] By contrast, it was not until 1875 that Congress enacted the first federal question jurisdiction statute that empowered the inferior federal courts to entertain cases "arising under the law of the United States."[71] Arising under jurisdiction is also referred to as federal question jurisdiction[72] and these terms are used interchangeably in this article.

Interestingly, the original Judiciary Act of 1789 conveyed both admiralty and diversity jurisdiction but permitted removal of only diversity cases not of admiralty and maritime cases.[73] As a result, the only ways for the federal courts to hear admiralty causes of action between 1789 and 1875 were as follows: (1) the admiralty claims could be initiated in federal court pursuant to the maritime jurisdiction conferred by the first Judiciary act; (2) the admiralty claims could be initiated in federal court pursuant to the diversity jurisdiction conferred by the first Judiciary act if the parties were diverse; (3) because the judiciary act of 1789 provided only for removal of diversity but not maritime cases then if the maritime cases were filed in state court originally they could only be removed to the federal court if diversity jurisdiction also existed.[74]

The removal provided for diversity cases in 1789 operated on basically the same premise as present day 28 U.S.C. §1441 - if a claim brought in state court is one which the federal courts have original jurisdiction over then it could be removed to federal court.[75]

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[70]See Judiciary Act of 1789 §§9,11

[71]See Tara Leigh Grove, *The Structural Safeguards of Federal Jurisdiction* 124 HARV. L. REV. 869, 893 (2011) ("The Judiciary Act of 1875 completely transformed the jurisdictional scheme created in 1789. The statute allowed the federal courts to hear all cases arising under federal law.").

[72]See, e.g., Barry Friedman & Erin F. Delaney, Becoming Supreme: *The Federal Foundation of Judicial Supremacy*, 111 COLUM. L. REV. 1137, 1158 (2011) labeling the jurisdiction granted in the Judiciary Act of 1875 as federal question jurisdiction.

[73]Id; see also Judiciary Act of 1789, §12

> [I]f a suit be commenced in any state court against an alien, or by a citizen of the state in which the suit is brought against a citizen of another state, and the matter in dispute exceeds the aforesaid sum or value of five hundred dollars, exclusive of costs, to be made to appear to the satisfaction of the court; and the defendant shall, at the time of entering his appearance in such state court, file a petition for the removal of the cause for trial into the next circuit court, to be held in the district where the suit is pending,

[74] Steven Friedell, *The Disappearing Act: Removal Jurisdiction of an Admiralty Claim*, 30 TUL. MAR. L.J. 75, 82 (2006))[hereinafter Friedell]

> Except in diversity cases, maritime litigation brought in state courts could not be removed to the federal courts." Again, in a footnote, the Court explained: "The removal provisions of the original Judiciary Act of 1789, 1 Stat. 79, conferred a limited removal jurisdiction, not including cases of admiralty and maritime jurisdiction. In none of the statutes enacted since that time have saving-clause cases been made removable."

[75]*Compare* 28 U.S.C. §1441 (2006) *with* §11 of the Judiciary Act of 1789.

About one hundred years later the Judiciary Act of 1875, in addition to establishing inferior court jurisdiction over cases arising under the laws of the United States, also permitted removal from state court of cases which arose under the laws of the United States.[76]

In order to understand the *Romero* court's conclusion that general maritime law claims are not claims arising under the laws of the United States and therefore not within the jurisdictional reach of 28 U.S.C. §1331, the historical underpinnings of the decision must be explored.

A. Romero's Historical Underpinnings

The Supreme Court began its analysis in *Romero* by explaining that statutory text alone would not suffice to decide whether admiralty and maritime claims should be considered laws of the United States. Rather the relevant historical context played a significant role in defining the scope of the statutory grant of the arising under jurisdiction conferred by the Judiciary Act of 1875.

> Abstractly stated, the problem is the ordinary task of a court to apply the words of a statute according to their proper construction. But 'proper construction' is not satisfied by taking the words as if they were self-contained phrases. So considered, the words do not yield the meaning of the statute. The words we have to construe are not only words with a history. They express an enactment that is part of a serial, and a serial that must be related to Article III of the Constitution, the watershed of all judiciary legislation, and to the enactments which have derived from that Article. Moreover, Article III itself has its sources in history. These give content and meaning to its pithy phrases. Rationally construed, the Act of 1875 must be considered part of an organic growth-part of the evolutionary process of judiciary legislation that began September 24, 1789, and projects into the future.[77]

The history which the *Romero* court deems so important to statutory interpretation involves issues of federalism. More specifically it involves an examination of the balance of power between the colonial courts and the national judiciary proposed by Article III at the time of ratification of the Constitution.

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[76]See Michael G. Collins, *The Unhappy History of Federal Question Removal*, 71 IOWA L. REV. 717, 722-23 (1986) (explaining that the 1875 Judiciary Act not only gave the "inferior federal courts original jurisdiction over 'all suits . . . arising under the Constitution or laws of the United States' [but][t]he statute also permitted removal of 'any suit brought in state court arising under the Constitution or laws.'"

[77]*Romero*, 358 U.S. at 360.

1. The Colonial Maritime Courts and Admiralty's Role in Article III's Ratification

Examining the role of admiralty and maritime jurisdiction in the ratification of the Constitution provides a federalism based analytical fulcrum for concluding admiralty and maritime claims do not "arise under" the laws of the United States for the purposes of 28 U.S.C. §1331.

The colonial charters of the mid 1600's did not generally create maritime courts but created common law courts that would also hear maritime matters.[78] Only later were the vice admiralty courts created by the colonial governors.[79] These vice-admiralty courts were created in response to the perceived need for specialized courts with expedited, non jury procedures for hearing prize causes of action.[80] Initially, there was concurrent jurisdiction between the admiralty courts and common law courts over many matters, and because compared to England there was a dearth of admiralty specialized lawyers in the colonies, the vice admiralty courts of the colonies, which were civil law tribunals, were forced to admit common-law attorneys to practice.[81] There was a generally recognized, "substantial sphere of activities in which both admiralty courts and common-law courts had cognizance, and . . . the selection of the appropriate forum [was left] to the convenience of the parties."[82]

By the eve of the revolution, admiralty courts had lost much of their importance. Perhaps this was because,[83] "[a]s the colonies moved closer to armed conflict with Britain, it was only natural that many colonists with private disputes would cease to avail themselves of a forum that-no matter how practical and convenient-was increasingly associated in the public imagination with British oppression."[84]

After the revolutionary war and prior to the ratification of the Constitution and the existence of a federal government and throughout much of the nineteenth century up until recently, maritime commerce was the prevalent means of commerce in the original thirteen colonies. In fact, "[t]he carrying trades and the related maritime industries that supported them were more

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[78]STEVEN L. SNELL, COURTS OF ADMIRALTY AND THE COMMON LAW: ORIGINS OF THE AMERICAN EXPERIMENT IN CONCURRENT JURISDICTION 133-36 (Carolina Academic Press 2d ed. 2007) at [hereinafter SNELL).

[79]Id. at 144, (explaining that the first vice admiralty courts were created in the United States in 1679.).

[80]Id. at 143.

[81]Id. at 123, 130.

[82]Id.

[83]Id. at 204-05.

[84]Id.

than important to the colonies; they were the linchpin that held the colonial economy together."[85]

Relying on work done by Steven Snell, I explained in a previous publication that in the post-revolutionary war era through the ratification of the Constitution both the federalists and anti-federalists agreed that maritime law was a "part of the law of nations" consisting "of a group of rules and customs unchanging since the inception of maritime trade and . . . uniformly applied in all sovereign nations where maritime trade existed."[86] The uniform application of this law was thought to be critical to encourage foreign traders to continue to do business with the post revolutionary colonies.[87]

Recognition of this need for uniformity in the application of admiralty and maritime law was an important consideration in the ratification of Article III and its proposed national judiciary. As Alexander Hamilton put it,

> [t]he most bigoted idolizers of state authority have not thus far shewn a disposition to deny the national judiciary the cognizance of maritime causes. These so generally depend on the law of nations, and so commonly affect the rights of foreigners, that they fall within the considerations which are relative to the public peace.[88]

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[85]Id. at 25.

[86]See Rory Bahadur, *Constitutional History, Federal Arbitration and Seamen's Rights Sinking in a Sea of Sweatshop Labor*, 39 J. MAR. L. & COM. 157, 188-89 (2008) [hereinafter Bahadur].

[87]See, e.g., Guerrido v. Alcoa S.S. Co., 234 F.2d 349, 352 (1st Cir.1956).

> The rules of the maritime law have been developed by the commercial nations of the world over a period of many centuries. The necessities of international trade and commerce have dictated that this development should be along rather uniform lines in the several maritime nations . . . . In the United States the federal Constitution adopted and established the rules of the general maritime law as part of the laws of the United States subject to the power of Congress and the courts to modify or develop them to meet the special needs of our nation . . . . One of the purposes of the establishment by the Constitution of the rules of the general maritime law as part of the laws of the United States was to preserve harmony and uniformity in maritime matters in both the international and interstate relations of the country. This purpose was best to be promoted if the rules of maritime law thus established were to be regarded as applicable and enforceable throughout the whole extent of the navigable waters over which the United States has authority to exercise jurisdiction . . . . Indeed when we recall that of the six 'great districts' into which our seacoasts and navigable rivers are divided for the purpose of administering the domestic shipping laws . . . we see just how important it was to the attainment of the constitutional ideal of harmony and uniformity in the rules governing admiralty and maritime matters that these rules be applicable in all the areas under the American flag . . . .

[88]SNELL supra note 78 at 207; THE FEDERALIST (Jacob E. Cooke ed., Middleton, Connecticut: Wesleyan University Press, 1961) No. 80, at 538); see also California v. Deep Sea Research, Inc., 532 U.S. 491, 501 (1998)

> The federal courts have had a unique role in admiralty cases since the birth of this Nation, because "[m]aritime commerce was ... the jugular vein of the Thirteen States." F. Frankfurter & J. Landis, The Business of the Supreme Court 7 (1927). Accordingly, "[t]he need for a body of law applicable throughout the nation was recognized by every shade of opinion in the Constitutional Convention." Ibid. The constitutional provision was incorporated into the first Judiciary Act in 1789, and federal courts have retained "admiralty or maritime jurisdiction" since then.

The constitutional grant of admiralty and maritime jurisdiction is therefore interpreted as a command to the federal courts to synthesize and develop a body of federal common law reflecting established customs observed by all maritime nations at the time of the original thirteen colonies.[89]

2. Federalism's Impact on the Statutory and Constitutional Grants of Admiralty and Maritime Jurisdiction

As mentioned previously, the constitutional grant of admiralty and maritime jurisdiction alone was not enough to confer subject matter jurisdiction to the federal courts because in order for a federal trial court to exercise subject matter jurisdiction, there must be both a constitutional basis and a statutory basis of jurisdiction.[90] The first grant of jurisdiction to the inferior federal courts was the Judiciary Act of 1789. In that grant Congress provided both admiralty[91] and diversity jurisdiction.[92]

The admiralty grant was:

> the district courts shall have, **exclusively of the courts of the several States**, . . . exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation or trade of the United States, where the seizures are made, on waters which are navigable from the sea by vessels of ten or more tons burthen, within their respective districts as well as upon the high seas; **saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it;**[93]

The diversity grant was:

> That the circuit courts shall have original cognizance, **concurrent with the courts of the several States**, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or

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[89]See John R. Brown, *Admiralty Judges: Flotsam on the Sea of Maritime Law?*, 24 J. MAR. L. & COM. 249, 251, 254, 264, 271 (1993) (explaining

> Admiralty is the only grant of judicial jurisdiction in the Constitution that identifies an area of substantive law. Federal authority over admiralty and maritime law is addressed only in the Judicial Article * * * [T]he Constitution does not confer a similar grant of specific authority to Congress over admiralty and maritime law. The grant of judicial power to the federal courts in ART III of the Constitution also imposes the power on admiralty judges to exercise that power. This duty requires that the admiralty judges declare the governing principles of maritime law;

See also Bederman, supra note 68 (describing the Supreme Court's Romero decision as interpreting Article III's grant of admiralty and maritime jurisdiction, "as *both* granting subject matter jurisdiction on federal courts *and* also conferring substantive maritime law-making power on both the courts and Congress.").

[90]See supra Part I.B.

[91]See Judiciary Act of 1789 §9.

[92]See id. §11.

[93]Id. §9 (emphasis supplied).

value of five hundred dollars, and the United States are plaintiffs, or petitioners; or an alien is a party, or the suit is between a citizen of the State where the suit is brought, and a citizen of another State.[94]

From a purely textual standpoint, the absence of a provision for removal of maritime claims is unremarkable because the admiralty and maritime jurisdiction granted to the federal courts was not merely original but it was also exclusive.[95] As a result, the grant is capable of being interpreted as prohibiting state court jurisdiction over admiralty and maritime claims.

However, that interpretation of the statutory language as actually giving the federal courts original and exclusive jurisdiction was never accepted by the Supreme Court for federalism-based reasons. Instead, the early Supreme Court and Justice Joseph Story concluded that §9 of the Judiciary Act of 1789 gave state courts (the former colonial common law courts) concurrent jurisdiction over all *in personam* maritime claims and the federal courts truly only had jurisdiction, exclusive of the courts of the state, in *in rem* admiralty actions.[96]

This federalism-based interpretation acknowledges that colonial common law courts were competent to exercise jurisdiction over admiralty and maritime claims, that they had in fact done so for centuries, and that Congress was aware of this when the first judiciary act was passed in 1789.[97] The understanding that federalism resulted in the Judiciary Act of 1789 confer-

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[94]Id. §11 (emphasis supplied).

[95]Id. §9 (explaining that the district courts were given admiralty and maritime jurisdiction, "exclusively of the courts of the several States.").

[96]JOSEPH STORY COMMENTARIES ON THE CONSTITUTION §1672 explaining, [hereinafter STORY]

> It is exclusive in all matters of prize, for the reason that at the common law this jurisdiction is vested in the courts of admiralty, to the exclusion of the courts of common law. But in cases where the jurisdiction of the courts of common law and the admiralty is concurrent (as in cases of possessory suits, mariners' wages, and marine torts), there is nothing in the Constitution necessarily leading to the conclusion that the jurisdiction was intended to be exclusive; and there is as little ground upon general reason to contend for it. The reasonable interpretation of the Constitution would seem to be, that it conferred on the national judiciary the admiralty and maritime jurisdiction, exactly according to the nature, and extent, and modifications in which it existed in the jurisprudence of the common law. Where the jurisdiction was exclusive, it remained so; where it was concurrent, it remained so. Hence the States could have no right to create courts of admiralty, as such, or to confer on their own courts the cognizance of such cases as were exclusively cognizable in admiralty courts.

See also The Moses Taylor, 71 U.S. (4 Wall.) 411 (1866) explaining

> The case before us is not within the saving clause of the ninth section. That clause only saves to suitors 'the right of a common-law remedy, where the common law is competent to give it.' It is not a remedy in the common-law courts which is saved, but a common-law remedy. A proceeding *in rem*, as used in the admiralty courts, is not a remedy afforded by the common law; it is a proceeding under the civil law.

[97]STORY, supra note 96 §1672

> But the States might well retain and exercise the jurisdiction in cases of which the cognizance was previously concurrent in the courts of common law. This latter class of cases can be no

ring jurisdiction concurrent with, rather than exclusive of, the state courts in *in personam* admiralty matters remains current today and is based on the savings to suitors clause found in §9 of the Judiciary Act of 1789.[98] The savings clause is the language in the original judiciary act which is preceded by the purported grant of exclusive and original maritime jurisdiction to the federal courts.[99]

The modern statutory expression of the maritime jurisdictional grant is found in 28 U.S.C. §1333.[100] The statute currently reads, "[t]he district courts shall have original jurisdiction, exclusive of the courts of the States, of: Any civil case of admiralty or maritime jurisdiction, **saving to suitors in all cases all other remedies to which they are otherwise entitled**." [101]

The original judiciary act provided, "[t]he district courts shall have . . . exclusive original cognizance of all civil cases of admiralty and maritime jurisdiction . . . ; **saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it.**"[102] Despite the slight differences in language the modern savings clause means exactly what the original clause meant in 1789.[103]

In 1789, therefore, when the Judiciary Act first conferred admiralty and maritime jurisdiction on the federal courts, a maritime suitor could invoke federal jurisdiction in only one of two ways. If diversity jurisdiction existed, then the federal court could hear the general maritime claims pursuant to the diversity or maritime jurisdictional statutory grants. If there was no diversi-

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more deemed cases of admiralty and maritime jurisdiction than cases of common-law jurisdiction. The Judiciary Act of 1789, ch. 20, § 9, has manifestly proceeded upon this supposition; for while it has conferred on the district courts "exclusive original[sic] cognizance of all civil causes of admiralty and maritime jurisdiction," it has at the same time saved "to the suitors in all cases the right of a-common-law remedy, where the common law is competent to give it."

[98]See Lewis v. Lewis and Clark Marine Inc., 531 US 438, 445 (2001) (explaining "the saving to suitors clause as a grant to state courts of *in personam* jurisdiction, concurrent with admiralty courts."); see also id. at 452 (restricting the reach of the savings clause as follows," Had petitioner sought to institute *in rem* proceedings against respondent in state court, that court would have lacked jurisdiction because the saving to suitors clause does not reach actions *in rem*.")

[99]See Judiciary Act of 1789 §9 (granting the federal courts exclusive jurisdiction over admiralty and maritime claims but then, " saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it . . . .")

[100]Am. Dredging v. Miller, 510 U.S. 443, (1994).

[101]28 U.S.C. §1333 (2006) (emphasis supplied).

[102]Judiciary Act of 1789 §9 (emphasis supplied).

[103]Madruga v. Superior Court of State of Cal., 346 U.S. 556, 566 (1954) (explaining that the reviser's notes completely refute the view that the change in statutory language changes the original meaning of the savings clause).

ty, federal court jurisdiction over a maritime claim was also possible pursuant to the congressional grant of admiralty and maritime jurisdiction.[104]

Congress, therefore, never meant to give federal courts exclusive jurisdiction over all maritime matters and the savings clause means the maritime grant in 1789 must be read as providing concurrent state and federal jurisdiction over *in personam* actions and exclusive federal jurisdiction only in *in rem* actions. All remedies previously available in state court (*in personam*) could still be tried in state court, not merely as a convenience for the suitor but as a federalism based pronouncement on the recognition of the states as capable sovereigns who had been trying these causes of action and developing the law of admiralty in their own common law courts before the Constitution and its accompanying national judiciary were even conceived of.

As *Romero* so eloquently explains,

> Although the corpus of admiralty law is federal in the sense that it derives from the implications of Article III evolved by the courts, to claim that all enforced rights pertaining to matters maritime are rooted in federal law is a destructive oversimplification of the highly intricate interplay of the States and the National Government in their regulation of maritime commerce . . . .[105]

This combination of the savings clause and limiting removability of general maritime law causes of actions only where diversity was independently present in the judiciary act of 1789 was a deliberate act by Congress recognizing that states had an important federalism-based role to play in admiralty.[106]

> Thus, if one thing is clear it is that the source of law in saving-clause actions cannot be described in absolute terms. Maritime law is not a monistic system. The State and Federal Governments jointly exert regulatory powers today as they have played joint roles in the development of maritime law throughout our history. This sharing of competence in one aspect of our federalism has been traditionally embodied in the saving clause of the Act of 1789. Here, as is so often true in our federal system, allocations of jurisdiction have been

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[104]See *Romero*, 358 U.S. at 362-63 (explaining that "up to the passage of the Judiciary Act of 1875," admiralty and maritime jurisdiction and diversity jurisdiction were the only bases for a federal court's jurisdiction over admiralty and maritime claims.)

[105]Id. at 373.

[106]Id. at 373-74; see also id. at 362.

> Section 9 not only established federal courts for the administration of maritime law; it recognized that some remedies in matters maritime had been traditionally administered by common-law courts of the original States. This role of the States in the administration of maritime law was preserved in the famous 'saving clause'-'saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it.' Since the original Judiciary Act also endowed the federal courts with diversity jurisdiction, common-law remedies for maritime causes could be enforced by the then Circuit Courts when the proper diversity of parties afforded access.

> carefully wrought to correspond to the realities of power and interest and national policy. To give a novel sweep to the Act would disrupt traditional maritime policies and quite gratuitously disturb a complementary, historic interacting federal-state relationship.[107]

Romero demonstrates the importance and necessity of applying non-textual federalism based principles to glean the correct meaning of a jurisdictional statute's text. Applying those principles it concludes, despite the apparent exclusive federal jurisdiction over admiralty and maritime claims textually conferred in the judiciary act of 1789, federalism prevents the general maritime law claims from being considered a law of the United States for the purpose of federal question jurisdiction. Because to hold otherwise would make these general maritime law claims freely removable, "mak[ing] considerable inroads into the traditionally exercised concurrent jurisdiction of the state courts in admiralty matters-a jurisdiction which it was the unquestioned aim of the saving clause of 1789 to preserve."[108] As a result of this federalism, common law admiralty and maritime causes of action are only removable from state to federal court when a separate and independent jurisdictional basis such as diversity also exists.[109]

B. The Deficiency of Ignoring Federalism in Interpreting Jurisdictional Grants

Professor Friedell further demonstrates that ignoring the federalism based principles which impact the scope of jurisdictional statutes and constitutional grants and instead engaging in unrestrained textualism as a means of statutory interpretation produces erroneous results.

Professor Friedell examined the removal statutes, as they existed prior to December 7, 2011 and from a purely textual perspective, concluded, contrary to the majority rule, that

> Admiralty claims should be removable whenever the defendants are not from the forum state. Admiralty claims filed in state court are civil actions that fall

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[107]Id. at 374-75.

[108]Id. at 371.

[109]14A Wright, Miller & Cooper, Federal Practice and Procedure §3674 (3d ed.)

> The preferable conclusion from a policy perspective, and the one that seems most consistent with what appears to be the law, is to permit removal of admiralty and maritime actions only when they would be removable on some basis other than their maritime or admiralty nature. This would permit removal of a case that otherwise would be removable as a diversity of citizenship case, or because the United States or one of its officers is named as a defendant, or because the action could be removed as a federal question case for reasons other than its maritime character.

within the federal court's original jurisdiction. Because they are not federal question cases, they should be removable only if none of the defendants are citizens of the forum state.[110]

Professor Friedell was able to achieve this result by defining the *Romero* federalism rationales regarding removability as dicta, "inconsistent with the removal statute and based on an outmoded conception of admiralty jurisdiction."[111] This despite the fact that in 2001 the Supreme Court affirmed that the relevant language in *Romero* was indeed more than dicta, by citing to *Romero* and stating, "We have previously refused to hold that admiralty claims, such as a limitation claim, fall within the scope of federal question jurisdiction out of concern that saving to suitors actions in state court would be removed to federal court and undermine the claimant's choice of forum."[112] The Supreme Court also explained that the language Professor Friedell labels dicta, which restricts removal of general maritime claims has since been consistently recognized by Congress and this Court.[113]

Prior to December 7, 2011, the removal statutes read as follows:

> **(a) Except as otherwise expressly provided by Act of Congress**, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.
>
> **(b)** Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. **Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.**[114]

From a purely textual perspective, Friedell concludes that the only non-removable civil actions for which original federal jurisdiction exists under 28 U.S.C. §1441(a) are those barred from removal by an act of Congress.[115] Because removal of maritime actions is not expressly prohibited by a congressional statute, they should be removable pursuant to 28 U.S.C.

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[110]Friedell, supra note 74 at78.

[111]Id. at 79-80.

[112]Lewis v. Lewis & Clark Marine, Inc. 531 U.S. 438, 455 (2001).

[113]Id.

[114]Previous versions of 28 U.S.C. §1441 (emphasis added)

[115]See supra note 56 and accompanying text, explaining that the only claims not removable are those which Congress expressly says are not removable.

§1441(a).[116] Further, according to Friedell, because general maritime law claims are not claims arising under the laws of the United States they should be freely removable as long as they satisfy the second sentence of 28 U.S.C. §1441(b) as it existed prior to December 7, 2011, which allows removal provided for in (a) to occur as long as the defendant was not a resident of the forum state.[117]

How Professor Friedell could colorably conclude that the absence or presence of a non-resident defendant as a condition precedent to removal was related to anything other than diversity jurisdiction is an exercise in unrestrained, albeit implausible, textualism.

While the previous version of the statute barely permitted that interpretation, nothing in the legislative history indicated that the provision was meant to apply to any jurisdictional basis other than diversity. In fact, the December 7, 2011, amendments were designed to make clear that the non-resident defendant condition applied only to diversity claims and not as Professor Friedell suggests to admiralty and maritime claims.[118]

The reasoning of *Romero* which Professor Friedell calls dicta is actually one of two separate reasons for the Court's conclusion that general maritime law claims do not arise under the laws of the United States for the purposes of 28 U.S.C. §1331. The first is that it would give the 1875 act [1331] a new meaning beyond its reconstruction focused genesis and the second is a

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[116]See supra, note 62 (explaining that according to 28 U.S.C. §1441(a) there is no removal permitted when Congress in another statute prohibits removal of the particular cause of action.).

[117]The last sentence of the old 28 U.S.C. §1441(b) allows removal of non-federal question claims, which admiralty claims are, only when, "none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought." As Professor Friedell explains,

> Under 28 U.S.C. § 1441(a) and (b), the defendants in any nonfederal question case can remove provided they are not citizens of the state where the suit is brought. Since Romero excludes admiralty cases from being considered federal question cases unless a federal statute provides the rule of decision, maritime cases that satisfy the requirements of § 1441(b) must be removable.

See Friedell, supra note 74 at 82 (detailing his reasoning).

[118]See H.R. REP. 112-10, at 9(2011) affirming,

> Section 103(a)(1) of the bill revises the heading for 28 U.S.C. § 1441 to reflect that its application is limited to civil cases. Section 103(a)(2) inserts a heading for subsection (a) of section 1441 and deletes the last sentence in that subsection (the substance of which is moved to new proposed paragraph 1441(b)(1), see below). Section 103(a)(3) places the provisions that apply to diversity actions under one subsection. This change is intended to make it easier for litigants to locate the provisions that apply uniquely to diversity removal. Proposed paragraph 1441(b)(1) takes the substance of the last sentence in current subsection 1441(a) and places it within the diversity subsection, as the sentence moved pertains only to diversity cases. Proposed paragraph 1441(b)(2) restates the substance of the last sentence of current subsection 1441(b), which relates only to diversity. (The first sentence currently in subsection 1441(b) is deleted because its reference to Federal question jurisdiction is addressed in the first sentence of subsection 1441(a).)

recognition that abolishing restrictive removability of general maritime law claims would, "eviscerate the postulates of the saving clause," which are based on notions of federalism.[119]

The second reason, erroneously classified as dicta by Professor Friedell, is really the Supreme Court's recognition that it was no accident that the Judiciary Act of 1789 did not provide for removal of general maritime law claims where the only jurisdictional basis was admiralty and maritime jurisdiction, yet it provided for removal of diversity claims.[120]

In my opinion, there are only two possible reasons for this statutory discrepancy. The first is that the saving clause correctly reflects federalism principles weighing against removal.[121] The second is that there was no need to address removal in admiralty claims because the grant of admiralty and maritime jurisdiction in 1789 stripped the state courts of their jurisdiction such that the grant of federal jurisdiction really was "exclusive of the state courts," meaning admiralty claims could not be brought in state courts. The latter is no longer a viable legal argument in light of the established precedent interpreting the saving to suitors clause.[122]

Just as nothing in the text of 28 U.S.C. §1331 precludes admiralty and maritime law from falling under its jurisdictional scope, nothing in the text of 28 U.S.C. §1441(a) prevents maritime law from being removed. However,

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[119]See *Romero*, at 368,

> Not only does language and construction point to the rejection of any infusion of general maritime jurisdiction into the Act of 1875, but history and reason powerfully support that rejection. The far reaching extension of national power resulting from the victory of the North, and the concomitant utilization of federal courts for the vindication of that power in the Reconstruction Era, naturally led to enlarged jurisdiction of the federal courts over federal rights. But neither the aim of the Act of 1875 to provide a forum for the vindication of new federally created rights, nor the pressures which led to its enactment, suggest, even remotely, the inclusion of maritime claims within the scope of that statute.

[120]*Compare* Judiciary Act of 1789, §9 granting admiralty and maritime jurisdiction *with* §11 granting diversity jurisdiction. §11 is followed by §12 which says that §11 cases may be removed. There is no equivalent language allowing removal of maritime claims.

[121]See supra Parts IV.A-B and accompanying text.

[122]See, e.g., Lewis v. Lewis & Clark Marine, Inc. 531 U.S. 438, 455 (2001) (revitalizing the normative rationale for *Romero*'s prohibition of removal as follows

> We have previously refused to hold [in *Romero*] that admiralty claims, such as a limitation claim, fall within the scope of federal question jurisdiction out of concern that saving to suitors actions in state court would be removed to federal court and undermine the claimant's choice of forum. We explained [in *Romero*] that to define admiralty jurisdiction as federal question jurisdiction would be a "destructive oversimplification of the highly intricate interplay of the States and the National Government in their regulation of maritime commerce. Moreover, in this case respondent raised a Jones Act claim, which is not subject to removal to federal court even in the event of diversity of the parties. Respondent's arguments to limit and enumerate the saved remedies under the saving to suitors clause must fail in view of the consistent recognition by Congress and this Court that both state and federal courts may be proper forums for adjudicating claims such as petitioner's.).

nothing in the legislative history of 28 U.S.C. §1331 indicates that federalism based restrictions on removal should be upended by considering general maritime law claims as "arising under" the laws of the United States.

Likewise, as Professor Friedell himself observes, nothing in the legislative history of the removal statutes from their first incarnation in the Judiciary Act of 1789 to their current expression in 28 U.S.C. §1441(a) indicates that maritime claims should be removable without an independent basis of jurisdiction because none of the removal statutes since 1789 have made admiralty and maritime claims removable.[123]

At bottom, Professor Friedell's theory only works if we graft onto the evolution of the removal statutes an intention to change the federalism-reflective status quo of the Judiciary Act of 1789 regarding admiralty claims which did not allow removal of saving clause claims absent another basis of jurisdiction. No such expression of intent is found in the evolution of the removal statutes, however. If an absence of intent failed to sweep general maritime law claims up in the jurisdictional grant of 28 U.S.C. §1331, then the lack of intent also fails to expand 28 U.S.C. §1441(a) to cover general maritime claims based on the saving clause.

The federalism tides that tugged against the removal of admiralty and maritime claims in the original judiciary act and after the passage of 28 U.S.C. §1331 in 1875, have not ebbed such that they should be read out of the general removal statute.[124]

Professor Friedell's result further illustrates the shortcomings of ignoring federalism based restrictions on original jurisdiction in charting the scope of statutory and constitutional jurisdictional grants.

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[123]This is especially true given Professor Friedell's own observations that "the removal provisions of the original Judiciary Act of 1789, 1 Stat. 79, conferred a limited removal jurisdiction, not including cases of admiralty and maritime jurisdiction. In none of the statutes enacted since that time have saving-clause cases been made removable." Additionally, Professor Friedell ignores the fundamental principle of statutory interpretation in his article. If Congress, knowing of an interpretation of a statute then reenacts the statute without changing the interpreted language, it is in essence acquiescing in the interpretation of the statute.

[124]Health care law is an example of an area of law in which federalism is alive and well today.

VI
TITLE 9 BASED REMOVAL OF ADMIRALTY ACTIONS ILLUSTRATES TEXTUAL IDENTITY OF JURISDICTIONAL LANGUAGE IS NOT FUNCTIONAL EQUIVALENCY

Recent federal court decisions interpret federal arbitration law as permitting removal of admiralty actions.[125] Examining the mechanism of this removal facilitates an understanding of a fairly troubling non-textual principle of original jurisdiction – the Supreme Court sometimes interprets the text of jurisdictional statutes to mean something entirely different than the identical text when it is used in the Constitution.[126] One consequence of this divergent interpretation of identical text is that statutory arising under jurisdiction pursuant to 28 U.S.C. §1331 is not coextensive with constitutional arising under jurisdiction. Before explaining how the arbitration decisions might serve as heuristic for this distinction it is important to explore the distinction between statutory and constitutional arising under jurisdiction.

A. Constitutional vs. Statutory Jurisdiction

The Constitution grants jurisdiction over "*all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . .*"[127] The corresponding statutory grant of jurisdiction provides, "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."[128]

Even though the language of each jurisdictional grant is similar, the Supreme Court has interpreted the grants differently and concluded that the "arising under" jurisdiction granted by the statute is much narrower than the "arising under" jurisdiction granted by the Constitution.[129] For the purposes of

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[125]See, e.g., Francisco v. M/T Stolt Achievement, 537 U.S. 1030 (2002).

[126]See Michael E. Klenov, *Preemption and Removal, Watson Shuts the Federal Officer Backdoor to the Federal Courthouse, Conceals Familiar Motive*, 86 WASH. U. L. REV. 1455, 1464 (2009) (referring to "The Court's drastically different interpretations of nearly identical language in Article III and § 1331 . . . .").

[127]Article II § 2 cl. 1.

[128]28 U.S.C. §1331.

[129]See, e.g., Lumen N. Mulligan, *A Unified Theory of 28 U.S.C. § 1331 Jurisdiction*, 61 VAND. L. REV. 1667 (2008) "Even though the language of § 1331 parallels that of Article III of the Constitution, the Supreme Court does not hold that § 1331 federal question jurisdiction is identical in scope to the constitutional federal question jurisdiction provision." In fact, "The statutory grant of federal question jurisdiction in 28 U.S.C. § 1331 has been interpreted more narrowly and is assumed not to extend to the limits of Article III as delineated by Chief Justice Marshall in Osborn, despite the use of nearly identical language." Mark F. Kohler, *Revisiting the Past and Rethinking the Future of Incidental Jurisdiction*, 17 OHIO N.U. L. REV. 65 (1990) n. 17.

Article III, a case arises under the law of the United States when federal law is merely a potential ingredient in the case.[130] This is a much more inclusive test than determining when a cause or case arises under the law of the United States for the purposes of 28 U.S.C. §1331. Jurisdiction exists pursuant to 28 U.S.C. §1331 only when a "well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law."[131]

The generally accepted rationale for this discrepancy in the meaning of the identical words as used in the Constitution and in a congressional statute is again a corollary of the notion that Congress-having plenary power over the inferior federal courts-can choose to grant the federal courts as much or as little of the jurisdiction the Constitution contains.[132] Comparing the *Osborn*[133] case with the *Mottley*[134] case perfectly illustrates the difference between constitutional arising under and statutory arising under jurisdiction.

Osborn was decided in 1824 almost 50 years before Congress enacted the first statute granting broad arising under jurisdiction.[135] In *Osborn* state offi-

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[130]See Gary W. Thompson, *Grappling with Grable in Singh v. Duane Morris, LLP: A Practical Guide for Practitioners who Litigate State Causes of Action with Embedded Federal Issues in the Fifth Circuit*, 29 MISS. C. L. REV. 281, 285(2010). (explaining that the test for original federal jurisdiction under Article III is satisfied "when a question to which the judicial power of the Union is extended by the constitution, forms an ingredient of the original cause.").

[131]Abbott Laboratories v. Sandoz, Inc. 544 F.3d 1341, 1368 (2008). See, also, Lumen N. Mulligan, *A Unified Theory of 28 U.S.C. §1331 Jurisdiction*, 61 VAND. L. REV. 1667 (2008). According to the well pleaded complaint rule "only federal issues raised in a plaintiff's complaint, not anticipated defenses, establish federal question jurisdiction." The well pleaded complaint rule may be succinctly explained as follows, "Under the well-pleaded complaint rule, such a federal question must be presented on the face of the plaintiff's properly pleaded complaint without regard to federal defenses." See, Federal Preemption Developments: An Industry Counsel's Perspective 1472 PLI/Corp 519, 538 (2005).

[132]See supra note 15 and accompanying text. Diversity jurisdiction is another good example of this rationale. The Supreme Court in Strawbridge v. Curtis held that the diversity jurisdictional statute 28 U.S.C §1332(a), required complete diversity where as the constitution required only minimal diversity. Yet in §1332(d) the Class Action Fairness Act ("CAFA") Congress indicates that less than minimal diversity will satisfy the statute. Congress is free to convey varying amounts of the constitutional diversity jurisdiction even in different sections of the same statute. See Georgene Vairo, *Judicial v. Congressional Federalism: The Implications of the New Federalism Decisions on Mass Tort Cases and other Complex Litigation*, 33 LOY. L.A. L. REV. 1559, 1615-1616 (2000) discussing CAFA and diversity jurisdiction and concluding,

> [T]he class action legislation is patently constitutional under Article III. Article III provides for diversity jurisdiction over cases between citizens of different states. The class action legislation provides for original jurisdiction and allows for removal of class actions when any proposed class member is a citizen of a state different from any defendant. The legislation thus requires minimal diversity. According to the Supreme Court, the complete diversity rule of Strawbridge v. Curtis was merely a statutory requirement, not a constitutional one. Thus, legislation that permits federal jurisdiction on the basis of minimal diversity would seem to be constitutionally sufficient.

[133]Osborn v. Bank of the United States, 22 U.S. 738 (1824).

[134]Louisville & Nashville R.R. v. Mottley, 211 U.S. 149 (1908).

[135]See supra note 27 and accompanying text.

cers who probably disagreed with or utterly disregarded *McCulloch v. Maryland*[136] decided to try to collect a tax from a federal bank operating in the state of Ohio.[137] The bank sued in the federal district court to enjoin the state officer from collecting the tax.[138] The federal court ruled for an injunction but did not issue the injunction.[139] The state officers decided to take advantage of the delay in issuing the injunction and ran down to the bank collecting approximately $98,000.[140]

The bank then sued the state officers in federal court for the return of the money.[141] The basis of federal jurisdiction asserted by the bank was that the cause of action arose under the laws of the United States as per Article III of the Constitution.[142] The bank also asserted that the statutory basis of jurisdiction was its incorporation statute which allowed the bank to "sue or be sued" in federal court.[143]

One of the state officers' arguments was that the statute, if it actually allowed the bank to sue or be sued in federal court for anything, was unconstitutional and violative of federalism principles especially in the case at bar, where many questions of state law were at issue.[144] The state officers therefore argued that allowing the federal courts to have original jurisdiction even where state law would likely be dominant and dispositive and there was only the possibility of federal law being relevant, would in effect be stripping the state courts of the power to hear any case where federal law could potentially be an issue.[145]

The Supreme Court discussed the pros and cons of a narrow or broad construction of federal jurisdiction[146] then unambiguously explained constitutional arising under jurisdiction was very broad.

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[136]See generally M'Culloch v. Maryland, 17 U.S. 316 (1819) decided only 5 years before *Osborn* and unequivocally holding that Congress had the power to incorporate a bank of the United States and that the States were without power to tax a bank of the United States.

[137]*Osborn*, at 739-40.

[138]Id. at 740-41.

[139]Id. at 741-42.

[140]Id. at 742.

[141]Id.

[142]Id. at 806.

[143]Id. at 805,

> In favor of the jurisdiction, it was argued, (1.) that the jurisdiction was expressly and unequivocally conferred by the act of 1816, s. 7. incorporating the Bank. The terms used were free from all ambiguity, and they were introduced for the avowed purpose of giving jurisdiction to the Circuit Courts.

[144]Id. at 819, (explaining, "[t]he appellants contend, that it does not, because several questions may arise in it, which depend on the general principles of the law, not on any act of Congress."

[145]Id. at 821. "We ask, then, if it can be sufficient to exclude this jurisdiction, that the case involves questions depending on general principles?"

[146]*Osborn*, at 821-23.

> [W]hen[ever] a question to which the judicial power of the Union is extended by the Constitution, forms an ingredient of the original cause, it is in the power of Congress to give the [inferior federal] courts jurisdiction of that cause, although other questions of fact or law may be involved in it."[147]

The Supreme Court explained further that in order to satisfy constitutional arising under jurisdiction which the bank's incorporation statute conveyed,[148] all that was necessary was the possibility that the bank would raise a federal issue, even one as pedestrian as the bank's right to sue or to make a contract.[149]

> A cause may depend on several questions of fact and law. Some of these may depend on the construction of a law of the United States; others on principles unconnected with that law. If it be a sufficient foundation for jurisdiction, that the title or right set up by the party, may be defeated by one construction of the constitution or law of the United States, and sustained by the opposite construction, provided the facts necessary to support the action be made out, then all the other questions must be decided as incidental to this, which gives that jurisdiction. Those other questions cannot arrest the proceedings. Under this construction, the judicial power of the Union extends effectively and beneficially to that most important class of cases, which depend on the character of the cause. On the opposite construction, the judicial power never can be extended to a whole case, as expressed by the constitution, but to those parts of cases only which present the particular question involving the construction of the constitution or the law. We say it never can be extended to the whole case, because, if the circumstance that other points are involved in it, shall disable Congress from authorizing the Courts of the Union to take jurisdiction of the original cause, it equally disables Congress from authorizing those Courts to take jurisdiction of the whole cause, on an appeal, and thus will be restricted to a single question in that cause; and words obviously intended to secure to those who claim rights under the constitution, laws, or treaties of the United States, a trial in the federal Courts, will be restricted to the insecure remedy of an appeal upon an insulated point, after it has received that shape which may be given to it by another tribunal, into which he is forced against his will.

[147]Id. at 823.

[148]See id. (reaffirming that in this case "the judicial power of the Union is extended by the Constitution . . . .").

[149]Id. at 823-824.

> When a Bank sues, the first question which presents itself, and which lies at the foundation of the cause, is, has this legal entity a right to sue? Has it a right to come, not into this Court particularly, but into any Court? This depends on a law of the United States. The next question is, has this being a right to make this particular contract? If this question be decided in the negative, the cause is determined against the plaintiff; and this question, too, depends entirely on a law of the United States. These are important questions, and they exist in every possible case. The right to sue, if decided once, is decided for ever; but the power of Congress was exercised antecedently to the first decision on that right, and if it was constitutional then, it cannot cease to be so, because the particular question is decided. It may be revived at the will of the party, and most probably would be renewed, were the tribunal to be changed. But the question respecting the right to make a particular contract, or to acquire a particular property, or to sue on account of a particular injury, belongs to every particular case, and may be renewed in every case. The question forms an original ingredient in every cause. Whether it be in fact relied on or not, in the defence, it is still a part of the cause, and may be relied. on. The right of the plaintiff to sue, cannot depend on the defence which the defendant may choose to set up. His right to sue is anterior to that defence, and must depend on the state of things when the action is brought. The questions which the case involves, then, must determine its character, whether those questions be made in the cause or not.

Osborn type jurisdiction is not a relic of the past, and as illustrated in the *Verlinden*[150] case whenever the Supreme Court concludes that Congress, in a statute, granted the full extent of the constitutional arising under jurisdiction, the federal courts have original jurisdiction as long as federal law is an ingredient in the action.

In contrast to the broad interpretation of the Constitution's arising under jurisdiction is the narrow interpretation given to the meaning of arising under jurisdiction in the federal question statute 28 U.S.C. §1331. The *Mottley* case perfectly illustrates the difference.

In *Mottley* the plaintiff, as a settlement in a personal injury suit against a railroad, was awarded free lifetime passes.[151] Subsequently, but not as a result of this case, Congress passed a law which prohibited railroads from issuing free passes.[152] The railroad failed to renew the plaintiff's free passes after the law prohibiting them became effective.[153]

The plaintiff sued the railroad on a state law breach of contract action in federal court, basically alleging that the 1906 law did not apply to prevent him from renewing his free passes. Further, if the railroad raised, the law as a defense, as it likely would have, and the law was construed to be applica-

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[150]461 U.S. 480 (1983), In *Verlinden* Supreme Court interpreted the FSIA to be a statute which granted jurisdiction to the fullest extent of the constitution. A federal court had the power to adjudicate the claim even though the claim failed 28 USC §1331's arising under jurisdictional test. Since the statutory basis of jurisdiction was based on the FSIA and not §1331 and since the FSIA provided jurisdiction to the same extent as the constitution then there was federal jurisdiction because federal law (the interpretation of an immunity) was an ingredient in the action.

[151]*Mottley*, 211 U.S. at 150

> The appellees (husband and wife), being residents and citizens of Kentucky, brought this suit in equity in the circuit court of the United States for the western district of Kentucky against the appellant, a railroad company and a citizen of the same state. The object of the suit was to compel the specific performance of the following contract:
>
> Louisville, Ky., Oct. 2d, 1871.
>
> The Louisville & Nashville Railroad Company, in consideration that E. L. Mottley and wife, Annie E. Mottley, have this day released company from all damages or claims for damages for injuries received by them on the 7th of September, 1871, in consequence of a collision of trains on the railroad of said company at Randolph's Station, Jefferson County, Kentucky, hereby agrees to issue free passes on said railroad and branches now existing or to exist, to said E. L. & Annie E. Mottley for the remainder of the present year, and thereafter to renew said passes annually during the lives of said Mottley and wife or either of them.

[152]Id.

It is alleged that the contract was performed by the defendant up to January 1, 1907, when the defendant declined to renew the passes. The bill then alleges that the refusal to comply with the contract was based solely upon that part of the act of Congress of June 29, 1906 (34 Stat. at L. 584, chap. 3591, U. S. Comp. Stat. Supp. 1907, p. 892), which forbids the giving of free passes or free transportation.

[153]Id.

ble, then the law would violate the 5th Amendment takings clause.[154] The plaintiff based statutory federal jurisdiction on the then equivalent of 28 U.S.C. §1331 which was the federal question jurisdictional statute.[155]

Clearly, here federal law would be an ingredient in the cause of action, perhaps even more so than in *Osborn*, given the extreme probability of the railroad raising the federal law as a defense and the necessity of declaring the law's constitutionality.[156]

Yet the Court said that in order for "arising under" jurisdiction to exist under the general "arising under" statute, it was not enough that federal law would be an ingredient in the cause of action but rather plaintiff had to show that their cause of action was based on federal law.[157] Ten years later, *American Well Works* further refined the contrast between constitutional and statutory arising under jurisdiction declaring that a suit arises under the law that creates the cause of action for the purposes of determining statutory arising under jurisdiction.[158] So, for example, in *Mottley,* the cause of action was specific performance of a contract[159] and therefore the suit arose under state law and there was no arising under statutory jurisdiction even though constitutional arising under jurisdiction was clearly satisfied because federal law was an ingredient in the cause of action.[160]

This dichotomy in meaning of "arising under" can be illustrated by carefully examining a recent development in the law of maritime removal which I addressed in a previous scholarly piece.

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[154] Id.

The bill further alleges: First, that the act of Congres referred to does not prohibit the giving of passes under the circumstances of this case; and, second, that if the law is to be contrued as prohibitig such passes, it is in conflict with the 5th Amendment of the Constitution, because it deprives the plaintiffs of their property without due process of law.

[155] Id. at 152

There was no diversity of citizenship, and it is not and cannot be suggested that there was any ground of jurisdiction, except that the case was s 'suit . . . arising under the Constitution or laws of the United States.' 25 Stat. at L. 434, chap. 866, U. S. Comp. Stat. 1901, p. 509.

[156] See supra note 147 and accompanying text.

[157] Id. at 152.

> It is the settled interpretation of these words, as used in this statute, conferring jurisdiction, that a suit arises under the Constitution and laws of the United States only when the plaintiff's statement of his own cause of action shows that it is based upon those laws or that Constitution. It is not enough that the plaintiff alleges some anticipated defense to his cause of action, and asserts that the defense is invalidated by some provision of the Constitution of the United States. Although such allegations show that very likely, in the course of the litigation, a question under the Constitution would arise, they do not show that the suit, that is, the plaintiff's original cause of action, arises under the Constitution.

[158] American Well Works Co. v. Layne & Bowler Co., 241 U.S. 257, 260 (1916), "A suit arises under the law that creates the cause of action."

[159] *Mottley*, 211 U.S. at 150, expressly so stating.

[160] See supra note 147 and accompanying text demonstrating the much lower threshold for a suit to arise under the laws of the United States for the purposes of Article III.

B. Title 9 Based Removal of Admiralty Claims as a Heuristic for Distinguishing Statutory and Constitutional Arising Under Jurisdiction

In 2008, I argued that the recent phenomenon of removal of seamen's personal injury actions, especially the general maritime law claims pursuant to the enabling legislation associated with the United States' 1970 ratification of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("Convention Act") was violative of the federalism announced in the *Romero* decision.[161] This improper removal is illustrated by the *Bautista* case.

The *Bautista* case arose from

> the May 25, 2003 steam boiler explosion on board NCL's vessel, the S/S Norway, at the Port of Miami. The explosion killed six of the Plaintiff seamen, and seriously injured four others. On June 2, 2003, the four surviving seamen and the personal representatives of the six decedent crew members filed suit against NCL and Star Cruises in the Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County, Florida. Plaintiffs' virtually identical complaints seek damages for negligence and unseaworthiness under the Jones Act, 46 U.S.C.—App.—§ 688, and for failure to provide maintenance, cure and unearned wages under the general maritime law of the United States.

Despite the fact that the plaintiffs filed unremovable Jones Act and general maritime law claims[162] the defendant "removed the ten cases to federal district court pursuant to section 205 of the Convention Act, which permits removal before the start of trial when the dispute relates to an arbitration agreement or arbitral award covered by the Convention." [163]

The claims were governed by the convention because,

> (1) there [wa]s an agreement in writing within the meaning of the Convention; (2) the agreement provide[d] for arbitration in the territory of a signatory of the Convention; (3) the agreement ar[ose] out of a legal relationship, whether contractual or not, which [wa]s considered commercial; and (4) a party to the

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[161]See Bahadur, supra note 86 at 172-188.

[162]See supra Parts III. & IV. discussing the "unremovability of Jones Act and General Maritime claims.

[163]*Bautista*, 369 F.3d at 1292; see also 9 U.S.C. §205

> Where the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention, the defendant or the defendants may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States for the district and division embracing the place where the action or proceeding is pending. The procedure for removal of causes otherwise provided by law shall apply, except that the ground for removal provided in this section need not appear on the face of the complaint but may be shown in the petition for removal. For the purposes of Chapter 1 of this title any action or proceeding removed under this section shall be deemed to have been brought in the district court to which it is removed.

> agreement [wa]s not an American citizen, or that the commercial relationship ha[d] some reasonable relation with one or more foreign states.[164]

In other words the seamens' claims in this case were covered by the Convention Act because, (1) the seaman's employment contract was an agreement in writing agreeing to arbitration, which (2) provided for arbitration in the Philippines, a signatory to the convention; (3) the agreement arose out of an employment relationship and therefore was considered commercial; and (4) a party to the agreement (the Pilipino Seamen) wereas not American citizens.[165]

I demonstrated that the removal provided for in 9 U.S.C. §205 was violative of federalism because it was premised on an impermissible "transmogrification" by 9 U.S.C. §203 of general maritime law claims into "claims arising under the laws of the United States," a result forbidden by *Romero*.[166]

9 U.S.C. §203 provides,

> An action or proceeding falling under the Convention shall be deemed to **arise under** the laws and treaties of the United States. The district courts of the United States . . . shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy.[167]

The normative thrust of my previous scholarly argument rejecting the legitimacy of this removal was that because of the federalism explicit in *Romero*, Congress could not do indirectly via §203 of this arbitration statute what they could not do directly under 28 U.S.C. §1331 - that is to make admiralty claims fall under the jurisdictional umbrella of statutory arising under jurisdiction.[168]

At this juncture it is worth remembering that any removal from state to federal Court must be predicated on the existence of original federal jurisdiction.[169] Therefore the removal permitted pursuant to 9 U.S.C. §205 is wholly dependent on 9 U.S.C. §203 providing a basis for original jurisdic-

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[164]Bautista v. Star Cruises & NCL, 396 F.3d 1289, 1295 (2005).

[165]See *Bautista*, at 1295 (explaining, "It is beyond dispute that the second and fourth conditions are fulfilled in this case. The crewmembers' arbitration provisions provide for arbitration in the Philippines, a signatory of the Convention. The crewmembers are not American citizens, but are citizens of the Philippines."); see also id., at 1299-1302 concluding that the remaining two elements of the test are satisfied because the seamens' contracts were agreements in writing to arbitrate and they arose out of a commercial legal relationship.

[166]See Bahadur, supra note 86 at 172-188, 194-195 (2008).

[167]9 U.S.C. §203 (emphasis added).

[168]Id.

[169]See supra Part I.C

tion by declaring that arbitral claims **arise under** the laws of the United States.[170]

If the Supreme Court were to interpret the Convention Act as providing all the arising under jurisdiction of Article III then it might be possible to justify removal.[171] In other words if by "arise under the laws of the United States," the Supreme Court deems the Convention Act to be one of those rare statutes conveying federal jurisdiction predicated only on federal law being an ingredient in the cause of action then the removal of maritime claims pursuant to the Convention Act becomes exponentially less offensive to *Romero's* federalism. Additionally, there is some support for the proposition that although general admiralty and maritime law does not arise under the laws of the United States for the purposes of 28 U.S.C. §1331, it is considered a law of the United States as that term is defined for the purpose of Article III.[172]

If the Supreme Court interpreted the "arising under" jurisdiction conferred by 9 U.S.C. §203 as coextensive with Article III's arising under jurisdiction it would ameliorate the federalism concerns in *Romero* because so few federal statutes have been interpreted as providing more arising under jurisdiction than 28 U.S.C. §1331.

Romero's federalism based restrictions on removal focused on the fact that if general maritime law claims were considered statutory arising under claims, for the purposes of 28 U.S.C. §1331, then they would always be removable because the mere existence of 28 U.S.C. §1331 would be a per-

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[170]See supra note 167 (demonstrating that 9 U.S.C. §203 converts claims falling under the Convention into statutory "arising under" claims.

[171]In fact, many of the instances of this "broader than 1331 statutory jurisdictional grant" involve statutes dealing with the United States International relations. The Convention Act fits nicely within this genre because it squarely involves US international relations

> The goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was *to encourage the recognition and enforcement of commercial arbitration agreements in international contracts* and *to unify the standards by which agreements to arbitrate are observed* and arbitral awards are enforced in the signatory countries.
>
> In pursuing effective, unified arbitration standards, the Convention's framers understood that the benefits of the treaty would be undermined if domestic courts were to inject their "parochial" values into the regime:
>
> In their discussion of [Article II(1)], the delegates to the Convention voiced frequent concern that courts of signatory countries in which an agreement to arbitrate is sought to be enforced should not be permitted to decline enforcement of such agreements on the basis of parochial views of their desirability or in a manner that would diminish the mutually binding nature of the agreements.

See *Bautista*, at 1299-1300.

[172]See, e.g., Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920) (explaining, "The Constitution itself adopted and established, as part of the laws of the United States, approved rules of the general maritime-law and empowered Congress to legislate in respect of them and other matters within the admiralty and maritime jurisdiction.

petual statutory basis of original federal jurisdiction. Were this true, admiralty and maritime cases would always be freely removable to federal court pursuant to 28 U.S.C. §1441, because there would always be both a statutory (28 U.S.C. §1331) and constitutional (maritime law would be an ingredient) basis of jurisdiction. That interpretation, *Romero* forbade because it could obliterate the federalism based concurrent jurisdiction which recognized both the state courts' competence and track record in adjudicating maritime cases.[173]

However, given the dearth of statutes that have been found to convey the full extent of the constitutional arising under jurisdiction, the instances where admiralty claims would be removable because they "arise under" the laws of the United States, for the purposes of these statutes would indeed be few and far between. Thus, the federalism problems inherent in de facto stripping state courts of jurisdiction by including general maritime claims within the subject matter jurisdiction conferred by 28 U.S.C. §1331, would not exist if the Convention Act is considered such a statute.[174]

There is even precedent for a removal statute allowing removal because it provided for the full extent of the arising under jurisdiction in Article III even when original federal jurisdiction wass otherwise nonexistent pursuant to 28 U.S.C. §1331. In *Mesa v. California*[175] the Supreme Court held that pursuant to 28 U.S.C. §1442, a cause of action for which there is no statutory arising under, original federal jurisdiction pursuant to 28 U.S.C. §1331, may none-the-less be removed to federal court and federal jurisdiction would be proper.[176] In other words, pursuant to 28 U.S.C. §1442, a federal

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[173]This is precisely the reason why the Romero Court explains,

> The interpretation of the Act of 1875 [as including general maritime law claims] would have consequences more deeply felt than the elimination of a suitor's traditional choice of forum. By making maritime cases removable to the federal courts it would make considerable inroads into the traditionally exercised concurrent jurisdiction of the state courts in admiralty matters- a jurisdiction which it was the unquestioned aim of the saving clause of 1789 to preserve.

Romero at 372.

[174]Thanks to Professors Chibundu Maxwell, Paul Lund, Steve Vladeck, Janet Alexander, Lewis Grossman and David Shapiro for their informal discussion regarding the paucity of statutes conveying more original federal question jurisdiction than 28 U.S.C. §1331. With their help I identified only the following statutes the Supreme Court has stated grants more than the jurisdiction provided by 28 U.S.C. §1331. The incorporation statutes of corporations where the federal government is a majority shareholder, see e.g., Paul Lund, *Federally Chartered Corporations and Federal Jurisdiction*, 36 FLA. ST. U. L. REV. (2009); the Red Cross' incorporation statute, see e.g American Red Cross v. S.G. 505 U.S. 247, 258 (citing to the *Verlinden* case supra note 150 and explaining that well pleaded complaint rule does not apply to limit federal jurisdiction because the Red Cross charter is an independent grant of jurisdiction), the Alien Tort Statute See Sosa v. Alvarez-Machain, 542 U.S. 692, 714 (2004) referring to the brief of Amici professors suggesting that Alien Tort Claims could have been entertained since the first Judiciary Act even before the adoption of the federal questions statute).

[175]489 U.S. 121 (2007)

[176]See *Mesa*, 489 U.S. at 136-37 (explaining how 28 U.S.C. §1442 in a manner similar to *Verlinden* "overcome[s] the well pleaded complaint rule. . . .").

district court could hear a case via removal over which it did not possess original arising under jurisdiction pursuant to 28 U.S.C. §1331.[177]

In *Mesa,* federal postal officers were charged in state criminal court in California with traffic violations while they were operating mail trucks.[178] The U.S. attorney sought removal of the cases to federal court pursuant to pursuant to 28 U.S.C §1442 which provides,

> (a) A civil action or criminal prosecution commenced in a State court against any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> (1) The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, sued in an official or individual capacity for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.[179]

The Supreme Court permitted removal and federal jurisdiction in this situation because there was a good chance that the federal officers would raise a federal defense.[180]

This is important because the very same causes of action could not be initiated in the federal court because original jurisdiction over claims arising under the law of the United States pursuant to 28 U.S.C. §1331 requires that federal law create the cause of action.[181] In *Mesa,* state law created the cause of action but a federal defense asserted by the defendants supported original jurisdiction.[182] The existence of a federal defense is not enough to satisfy the jurisdictional requirements of 28 U.S.C §1331.[183]

Interpreting 9 U.S.C. §203 as granting all of Article III's arising under jurisdiction would resolve the current untenability of removal of general maritime claims pursuant to the Convention Act even without a separate removal provision in 9 U.S.C. §205. This is because the maritime claims governed by the Convention Act would be removable under 28 U.S.C.

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[177]See id.
[178]Id. at 123.
[179]Id. see also 28 U.S.C. §1442(a).
[180]Id. at 139.
[181]See supra notes 129, 130 & 157-160 and accompanying text.
[182]*Mesa*, 489 U.S. at 139.
[183]See supra note 181.

§1441, because statutory original federal jurisdiction would exist pursuant 9 U.S.C. §203 instead of 28 U.S.C. §1331 as prohibited by the *Romero* case.[184]

However, even if the Supreme Court interpreted 9 U.S.C. §203 as granting arising under jurisdiction coterminous with Article III and broader than 28 U.S.C. §1331, 9 U.S.C. §205 would still be necessary to accomplish removal of the Jones Act claims. This is because Congress in enacting in 28 U.S.C. §1445(a) expressly prohibits the removal of Jones Act claims via 28 U.S.C. §1441.[185] The removal provided for in 9 U.S.C. §205, however, is not impeded by congressional restrictions on removal because, unlike 28 U.S.C. §1441, it does not contain the prefatory language allowing removal only where removal is not "otherwise expressly prohibited by an act of Congress."[186]

Until the Supreme Court so interprets 9 U.S.C. §203 there is no suggestion that the words "arising under" as used in 28 U.S.C. §1331 and 9 U.S.C. §203 are not equivalent and therefore the removal of general maritime claims pursuant to 9 U.S.C. §205 continues to be violative of the federalism principles announced in *Romero*.

This alternative theory of removal is possible only if the Supreme Court subsequently interprets 9 U.S.C. §203 as conveying the full extent of Article III's arising under jurisdiction. The fact that this broader, constitutional arising under jurisdiction would permit removal even though *Romero* prohibits classification of maritime claims as arising under 28 U.S.C. §1331, illustrates clearly that statutory and constitutional grants of jurisdiction are not functionally coextensive despite the identical textual basis for the grants.[187]

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[184]See supra note 56 and accompanying text explaining the bar on removal pursuant to §1441 which exists when Congress expressly prohibits removal; see also supra note 174 explaining that arising under jurisdiction over general maritime claims pursuant to 9 U.S.C. §203 ameliorates the federalism concerns resulting in the *Romero* decision which prohibits general maritime law claims from falling under the jurisdictional umbrella of 28 U.S.C. §1331.

[185]See supra notes 57-63 (discussing the express congressional prohibition to removal of Jones Act claims pursuant to 28 U.S.C. §1441).

[186]*Compare* 9 U.S.C. §205 *with* 28 U.S.C. §1441.

[187]The immediately preceding discussion attempts to explain how admiralty removal pursuant to the arbitration statutes might be properly conceptualized so as to do away with the current dissonance between Romero's federalism based prohibition on removal and interpreting the Convention Act as converting general maritime law claims into statutory arising under claims. However, there is one complex structural consideration antecedent to deciding whether general maritime law claims may properly be considered laws of the United States for the purposes of Article III under 9 U.S.C. §203.

Even though there is support for the idea that maritime law could be considered a law of the United States, I think the actual structure of the Constitutional grants may cut the other way. As Romero acknowledged, the constitutional grants of jurisdiction in Article III §2 are discrete entities, and when the Supreme Court compared the arising under grant and the maritime grant it stated,

VII
CONCLUSION

Admiralty and maritime law is an area of law which predated the constitution. It was an area of international law common to all maritime nations which facilitated trade because of its uniform international application. The courts of the original American colonies administered, interpreted and developed this body of law long before the concept of the American nation or Constitution existed.

Post the war of independence, the judicial article of the Constitution depended in large part for its ratification on the acknowledgment that a national judiciary was necessary for the uniform interpretation of this body of international law to keep the country attractive as a trading partner with the other maritime nations. Even the antifederalist's reluctantly agreed to the necessity of Article III because of admiralty and maritime concerns.

Therefore admiralty law embodies the very essence of the federalism based readjustment occurring as thirteen colonies strived to become a young nation. The saving to suitors clause in §9 of the first judiciary act and the current statutory grant of admiralty and maritime jurisdiction are the embodiments of this federalism. Understanding this allows a deep understanding of the historical baggage associated which the interpretation of federal jurisdictional statutes.

Examining the restrictions on Jones Act cases additionally illustrates how accurate jurisdictional statutory interpretation depends on reading statutes in tandem and incorporating the judicial glosses on statutory text.

Finally exploring the removal of admiralty and maritime claims pursuant to title 9 of the United States Code facilitates a deep understanding of a particularly vexing topic in original jurisdiction; the difference in scope between the constitutional grants of jurisdiction and the statutory grants which are necessary to effectuate the constitutional grants.

> These provisions of Article III are two of the nine separately enumerated classes of cases to which 'judicial power' was extended by the Constitution and which thereby authorized grants by Congress of 'judicial Power' to the 'inferior' federal courts. The vast stream of litigation which has flowed through these courts from the beginning has done so on the assumption that, in dealing with a subject as technical as the jurisdiction of the courts, the Framers, predominantly lawyers, used precise, differentiating and not redundant language.

Romero, at 364.

It may also be that the very structure of the Constitution prevents admiralty and maritime claims from being considered laws of the United States, but that is a distinct problem from solving the federalism problems of Romero, permitting removal pursuant to Title 9 U.S.C. and using admiralty removal to demonstrate the difference in statutory and constitutional arising under jurisdiction.