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## Establishing an Unqualified Standard for Removal Under 28 U.S.C. § 1441: The Propriety of Removing Maritime Cases to Federal Court

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# ESTABLISHING AN UNQUALIFIED STANDARD FOR REMOVAL UNDER 28 U.S.C. § 1441: THE PROPRIETY OF REMOVING MARITIME CASES TO FEDERAL COURT

*Michael Schwartz, J.D., Ph.D.\**

*The ability to remove a case from state court to federal court is a staple of our judicial system. In order for a case to be removable, it must fall within the purview of the federal courts' original jurisdiction. While federal jurisdiction encompasses admiralty and maritime matters, these cases were long-held to be non-removable under 28 U.S.C. § 1441: the removal statute. However, the removal statute was amended in 2011 and no longer arguably excludes maritime cases from removal jurisdiction. Several courts consequently permitted removal of maritime cases, but this practice was widely condemned and proved to be short-lived as the judiciary utilized other bases to uphold the longstanding prohibition. Yet, cases from both the Fifth and Seventh Circuits have renewed the uncertainty as to whether maritime cases are in fact removable and have provided an opportunity to finally eliminate the confusion surrounding the topic. This Article elucidates the errancy in both the historical and more recent justifications for denying removal of maritime cases and harmonizes the objectives of the implicated statutes within the modern judiciary. In the current absence of a credible prohibition, federal courts are poised to allow maritime removal while also comporting with the various bases previously used to justify the exclusion of maritime cases from removal jurisdiction.*

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## I. INTRODUCTION

Original jurisdiction: a simple standard to remove a case from state court to federal court.<sup>1</sup> Among civil procedure concepts, this one is rather elementary. Plainly, if a case could have been originally filed in federal court, it will be removable there.<sup>2</sup> Perhaps the most noteworthy bases for federal jurisdiction are federal question,<sup>3</sup> diversity of citizenship,<sup>4</sup> and admiralty/maritime,<sup>5</sup> which appear sequentially in the United States Code. These main types of cases, among others,<sup>6</sup> should therefore be removable to federal court. It seems straightforward enough.

Except maritime cases are not removable. Despite being within the original jurisdiction of the federal courts,<sup>7</sup> and not exempted from removability,<sup>8</sup> general maritime cases have long been held to be non-removable without an independent basis for federal jurisdiction.<sup>9</sup> Given the importance of removal as a procedural tool,<sup>10</sup> lawyers are frequently surprised to learn of such a flagrant inconsistency in the

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1. 28 U.S.C. § 1441(a) (2018) (“[A]ny civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed . . .”).

2. *Sabin v. Home Owners’ Loan Corp.*, 147 F.2d 653, 655–56 (10th Cir. 1945) (“The test for determining the removability of an action is whether the United States Court might have exercised original jurisdiction.”); *Nyberg v. Montgomery Ward & Co.*, 123 F. Supp. 599, 602–03 (W.D. Mich. 1954) (“The test as to whether the defendant was entitled to remove the present civil action from the State court to this Federal district court, is whether this court would have had original jurisdiction of the action.”).

3. 28 U.S.C. § 1331 (“The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.”).

4. *Id.* § 1332(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—(1) citizens of different States . . .”).

5. *Id.* § 1333 (“The district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty or maritime jurisdiction . . .”).

6. *See id.* §§ 1330–1369.

7. U.S. CONST. art. III, § 2 (“The judicial Power shall extend to all Cases . . . of admiralty and Maritime Jurisdiction . . .”); 28 U.S.C. § 1333 (“The district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty or maritime jurisdiction . . .”).

8. *See* 28 U.S.C. § 1445.

9. *See, e.g., Demer v. Pac. S.S. Co.*, 273 F. 567, 569 (W.D. Wash. 1921) (denying removal of a maritime claim); *see also In re Chimenti*, 79 F.3d 534, 537 (6th Cir. 1996) (citations omitted) (“[T]he two courts of appeals that have squarely faced the issue have held that admiralty and maritime claims are not removable to federal court unless there exists some *independent* basis, such as diversity of the parties, for federal jurisdiction.”).

10. *See* Thomas R. Hrdlick, *Appellate Review of Remand Orders in Removed Cases: Are They Losing a Certain Appeal?*, 82 MARQ. L. REV. 535, 535 (1999) (“The removal of lawsuits from state to federal courts is a litigation privilege and tactic as old as the Federal Constitution and the Federal Judiciary it contemplated.”).

removal standard.<sup>11</sup> This obscure procedural convention has been based largely on a strained interpretation of 28 U.S.C. § 1441—the removal statute—which was deemed to prohibit removing maritime cases to federal court.<sup>12</sup> Until recently, this practice was sparsely challenged.<sup>13</sup>

Everything changed in 2011 when the Federal Courts Jurisdiction and Venue Clarification Act (JVCA)<sup>14</sup> eliminated the language in 28 U.S.C. § 1441 that arguably restricted removal of maritime cases.<sup>15</sup> Following the JVCA, several district courts acted in accordance with the plain meaning of the amended statute and permitted removal of maritime cases under admiralty jurisdiction.<sup>16</sup> However, most district

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11. See Michael A. Orlando, *To Remove or Not to Remove, That Is the Question*, INT'L RISK MGMT. INST. (Feb. 2002), <https://www.irmi.com/articles/expert-commentary/to-remove-or-not-to-remove-that-is-the-question> [https://perma.cc/V8JL-5RRZ].

12. See 28 U.S.C. § 1441(b) (2006) (amended 2011) (“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.”). Maritime cases were considered “other actions” under 28 U.S.C. § 1441(b). *In re Dutile*, 935 F.2d 61, 63 (5th Cir. 1991) (“[A]dmiralty and general maritime claims fall within the category of ‘[a]ny other [civil] action’ governed by the second sentence of § 1441(b).” (second and third alterations in original)). This inclusion was deemed to be a prohibition on removing maritime cases. *Id.* (“The practical effect of [§ 1441(b)] is to prevent the removal of admiralty claims pursuant to § 1441(a) unless there is complete diversity of citizenship . . .”).

13. In the mid-1950s several courts found that maritime cases could be removed as “other actions” under the contemporaneous 28 U.S.C. § 1441(b) as long as no defendants were citizens of the forum state. See, e.g., *Davis v. Matson Navigation Co.*, 143 F. Supp. 537, 538–39 (N.D. Cal. 1956); *Crispin Co. v. Lykes Bros. S.S. Co.*, 134 F. Supp. 704, 707 (S.D. Tex. 1955); *Crawford v. E. Asiatic Co.*, 156 F. Supp. 571, 573 (N.D. Cal. 1957).

14. See The Federal Courts Jurisdiction and Venue Clarification Act of 2011, Pub. L. 112-63, 125 Stat. 758.

15. Compare 28 U.S.C. § 1441(b) (2006) (amended 2011) (“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.”), with 28 U.S.C. § 1441(b)(2) (2018) (“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.”).

16. See *Ryan v. Hercules Offshore, Inc.*, 945 F. Supp. 2d 722, 779 (S.D. Tex. 2013); *Wells v. Abe's Boat Rentals Inc.*, No. H-13-1112, 2013 WL 3110322, at \*4 (S.D. Tex. June 18, 2013); *Carrigan v. M/V AMC Ambassador*, No. H-13-03208, 2014 WL 358353, at \*2 (S.D. Tex. Jan. 31, 2014); *Exxon Mobil Corp. v. Starr Indem. & Liab. Co.*, No. H-14-1147, 2014 WL 2739309, at \*2 (S.D. Tex. June 17, 2014), *rev'd on other grounds*, 2014 WL 4167807 (S.D. Tex. Aug. 20, 2014); *Exxon Mobil Corp. v. Starr Indem. & Liab. Ins. Co.*, 181 F. Supp. 3d 347, 357 (S.D. Tex. 2015); *Murphy v. Seadrill Ams., Inc.*, No. H-4-1454, 2014 WL 12642104, at \*4 (S.D. Tex. Nov. 14, 2014); *Costanza v. Accutrans, Inc.*, No. 17-5706, 2017 WL 4785004, at \*5 (E.D. La. Oct. 24, 2017); *Bridges v. Phillips 66 Co.*, No. 13-477, 2013 WL 6092803, at \*4 (M.D. La. Nov. 19, 2013); *Harrold v. Liberty Ins. Underwriters, Inc.*, No. 13-762, 2014 WL 688984, at \*4 (M.D. La. Feb. 20, 2014); *Garza v. Phillips 66 Co.*, No. 13-742, 2014 WL 1330547, at \*5 (M.D. La. Apr. 1, 2014); *Provost*

courts rejected a four-corners reading of the revised removal statute and held that the JVCA did not affect the longstanding practice of excluding maritime cases from removal jurisdiction.<sup>17</sup>

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v. Offshore Serv. Vessels, LLC, No. 14-89, 2014 WL 2515412, at \*3 (M.D. La. June 4, 2014); Walker v. BP Prods. N. Am., Inc., No. 1-13-CV-257, 2013 WL 11332950, at \*3 (E.D. Tex. Sept. 16, 2013).

17. See *Pierce v. Parker Towing Co.*, 25 F. Supp. 3d 1372, 1380 (S.D. Ala. 2014); *Dirkse v. Nu Venture Diving Co.*, No. LA CV17-08554 JAK (MRWx), 2018 WL 6133683, at \*6 (C.D. Cal. May 21, 2018); *J.P. v. Connell*, 93 F. Supp. 3d 1298, 1303 (M.D. Fla. 2015); *Kirkland v. Edward Yarborough Ranches, Inc.*, No. 15-cv-1436-Orl-40GJK, 2016 WL 8943288, at \*4-5 (M.D. Fla. Apr. 14, 2016); *Int'l Marine Underwriters v. S. Drydock, Inc.*, No. 16-cv-220-J-39, 2016 WL 11431679, at \*4 (M.D. Fla. Nov. 17, 2016); *Mitev v. Resort Sports Ltd.*, 133 F. Supp. 3d 1365, 1371 (S.D. Fla. 2015); *Boakye v. NCL (Bah.) Ltd.*, 295 F. Supp. 3d 1342, 1348 (N.D. Ga. 2018); *Palmer v. Georgia Ports Auth.*, No. CV 416-199, 2016 WL 5030372, at \*4 (S.D. Ga. Sept. 19, 2016); *Barglowski v. Nealco Int'l LLC*, No. 16-00209, 2016 WL 5107043, at \*8 (D. Haw. Sept. 20, 2016); *Lewis v. Foster*, No. 18-60-DLB-CJS, 2018 WL 4224445, at \*5 (E.D. Ky. Sept. 5, 2018); *In re Foss Mar. Co.*, 29 F. Supp. 3d 955, 961 (W.D. Ky. 2014); *Brown v. Porter*, 149 F. Supp. 3d 963, 973 (N.D. Ill. 2016); *Barry v. Shell Oil Co.*, No. 13-6133, 2014 WL 775662, at \*3 (E.D. La. Feb. 25, 2014); *Perrier v. Shell Oil Co.*, No. 14-490, 2014 WL 2155258, at \*3 (E.D. La. May 22, 2014); *Grasshopper Oysters, Inc. v. Great Lakes Dredge & Dock, LLC*, No. 14-934, 2014 WL 3796150, at \*2 (E.D. La. July 29, 2014); *Gregoire v. Enter. Marine Servs., LLC*, 38 F. Supp. 3d 749, 765 (E.D. La. 2014); *Henry J. Ellender Heirs, LLC v. Exxon Mobil Corp.*, 42 F. Supp. 3d 812, 819 (E.D. La. 2014); *Riley v. Llog Expl. Co.*, No. 14-437, 2014 WL 4345002, at \*5 (E.D. La. Aug. 28, 2014); *Bisso Marine Co. v. Techcrane Int'l, LLC*, No. 14-0375, 2014 WL 4489618, at \*5 (E.D. La. Sept. 10, 2014); *Yavorsky v. Felice Navigation, Inc.*, No. 14-2007, 2014 WL 5816999, at \*5 (E.D. La. Nov. 7, 2014); *Parish of Plaquemines v. Total Petrochemical & Refin. USA, Inc.*, 64 F. Supp. 3d 872, 899-900 (E.D. La. 2014); *Plaquemines Parish v. Rozel Operating Co.*, No. 13-6722, 2015 WL 403791, at \*4 (E.D. La. Jan. 29, 2015); *Jefferson Parish v. Anadarko E&P Onshore LLC*, No. 13-6701, 2015 WL 13534014, at \*6 (E.D. La. Mar. 11, 2015); *Alexander v. Magnolia Marine Transp. Co.*, No. 14-2795, 2015 WL 1298394, at \*3 (E.D. La. Mar. 19, 2015); *Jefferson Parish v. Equitable Petrol. Corp.*, No. 13-6714, 2015 WL 2372362, at \*11 (E.D. La. May 18, 2015); *Defelice Land Co. v. ConocoPhillips Co.*, No. 15-614, 2015 WL 3773034, at \*5 (E.D. La. June 17, 2015); *Jefferson Parish v. Exxon Mobile Corp.*, No. 13-6717, 2015 WL 4097111, at \*19 (E.D. La. July 7, 2015); *Plaquemines Parish v. BEPCO, L.P.*, No. 13-6704, 2015 WL 4097062, at \*18 (E.D. La. July 7, 2015); *Darville v. Tidewater Marine Serv., Inc.*, No. 15-6441, 2016 WL 1402837, at \*8 (E.D. La. Apr. 11, 2016); *Arrington v. Seaonus Stevedoring—New Orleans, LLC*, No. 17-9383, 2017 WL 4803933, at \*2 (E.D. La. Oct. 25, 2017); *Fleming v. New Orleans Cold Storage & Warehouse Co.*, No. 18-4567, 2018 WL 2980067, at \*4 (E.D. La. June 14, 2018); *Langlois v. Kirby Inland Marine, LP*, 139 F. Supp. 3d 804, 815 (M.D. La. 2015); *Bingham v. Haynes*, No. 17-1694, 2018 WL 2124898, at \*5 (M.D. La. Feb. 28, 2018); *Jackson v. Chem Carriers LLC*, No. 18-1052, 2019 WL 1906261, at \*3 (M.D. La. Apr. 3, 2019); *Gabriles v. Chevron USA, Inc.*, No. 14-00669, 2014 WL 2567101, at \*4 (W.D. La. June 6, 2014); *Harbor Docking & Towing Co. v. Rolls Royce Marine N. Am.*, No. 14-CV-2487, 2014 WL 6608354, at \*3 (W.D. La. Nov. 19, 2014); *Serigny v. Chevron U.S.A., Inc.*, No. 14-0598, 2014 WL 6982213, at \*4 (W.D. La. Dec. 9, 2014); *Boudreaux v. Glob. Offshore Res., LLC*, No. 14-2507, 2015 WL 419002, at \*7 (W.D. La. Jan. 30, 2015); *Smith v. Marquette Transp. Co.*, No. 16-CV-01545, 2017 WL 3648459, at \*3 (W.D. La. Aug. 1, 2017); *Parish of Cameron v. Auster Oil & Gas, Inc.*, No. 16-cv-530, 2018 WL 2164854, at \*4 (W.D. La. Jan. 17, 2018); *Averill v. Fiandaca*, No. 17-cv-00287, 2017 WL 4419242, at \*2 (D. Me. Oct. 5, 2017); *Cassidy v. Murray*, 34 F. Supp. 3d 579, 584 (D. Md. 2014); *Schaffer v. Air & Liquid Sys. Corp.*, No. 14CV1789, 2015 WL 1611352, at \*3 (E.D. Mo. Apr. 10, 2015); *Glazer v. Honeywell Int'l, Inc.*, No. 16-7714, 2017 WL 1943953, at \*6 (D.N.J. May 10, 2017); *Nassau Cnty. Bridge Auth. v. Olsen*, 130 F. Supp. 3d 753, 763 (E.D.N.Y. 2015); *Gonzalez v. Red Hook Container*

Terminal, LLC, No. 16-CV-5104, 2016 WL 7322335, at \*4 (E.D.N.Y. Dec. 15, 2016); *In re Nagler*, 246 F. Supp. 3d 648, 664–65 (E.D.N.Y. 2017); *Forde v. Hornblower N.Y., LLC*, 243 F. Supp. 3d 461, 469–70 (S.D.N.Y. 2017); *Atl. Coast Marine Grp. v. Willis*, 210 F. Supp. 3d 807, 811 (E.D.N.C. 2016); *Sullivan v. Bay Point Resort Operations LLC*, 433 F. Supp. 3d 1072, 1076 (N.D. Ohio 2019); *Iturrino Carrillo v. Marina Puerto del Rey Operations, LLC*, 432 F. Supp. 3d 7, 12 (D.P.R. 2019); *Progressive Mountain Ins. Co. v. Dana C. McLendon Co.*, No. 14-cv-04413, 2015 WL 925932, at \*3 (D.S.C. Mar. 4, 2015); *Hamerly v. Tubal-Cain Marine Servs., Inc.*, 62 F. Supp. 3d 555, 560 (E.D. Tex. 2014); *Dyche v. U.S. Env't Servs., Inc.*, 72 F. Supp. 3d 692, 698 (E.D. Tex. 2014); *Skarpa v. Cameron Int'l Corp.*, No. 13-cv-616, 2015 WL 11072129, at \*6 (E.D. Tex. Jan. 30, 2015); *Carnes v. Friede & Goldman, LLC*, 103 F. Supp. 3d 821, 826 (E.D. Tex. 2015); *Hilton v. Kirby Inland Marine, LP*, No. 15-CV-93, 2016 WL 9088756, at \*4 (E.D. Tex. Feb. 24, 2016); *Palmer v. Beach Dryden Scuba Enters. LLC*, No. 17-CV-1819-L, 2018 WL 1569890, at \*6 (N.D. Tex. Mar. 30, 2018); *Rogers v. BBC Chartering Am., LLC*, No. 13-CV-3741, 2014 WL 819400, at \*1 (S.D. Tex. Mar. 3, 2014); *Alexander v. Seago Consulting, LLC*, No. 14-CV-1292, 2014 WL 2960419, at \*1 (S.D. Tex. June 23, 2014); *Figueroa v. Marine Inspection Servs.*, 28 F. Supp. 3d 677, 682 (S.D. Tex. 2014); *Rutherford v. Breathwite Marine Contractors, Ltd.*, 59 F. Supp. 3d 809, 813 (S.D. Tex. 2014); *Parker v. U.S. Env't Servs., LLC*, No. 14-CV-292, 2014 WL 7338850, at \*6 (S.D. Tex. Dec. 22, 2014); *Key Energy Servs., Inc. v. Matt-Alex, Inc.*, No. H-13-2853, 2015 WL 13800090, at \*4 (S.D. Tex. Jan. 8, 2015); *Cormier v. Chet Morrison Contractors, LLC*, 85 F. Supp. 3d 880, 884 (S.D. Tex. 2015); *Mims v. Deepwater Corrosion Servs., Inc.*, 90 F. Supp. 3d 679, 702–03 (S.D. Tex. 2015); *Waddell v. Edison Chouest Offshore*, 93 F. Supp. 3d 714, 725 (S.D. Tex. 2015); *Clear Lake Marine Ctr., Inc. v. Leidolf*, No. H-14-3567, 2015 WL 1876338, at \*2 (S.D. Tex. Apr. 22, 2015); *Ruiz v. Tube-Mac Indus. (Servs.), Inc.*, No. B-15-017, 2015 WL 12838998, at \*6 (S.D. Tex. May 1, 2015); *Ritchey v. Kirby Corp.*, No. CIV.A. 14-CV-0272, 2015 WL 4657548, at \*4 (S.D. Tex. Aug. 5, 2015); *Jimenez v. US Env't Servs., LLC*, No. 14-CV-0246, 2015 WL 4692850, at \*4 (S.D. Tex. Aug. 6, 2015); *Quintanilla v. Peveto Cos.*, No. 15-CV-288, 2015 WL 12838865, at \*4 (S.D. Tex. Aug. 27, 2015); *Sanders v. Cambrian Consultants (CC) Am.*, 132 F. Supp. 3d 853, 858 (S.D. Tex. 2015); *Harrison v. Crowley Mar. Corp.*, 181 F. Supp. 3d 441, 444 (S.D. Tex. 2016); *Pelagidis v. Future Care, Inc.*, No. H-17-3798, 2018 WL 2221838, at \*8 (S.D. Tex. May 15, 2018); *A.E.A. ex rel. Angelopoulos v. Volvo Penta of the Ams., LLC*, 77 F. Supp. 3d 481, 492 (E.D. Va. 2015); *Coronel v. AK Victory*, 1 F. Supp. 3d 1175, 1189 (W.D. Wash. 2014); *N.Y. Marine & Gen. Ins. Co. v. AGCS Marine Ins. Co.*, 454 F. Supp. 3d 1335, 1346 (S.D. Ga. 2020); *Harper v. Wetwild Water Sports, LLC*, No. 19cv4919, 2020 WL 773445, at \*2 (N.D. Fla. Jan. 13, 2020); *Great N. & S. Navigation Co. LLC French Am. Line v. Certain Underwriters at Lloyd's, London*, No. 18-4665, 2019 WL 5957583, at \*2 (E.D. La. Nov. 13, 2019); *Jackson v. Am. Bureau of Shipping*, No. H-20-109, 2020 WL 1743541, at \*2 (S.D. Tex. Apr. 8, 2020); *Belanger v. McDermott Int'l, Inc.*, No. H-19-1591, 2019 WL 5595452, at \*2 (S.D. Tex. Oct. 30, 2019); *Est. of Umar v. Bensch*, No. 18-CV-01414, 2020 WL 3491633, at \*2 (W.D.N.Y. Jan. 9, 2020), *report and recommendation adopted*, No. 18-CV-1414, 2020 WL 3489674 (W.D.N.Y. June 26, 2020), *aff'd in part, rev'd in part and remanded*, 2 F.4th 70 (2d Cir. 2021); *Williams v. Aquachile, Inc.*, 470 F. Supp. 3d 1277, 1279–80 (S.D. Fla. 2020); *Granite State Ins. Co. v. Chaucer Syndicate 1084 at Lloyd's*, No. H-20-1588, 2020 WL 8678020, at \*5 (S.D. Tex. July 14, 2020); *Se. Dock & Platform, LLC v. Atl. Specialty Ins. Co.*, No. 20-1204, 2020 WL 5105322, at \*2–3 (D.S.C. Aug. 31, 2020); *Trahan v. Teche Towing Inc.*, No. 20-CV-01004, 2020 WL 6143664, at \*4 (W.D. La. Oct. 1, 2020), *report and recommendation adopted*, No. 20-CV-01004, 2020 WL 6143691 (W.D. La. Oct. 19, 2020); *Rivera v. Orion Marine Grp. Inc.*, 509 F. Supp. 3d 926, 933–34 (S.D. Tex. 2020), *appeal filed, sub nom. Rivera v. Epic Midstream*, No. 21-40005 (5th Cir. Jan. 4, 2021); *Silagyi v. Towriss*, No. 20-61850-CIV, 2020 WL 7348095, at \*1 (S.D. Fla. Dec. 11, 2020); *Island Ventures, LLC v. K-Mar Supply II, LLC*, No. 20-2263, 2020 WL 6269136, at \*7 (E.D. La. Oct. 26, 2020); *Allied Shipyard Inc. v. Moore*, No. 20-2744, 2020 WL 7351306, at \*2 (E.D. La. Dec. 15, 2020); *Est. of Saravia v. Bayonne Dry Dock & Repair Corp.*, 492 F. Supp. 3d 345, 353–54 (D.N.J. 2020), *appeal filed*, No. 20-3334 (3d Cir. Nov. 19, 2020); *Alexis v. Hilcorp Energy Co.*, 493 F. Supp. 3d 497, 506 (E.D. La. 2020); *Cantu v. Orion Marine Grp., LLC*, 510 F. Supp. 3d 453, 458 (S.D. Tex.

In the absence of a plausible restriction within 28 U.S.C. § 1441 after the JVCA, a bar to removing maritime cases had to be justified elsewhere. Consequently, courts employed a clause within the admiralty jurisdiction statute, which was written to protect a maritime plaintiff's right to a jury trial in non-admiralty courts: the so-called saving-to-suitors clause.<sup>18</sup> Why did the right to a jury trial require express protection? As it happens, maritime claims originally brought in federal court—or theoretically removed to federal court—proceed under admiralty jurisdiction, which does not afford the right to a jury trial unless one is provided via a statute<sup>19</sup> or an independent basis for jurisdiction.<sup>20</sup> When the newly minted federal judiciary was granted “*exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction*,”<sup>21</sup> the possibility emerged that federal admiralty jurisdiction—and its corresponding absence of a jury<sup>22</sup>—was compulsory for adjudication of maritime claims. Because this was not the case, the saving-to-suitors clause<sup>23</sup> explicitly protected both the power

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2020), *appeal docketed, sub nom. Cantu v. Epic Midstream Holdings*, No. 21-40011 (5th Cir. Jan. 5, 2021); *Cook v. Rowan Cos.*, No. H-20-3811, 2021 WL 918756, at \*4 (S.D. Tex. Mar. 10, 2021); *Curry v. Boeing Co.*, No. 20 C 3088, 2021 WL 1088325, at \*11 (N.D. Ill. Mar. 22, 2021); *Ibarra v. Port of Houston Auth.*, 526 F. Supp. 3d 202, 215–16 (S.D. Tex. 2021); *Margaritis v. Mayo*, No. 20-CV-3995, 2021 WL 3472695, at \*2–5 (E.D.N.Y. Aug. 6, 2021).

18. 28 U.S.C. § 1333 (2018) (“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*.” (emphasis added)).

19. See FED. R. CIV. P. 9 advisory committee’s note to 1966 amendment (“One of the important procedural consequences is that in the civil action either party may demand a jury trial, while in the suit in admiralty there is no right to jury trial except as provided by statute.”); see also *Fitzgerald v. U.S. Lines Co.*, 374 U.S. 16, 17 (1963) (“[T]he actions for unseaworthiness and for maintenance and cure are traditional admiralty remedies which in the absence of a statute do not ordinarily require trial by jury.”).

20. See *In re Chimenti*, 79 F.3d 534, 537 (6th Cir. 1996) (“[A]dmiralty and maritime claims are not removable to federal court unless there exists some *independent* basis, such as diversity of the parties, for federal jurisdiction.”).

21. Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76–77 (codified as amended in scattered sections of 28 U.S.C.) (emphasis added) (“That the district courts[] shall have . . . exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction . . .”).

22. See *id.* at 77 (“And the trial of issues in fact, in the district courts, in all causes except civil causes of admiralty and maritime jurisdiction, shall be by jury.”).

23. The original saving-to-suitors clause provided that, “[T]he district courts[] shall have . . . exclusive original cognizance of all civil causes 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 . . .” *Id.* at 76–77. This enactment is currently codified in 28 U.S.C. § 1333.



of state courts to adjudicate maritime matters within their borders<sup>24</sup> and a plaintiff's corresponding right to a jury trial in state court.<sup>25</sup>

Preventing removal with a statute that protects jury trials is founded on the rationale that a defendant's act of removing a case under admiralty jurisdiction would deprive a maritime plaintiff of the right to a jury trial.<sup>26</sup> This historic right existed prior to the creation of the federal judiciary<sup>27</sup> and was explicitly protected by the saving-to-suitors clause thereafter.<sup>28</sup> However, the protection provided by the saving-to-suitors clause only extends to the jury trial and not to the state forum itself.<sup>29</sup> The saving-to-suitors clause could therefore only operate to bar removal if federal courts sitting in admiralty necessarily deprive plaintiffs of jury trials, which is not the case.<sup>30</sup>

Following the stint of decisions that permitted maritime cases to be removed after the JVCA,<sup>31</sup> district courts decisively settled on prohibiting the practice.<sup>32</sup> However, the higher courts that have considered the issue following the JVCA have not followed course. Cases from both the Fifth and Seventh Circuits have surprisingly maintained

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24. See *Steamboat Co. v. Chase*, 83 U.S. (16 Wall.) 522, 527 (1872) ("The fact that the Federal government has the power to carry out the objects of the Federal government over water or land, does not abrogate the power of a State to protect her citizens.").

25. See *Red Cross Line v. Atl. Fruit Co.*, 264 U.S. 109, 123–24 (1924) ("The 'right of a common-law remedy,' so saved to suitors . . . include[s] . . . all means other than proceedings in admiralty which may be employed to enforce the right or to redress the injury involved."); see also *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438, 454–55 (2001) ("Trial by jury is an obvious, but not exclusive, example of the remedies available to suitors." (citations omitted)).

26. See, e.g., *Barry v. Shell Oil Co.*, No. 13-6133, 2014 WL 775662, at \*3 (E.D. La. Feb. 25, 2014) ("[T]he removal of Plaintiff's claim solely on the basis of admiralty jurisdiction would deprive him of the right to pursue his nonmaritime remedy of a jury trial . . ."); *Riley v. Llog Expl. Co.*, No. 14-437, 2014 WL 4345002, at \*4 (E.D. La. Aug. 28, 2014) ("[T]here can be no question that a plaintiff necessarily loses his right to a jury trial when a case is removed into admiralty.").

27. See Robert Force, *Understanding the Nonremovability of Maritime Cases: Lessons Learned from "Original Intent,"* 89 TUL. L. REV. 1019, 1022–23 (2015) ("The vice-admiralty courts heard cases without a jury, and plaintiffs could choose to file suit there or in the common law courts.").

28. See *Lewis*, 531 U.S. at 454–55 ("Trial by jury is an obvious, but not exclusive, example of the remedies available to suitors.").

29. See *The Moses Taylor*, 71 U.S. (4 Wall.) 411, 431 (1866) ("It is not a remedy in the common-law courts which is saved, but a common-law remedy."); *The Belfast*, 74 U.S. (7 Wall.) 624, 644 (1868) (common law remedies are saved "to suitors, and not to the State courts").

30. See *Fitzgerald v. U.S. Lines Co.*, 374 U.S. 16, 20 (1963) (footnotes omitted) ("While this Court has held that the Seventh Amendment does not require jury trials in admiralty cases, neither that Amendment nor any other provision of the Constitution forbids them. Nor does any statute of Congress or Rule of Procedure, Civil or Admiralty, forbid jury trials in maritime cases.").

31. See cases cited *supra* note 16.

32. Compare dates and quantity of cases allowing removal in *supra* note 16 with dates and quantity of cases prohibiting removal in *supra* note 17.

the uncertainty as to whether maritime cases are in fact removable when admiralty is the sole basis for federal jurisdiction.<sup>33</sup> The issue still awaits a definitive resolution.

Thus, it is a fitting time to fully elucidate the topic of maritime removal, which has been mired in a century of prohibition<sup>34</sup> and remains stagnant due to the specious perception that federal courts sitting in admiralty are incapable of providing a jury trial.<sup>35</sup> Clarification ultimately requires a careful investigation of the relevant statutes and the separation of traditional admiralty procedure<sup>36</sup> from admiralty jurisdiction.<sup>37</sup> This Article aims to correct the enduring misunderstanding and establish original jurisdiction as an unqualified standard for removal under 28 U.S.C. § 1441. Part II illuminates the erroneous historical justification for prohibiting removal based on 28 U.S.C. § 1441(b), which is, and has always been, inapplicable to maritime cases. Part III of the Article examines the historical intricacies of admiralty jurisdiction and the saving-to-suitors clause to reveal how their interaction with the evolving removal statute errantly produced a prohibition on the removal of maritime cases. Part IV presents a contemporary solution: the saving-to-suitors clause should be established as

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33. See *Lu Junhong v. Boeing Co.*, 792 F.3d 805, 818 (7th Cir. 2015) (“Our conclusion that § 1333(1) supplies admiralty jurisdiction shows that subject-matter jurisdiction exists. Plaintiffs thus could have filed these suits directly in federal court (as many victims of this crash did). If the saving-to-suitors clause allows them to stay in state court even after the 2011 amendment, they are free to waive or forfeit that right—which given the scope of § 1331(1) concerns venue rather than subject matter jurisdiction. Boeing therefore was entitled to remove these suits to federal court.”); *Sangha v. Navig8 Shipmanagement Priv. Ltd.*, 882 F.3d 96, 100 (5th Cir. 2018) (“[T]he question of subject-matter jurisdiction presented in this case—whether the saving-to-suitors clause of the federal maritime statute prohibits removal of general maritime claims absent an independent basis for federal jurisdiction in light of Congress’s December 2011 amendment to the federal removal statute—is not clear.”).

34. See, e.g., *Demer v. Pac. S.S. Co.*, 273 F. 567, 577 (W.D. Wash. 1921) (denying removal of a maritime case).

35. See, e.g., *Barry v. Shell Oil Co.*, No. 13-6133, 2014 WL 775662, at \*3 (E.D. La. Feb. 25, 2014) (“[S]ince the removal of Plaintiff’s claim solely on the basis of admiralty jurisdiction would deprive him of the right to pursue his nonmaritime remedy of a jury trial, the saving to suitors clause under these circumstances prohibits the removal of this action.”); *Riley v. Llog Expl. Co.*, No. 14-437, 2014 WL 4345002, at \*4 (E.D. La. Aug. 28, 2014) (“[T]here can be no question that a plaintiff necessarily loses his *right* to a jury trial when a case is removed into admiralty.”); *Pierce v. Parker Towing Co.*, 25 F. Supp. 3d 1372, 1390 (S.D. Ala. 2014) (“Had Plaintiffs filed the same claims in this Court, pursuant to . . . admiralty jurisdiction . . . the remedy of trial by jury would not be available.”).

36. See FED. R. CIV. P. 9 advisory committee’s note to 1966 amendment (“One of the important procedural consequences is that in the civil action either party may demand a jury trial, while in the suit in admiralty there is no right to jury trial except as provided by statute.”).

37. 28 U.S.C. § 1333 (2018) (“The district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty or maritime jurisdiction . . .”).

a statute that provides the right to a jury trial after a maritime case has been removed to federal court under admiralty jurisdiction.<sup>38</sup> This approach both upholds the saving-to-suitors clause and does not contravene the modern standard for removal.<sup>39</sup> By exploring the history of the federal judiciary, this review expounds the propriety of removing maritime cases to federal court and describes the antiquated analysis that fostered the canonical prohibition known today.

## II. 28 U.S.C. § 1441: THE REMOVAL STATUTE

### A. Centuries of Statutory Evolution

For the past 100 years, courts have struggled to apply the continually evolving removal statute to maritime claims.<sup>40</sup> While maritime cases are never directly addressed by 28 U.S.C. § 1441 or its predecessors,<sup>41</sup> these suits theoretically entered the purview of removal jurisdiction by statute more than a century after its creation.<sup>42</sup> Nonetheless, in practice, courts have toiled to include maritime claims within

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38. See FED. R. CIV. P. 9 advisory committee's note to 1966 amendment ("One of the important procedural consequences is that in the civil action either party may demand a jury trial, while in the suit in admiralty there is no right to jury trial *except as provided by statute.*" (emphasis added)).

39. 28 U.S.C. § 1441(a) ("[A]ny civil action brought in a State court of which the district courts of the United States have *original jurisdiction*, may be removed . . ." (emphasis added)).

40. See, e.g., *Demer v. Pac. S.S. Co.*, 273 F. 567, 568, 576–77 (W.D. Wash. 1921) ("[I]t may appear that a suit upon a tort suffered by one in the service of the ship upon navigable waters . . . is now removable to the District Court . . ."); *Id.* at 576–77. ("[I]f this cause is held to be removable, it would seem to logically follow that a suitor, suing on account of a maritime tort at common law in the District Court . . . could demand a jury as a matter of right. Such a radical departure from the established practice is alone sufficient to cast doubt upon the right of removal.")

41. See Judiciary Act of 1789, ch. 20, § 12, 1 Stat. 73, 79–80 (codified as amended in scattered sections of 28 U.S.C.); Judiciary Act of 1875, ch. 137, § 2, 18 Stat. 470, 470–71; Act of Mar. 3, 1887, ch. 373, § 2, 24 Stat. 552, 553; Judicial Code of 1911, Pub. L. No. 61-475, § 28, 36 Stat. 1087, 1094–95; 28 U.S.C. § 1441 (2006).

42. See *Demer*, 273 F. at 575 ("As the Circuit Court had no original jurisdiction, under the admiralty and maritime law, a cause arising thereunder could not be removed. Under the foregoing terms of section 2, of course, there was no removal from the state court to the District Court, which did have such original jurisdiction. By the Judicial Code, taking effect January 1, 1912, both the original jurisdiction of the Circuit Court and its jurisdiction upon removal were transferred to, or merged in, the District Court."); Judicial Code of 1911 § 28 ("Any other suit of a civil nature, at law or in equity, of which the district courts of the United States are given jurisdiction by this title . . . may be removed into the district court of the United States . . ."); *Id.* § 24 ("The district courts shall have original jurisdiction as follows: . . . Third. Of all civil causes of admiralty and maritime jurisdiction . . .").

removal jurisdiction when considering the historical inability to remove these cases.<sup>43</sup>

Removal jurisdiction was originally created by the Judiciary Act of 1789, but its scope was limited to cases that possessed diversity of citizenship.<sup>44</sup> Nearly a century passed before the removal of maritime cases could be contemplated once the Judiciary Act of 1875 permitted removal of suits arising under the Constitution or laws of the United States.<sup>45</sup> The expanded scope of the removal statute could have plausibly included maritime cases, yet these suits were understood not to arise from the Constitution or laws of the United States.<sup>46</sup> Consequently, the removal statute remained inapplicable to maritime claims.

In 1887, the removal statute was amended to the modern standard of removability, which requires eligible cases be within the courts' "original jurisdiction."<sup>47</sup> However, as originally enacted, this standard for removal was based on the jurisdiction of the now defunct circuit

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43. See, e.g., *Coronel v. AK Victory*, 1 F. Supp. 3d 1175, 1178 (W.D. Wash. 2014) ("The court concludes, however, that it is the statutory grant of admiralty jurisdiction, 28 U.S.C. § 1333, and more than 200 years of precedent interpreting this grant, that ultimately determine the removability of Plaintiff's claims.").

44. See 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 . . . five hundred dollars . . . 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 . . ."). This enactment is currently codified in 28 U.S.C. § 1441(a).

45. Judiciary Act of 1875 § 2 ("That any suit of a civil nature, at law or in equity, now pending or hereafter brought in any State court . . . and arising under the Constitution or laws of the United States, or treaties made . . . either party may remove said suit into the circuit court of the United States for the proper district.").

46. See Harold K. Watson & Ifigeneia Xanthopoulos, *Evolution and Unification of the Federal Admiralty Rules and Federal Rules of Civil Procedure*, 92 TUL. L. REV. 1123, 1139 (2018) ("[T]he universal understanding at the time of this amendment was that maritime cases did not arise under the 'Constitution or laws of the United States.' [The Judiciary Act of 1875] therefore did not give the courts the occasion to address whether a maritime claim filed in state court could be removed in the absence of diversity or an applicable federal statute." (footnote omitted)); see also *Winter v. Swinburne*, 8 F. 49, 54 (E.D. Wis. 1881) ("The argument is that the matter in dispute here arises under the constitution and laws of the United States; that the decree in admiralty, which is the foundation of this suit, is the creature of the federal laws and constitution . . . . I cannot concur in this view.").

47. See Act of Mar. 3, 1887, ch. 373, § 2, 24 Stat. 552, 553 ("[A]ny suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the circuit courts of the United States are given original jurisdiction . . . may be removed by the defendant or defendants therein to the circuit court of the United States for the proper district[;] any other suit of a civil nature, at law or in equity of which the circuit courts of the United States are given jurisdiction . . . may be removed into the circuit court of the United States . . . by the defendant or defendants therein being non-residents of that state" (emphasis added)). This enactment is currently provided in 28 U.S.C. § 1441.

courts,<sup>48</sup> which did not have jurisdiction over maritime matters,<sup>49</sup> thereby sustaining the exclusion of maritime cases from removal jurisdiction. A highly consequential change soon followed in 1911 when Congress abolished the circuit courts and transferred their jurisdiction to the district courts.<sup>50</sup> Thereafter, removable cases had to be within the original jurisdiction of the district courts—the standard that persists today.<sup>51</sup> Cases that arose under the Constitution or laws of the United States remained freely removable after 1911, but in addition, nonresident defendants could also remove “[a]ny other suit of a civil nature, at law or in equity, of which the district courts of the United States [were] given jurisdiction.”<sup>52</sup> Because the Judicial Code of 1911 maintained the district courts’ jurisdiction over maritime and admiralty claims,<sup>53</sup> such cases would have been theoretically removable as “other suits” after 1911 provided the defendants were not residents of the forum state.<sup>54</sup> The section of the removal statute that became applicable to maritime cases as “other suits” beginning in 1911<sup>55</sup> and

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48. See ROBERT DESTY, *THE REMOVAL OF CAUSES FROM STATE TO FEDERAL COURTS* 204 (3d ed. 1893) (“Under the Act of 1887, no cause can be removed unless the circuit court would or could have had original jurisdiction of the controversy involved.”). The former U.S. circuit courts—not to be confused with the regional circuits for the current U.S. courts of appeals—were important federal trial courts with limited appellate jurisdiction established by the Judiciary Act of 1789 and abolished by the Judicial Code of 1911. See *Landmark Legislation: Abolition of U.S. Circuit Courts*, FED. JUD. CTR., <https://www.fjc.gov/history/legislation/landmark-legislation-abolition-us-circuit-courts> [<https://perma.cc/V93N-3KJD>].

49. See *Demer v. Pac. S.S. Co.*, 273 F. 567, 575 (W.D. Wash. 1921) (As the Circuit Court had no original jurisdiction, under admiralty and maritime law, a cause arising thereunder could not be removed.”); see also Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77 (“That the district courts shall have . . . exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction . . .”).

50. See *Landmark Legislation*, *supra* note 48.

51. See Judicial Code of 1911, Pub. L. No. 61-475, § 28, 36 Stat. 1087, 1094–95 (“Any other suit of a civil nature, at law or in equity, of which the district courts of the United States are given jurisdiction by this title . . . may be removed into the district court of the United States . . .”); 28 U.S.C. § 1441(a) (2018) (“[A]ny civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed . . .”).

52. Judicial Code of 1911 § 28.

53. Judicial Code of 1911 § 24 (“The district courts shall have original jurisdiction as follows: . . . Third. Of all civil causes of admiralty and maritime jurisdiction . . .”).

54. See 14A CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 3674, 630–31 (4th ed. 2013) (“There does not appear to be any statutory reason for denying a defendant who is not a citizen of the state in which the federal court is sitting the right to remove a state initiated maritime action brought under the savings clause.”).

55. See Judicial Code of 1911 § 28. This enactment is currently provided in 28 U.S.C. section 1441(b).

remaining pertinent until amended by the JVCA would eventually be known as the Forum Defendant Rule (FDR).<sup>56</sup>

While the nascent FDR theoretically allowed removal of maritime claims,<sup>57</sup> it surprisingly evolved into the section of the removal statute that would function to prohibit removal thereafter.<sup>58</sup> After 1911, the main removal clause restricted removal of cases within the district courts' original jurisdiction to those that arose under the Constitution and laws of the United States<sup>59</sup> (which did not include maritime cases),<sup>60</sup> and the nascent FDR further permitted nonresident defendants to remove "other suits" within the courts' original jurisdiction.<sup>61</sup> When the modern judicial code was created in 1948, the main removal clause's requirement that cases arise under the Constitution and laws of the United States was abrogated<sup>62</sup> and removal became governed exclusively by the district courts' original

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56. See Aaron E. Hankel, Note, *On the Road to the Merits in Our Federal System: Is the "Forum Defendant Rule" a Procedural Speed Bump or a Jurisdictional Road Block?*, 28 WASH. U.J.L. & POL'Y 427, 434 (2008) (citations omitted) ("Yet, where removal is predicated upon the diversity of the litigants, Congress rejected a per se right to removal and conditioned the defendant's right to remove upon his relation to the forum state. This restriction is embodied in § 1441(b), and has been dubbed the Forum Defendant Rule." (footnotes omitted)).

57. See Judicial Code of 1911 § 28 ("Any other suit of a civil nature, at law or in equity, of which the district courts of the United States are given jurisdiction by this title . . . may be removed into the district court of the United States for the proper district by the defendant or defendants therein, being nonresidents of that state."). This enactment is currently provided in 28 U.S.C. section 1441(b).

58. See 28 U.S.C. § 1441(b) (2006) ("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."); *In re Dutile*, 935 F.2d 61, 63 (5th Cir. 1991) ("The practical effect of [§ 1441(b)] is to prevent the removal of admiralty claims pursuant to § 1441(a) unless there is complete diversity of citizenship . . .").

59. See Judicial Code of 1911 § 28 ("Any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made . . . of which the district courts of the United States are given original jurisdiction by this title . . . may be removed by the defendant . . ."). This enactment is currently provided in 28 U.S.C. § 1441(b).

60. See *Watson & Xanthopoulou*, *supra* note 46, at 1139.

61. See Judicial Code of 1911 § 28 ("Any other suit of a civil nature, at law or in equity, of which the district courts of the United States are given jurisdiction by this title . . . may be removed into the district court of the United States for the proper district by the defendant or defendants therein, being nonresidents of that state."). This enactment is currently provided in 28 U.S.C. § 1441(b).

62. See Act of June 25, 1948, ch. 646, § 1441(a), 62 Stat. 869, 937–38 (codified at 28 U.S.C. § 1441(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 . . .").

jurisdiction,<sup>63</sup> which did include maritime cases.<sup>64</sup> Consequently, after 1948, removal of maritime claims would have been allowable under the main removal clause, 28 U.S.C. § 1441(a),<sup>65</sup> while the codified FDR, 28 U.S.C. § 1441(b),<sup>66</sup> became a clawback provision that prohibited citizen defendants from removing cases that did not arise under the Constitution and the laws of the United States—including maritime cases.<sup>67</sup> The removal statute went nearly unchanged until the JVCA in 2011.<sup>68</sup> At this point, the FDR, which was formerly applicable to all cases that did not arise under the Constitution and laws of the United States,<sup>69</sup> was clarified according to its genuine purpose<sup>70</sup>: to exclusively control removal based on diversity of citizenship.<sup>71</sup>

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63. *See id.*; *see also* *Sabin v. Home Owners' Loan Corp.*, 147 F.2d 653, 655–56 (10th Cir. 1945) (“The test for determining the removability of an action is whether the United States Court might have exercised original jurisdiction.”); *Nyberg v. Montgomery Ward & Co.*, 123 F. Supp. 599, 602–03 (W.D. Mich. 1954) (“The test as to whether the defendant was entitled to remove the present civil action from the State court to this Federal district court, is whether this court would have had original jurisdiction of the action.”).

64. *See* 28 U.S.C. § 1333 (1952) (“The district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty or maritime jurisdiction . . .”).

65. *See id.* § 1441(a) (1952) (“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 . . .”).

66. *See id.* § 1441(b) (1952) (“Any civil action . . . 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.”).

67. *See* *Watson & Xanthopoulou*, *supra* note 46, at 1139–40.

68. *See* The Federal Courts Jurisdiction and Venue Clarification Act of 2011, Pub. L. 112-63, § 103, 125 Stat. 758, 759.

69. *See* 28 U.S.C. § 1441(b) (2006) (“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.”).

70. *See* Comment, *Judicial Code Section 1441 and Federal Admiralty Jurisdiction*, 10 STAN. L. REV. 168, 170 (1957) (quoting 28 U.S.C. § 1441(b)) (“1441(b) . . . divides all removable cases into two classes: (1) ‘[A]ctions arising under the Constitution, treaties, or laws of the United States’; (2) Actions in which ‘none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.’ The second class obviously refers only to diversity and alienage cases.” (alteration in original)); *see also* H.R. REP. NO. 112-10, at 12 (2011) (“Proposed paragraph 1441(b)(2) restates the substance of the last sentence of current subsection 1441(b), which relates only to diversity.”).

71. *See* The Federal Courts Jurisdiction and Venue Clarification Act of 2011 § 103 (“A civil action otherwise removable solely on the basis of the jurisdiction under section 1332(a) of this title [diversity jurisdiction] 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.”).

Diversity jurisdiction was originally created to allow out-of-state defendants to evade the potential for local bias in state courts.<sup>72</sup> The limitation imposed by the FDR prevents defendants who are citizens of the forum state, and therefore not subject to bias, from removing cases to federal court.<sup>73</sup> The FDR's limitation eventually extended to "other suits,"<sup>74</sup> but its basic premise began as a central requirement for removal on the basis of diversity in the Judiciary Act of 1789.<sup>75</sup> When the JVCA clarified the FDR to exclude all non-diversity of citizenship cases,<sup>76</sup> it restored the FDR's original embodiment and corroborated the diversity-specific purpose of the rule.<sup>77</sup>

In the absence of the rationale for diversity jurisdiction—namely, prejudice based on citizenship—application of the FDR is inappropriate. Courts have understandably strained to apply the FDR's citizenship requirements to maritime claims<sup>78</sup> and have repeatedly recognized its irrelevance to these cases.<sup>79</sup> The struggle to finagle maritime

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72. See Hankel, *supra* note 56, at 434 ("[W]here the basis for removal is diversity of citizenship, the defendant's right to remove the litigation from a state court of competent jurisdiction to the federal courts only exists where the defendant is not a resident of the forum state. This restriction is reasonable considering the rationale for removal of diversity actions, namely the possibility for bias against an out-of-state defendant." (footnotes omitted)).

73. See *id.* ("Yet, where removal is predicated upon the diversity of the litigants, Congress rejected a *per se* right to removal and conditioned the defendant's right to remove upon his relation to the forum state. This restriction is embodied in § 1441(b), and has been dubbed the Forum Defendant Rule." (footnotes omitted)).

74. See Judicial Code of 1911, Pub. L. No. 61-475, § 28, 36 Stat. 1087, 1094–95 ("Any other suit of a civil nature, at law or in equity, of which the district courts of the United States are given jurisdiction by this title . . . may be removed into the district court of the United States for the proper district by the defendant or defendants therein, being nonresidents of that State."). This enactment is currently provided in 28 U.S.C. § 1441.

75. See Judiciary Act of 1789, ch. 20, § 12, 1 Stat. 73, 79–80 (codified as amended in scattered sections of 28 U.S.C.) ("[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 . . . five hundred dollars . . . 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 . . ." (emphasis added)).

76. See *supra* note 15.

77. See *supra* notes 69–73 and accompanying text.

78. See, e.g., *J.J. Ryan & Sons, Inc. v. Cont'l Ins. Co.*, 369 F. Supp. 692, 697–98 (D.S.C. 1974) (holding that removal of maritime claims was improper even though the court had original jurisdiction and defendant was not a citizen of the forum state).

79. See *Barker v. Hercules Offshore, Inc.*, 713 F.3d 208, 230 (5th Cir. 2013) (citation omitted) ("Absent diversity . . . it simply does not make any sense to make removal of a saving-clause case turn on whether one of the defendants is a citizen of the forum state. The fortuity of citizenship is totally irrelevant to the policy factors germane to the removal question under discussion." (quoting *WRIGHT, supra* note 14, at § 3674); *Tenn. Gas Pipeline v. Houston Cas. Ins. Co.*, 87 F.3d 150, 156 (5th Cir. 1996) ("We recognize that it may be a distortion of the legal scheme to decide this case



cases within the FDR prior to the JVCA resulted in a prevalent yet perplexing interpretation that the FDR, a limitation on diversity cases,<sup>80</sup> actually required diverse citizenship among parties to remove a maritime case.<sup>81</sup> Yet, this interpretation was largely a disguised prohibition on removal because diversity independently affords federal jurisdiction, regardless of the maritime nature of the claims.<sup>82</sup>

While the JVCA might have amended the FDR, it did not change the FDR's original purpose or applicability to maritime cases.<sup>83</sup> As a result, inclusion of maritime claims within the purview of the FDR is, and has always been, a nonsensical basis to regulate the removability of maritime cases. The JVCA merely made this understanding explicit.<sup>84</sup> The majority of district courts that denied removal of maritime cases following the JVCA were consequently correct to conclude that the amended FDR should not affect the removability of maritime claims,<sup>85</sup> yet given the unabating irrelevance of the FDR, it should never have restricted or theoretically allowed removal of these suits in the first place.

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on the citizenship of [the defendant]. . . . [T]he language of the second sentence supports removal, though the purpose of the sentence (diversity) is arguably irrelevant to our case.”)

80. See *Lively v. Wild Oats Mkts., Inc.*, 456 F.3d 933, 939 (9th Cir. 2006) (“Separate and apart from the statute conferring diversity jurisdiction, 28 U.S.C. § 1332, § 1441(b) confines removal on the basis of diversity jurisdiction to instances where no defendant is a citizen of the forum state.”); see also H.R. REP. NO. 112-10, at 12 (2011) (“Proposed paragraph 1441(b)(2) restates the substance of the last sentence of current subsection 1441(b), which relates only to diversity.”).

81. See Michael F. Sturley, *Removal into Admiralty: The Removal of State-Court Maritime Cases to Federal Court*, 46 J. MAR. L. & COM. 105, 117 (2015) (“Under section 1441(b)’s second sentence (at that time), the forum-defendant constraint barred removal in all cases except federal question cases when a proper defendant was a citizen of the forum state. On that basis, the *Dutile* court concluded ‘that the ‘practical effect of these provisions is to prevent removal of admiralty claims pursuant to § 1441(a) unless there is complete diversity of citizenship (predicated upon out-of-state defendants) . . . . A defendant who desires to remove a maritime action from state court must establish diversity jurisdiction.’” (omission in original) (footnote omitted) (quoting *In re Dutile*, 935 F.2d 61, 63 (5th Cir. 1991))).

82. See 28 U.S.C. § 1332 (2018). Diversity of citizenship jurisdiction also has an amount in controversy requirement. See *id.*

83. See Hankel, *supra* note 56, at 434 (“[W]here the basis for removal is diversity of citizenship, the defendant’s right to remove the litigation from a state court of competent jurisdiction to the federal courts only exists where the defendant is not a resident of the forum state. This restriction is reasonable considering the rationale for removal of diversity actions, namely the possibility for bias against an out-of-state defendant.” (footnote omitted)); *id.* (“Yet, where removal is predicated upon the diversity of the litigants, Congress rejected a per se right to removal and conditioned the defendant’s right to remove upon his relation to the forum state. This restriction is embodied in § 1441(b), and has been dubbed the Forum Defendant Rule.” (footnote omitted)).

84. See H.R. REP. NO. 112-10, at 12 (“This change is intended to make it easier for litigants to locate the provisions that apply uniquely to diversity removal.”).

85. See cases cited *supra* note 17.

Intriguingly, if Congress chose to expressly exclude non-diversity cases from the purview of the early FDR prior to the creation of the judicial code in 1948—when the nascent FDR served as the allowance, rather than the limitation to removal<sup>86</sup>—this action would have actually *prevented* removal of maritime cases. Such an arbitrary result further evidences the irrationality of using the FDR to govern maritime removal. The former influences of the FDR to maritime cases should have been disregarded, and following the JVCA, fortunately they must be. The standard for removal remains inarguably founded on the district courts’ original jurisdiction,<sup>87</sup> and no exceptions for maritime cases—express or contrived—currently exist within the removal statute or its exceptions.<sup>88</sup> Several courts understandably permitted removal of maritime cases based on the plain language of the amended removal statute following the JVCA.<sup>89</sup> Nevertheless, this seemingly novel capacity within the federal judiciary would prove to be controversial.

### B. Judicial Vacillation

The modern debate regarding the removability of maritime claims has revolved around the 2013 Southern District of Texas case, *Ryan v. Hercules Offshore, Inc.*<sup>90</sup> *Ryan* has served as the face of the maritime removal cause, yet it was not the first case to employ a four-corners reading of 28 U.S.C. § 1441 to allow removal of maritime claims.<sup>91</sup> In fact, several courts in the 1950s acknowledged the possibility of removing maritime cases provided the defendant was not a citizen of the forum state in compliance with the FDR.<sup>92</sup> However, by the end of the

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86. See Judicial Code of 1911, Pub. L. No. 61-475, § 28, 36 Stat. 1087, 1094–95 (“Any other suit of a civil nature, at law or in equity, of which the district courts of the United States are given jurisdiction by this title . . . may be removed into the district court of the United States for the proper district by the defendant or defendants therein, being nonresidents of that State.”).

87. See 28 U.S.C. § 1441(a) (2018) (“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 . . .”).

88. See 28 U.S.C. §§ 1441, 1445 (2018).

89. See cases cited *supra* note 16.

90. 945 F. Supp. 2d 772 (S.D. Tex. 2013).

91. See, e.g., *Davis v. Matson Navigation Co.*, 143 F. Supp. 537, 538–39 (N.D. Cal. 1956) (permitting removal of a maritime case).

92. See *id.*; *Crispin Co. v. Lykes Bros. S.S. Co.*, 134 F. Supp. 704, 707 (S.D. Tex. 1955) (acknowledging that removal of maritime cases does not require diversity jurisdiction); *Crawford v. E. Asiatic Co.*, 156 F. Supp. 571, 572–74 (N.D. Cal. 1957) (stating that removal would have been proper if the defendant was not a citizen of the forum state).

1950s, courts entirely discounted removal of maritime cases after the Supreme Court discouraged the practice in *Romero v. International Terminal Operating Co.*<sup>93</sup>

Despite its influence, *Romero* did not actually involve removal.<sup>94</sup> Further, *Romero*'s commonly cited dictum opposing removal of maritime cases analyzed whether these suits could be removed under federal question jurisdiction<sup>95</sup>—an impossibility recognized since removal based on federal question jurisdiction was created.<sup>96</sup> *Romero* also did nothing to alter the unanimous understanding that maritime cases were considered “other actions” under 28 U.S.C. § 1441(b),<sup>97</sup> and thus, should have been removable as long as no defendant was a citizen of the forum state.<sup>98</sup> Nonetheless, courts found *Romero*'s dictum<sup>99</sup> to be persuasive and subsequently began patently denying removal of maritime cases on that basis, independent of the citizenship standard in the FDR.<sup>100</sup> The topic remained dormant for decades.

The JVCA reignited the debate in 2011 by rendering the belabored inclusion of maritime suits within the FDR meritless.<sup>101</sup> The *Ryan* court was the first to meaningfully act on the amended removal statute as it applied to maritime cases. In *Ryan*, the court analyzed the JVCA amended removal statute and concluded that its unambiguous

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93. 358 U.S. 354 (1959). *See, e.g.*, Harbor Boating Club of Huntington, N.Y., Inc. v. Red Star Towing & Transp. Co., 179 F. Supp. 755, 756–57 (E.D.N.Y. 1960) (denying removal of a maritime case based on dicta from *Romero*, 358 U.S. at 371–72).

94. *See Romero*, 358 U.S. at 355–58.

95. *See id.* at 371–72 (discussing the procedural difficulties that would ensue from including maritime cases within federal question jurisdiction).

96. *See Watson & Xanthopoulou, supra* note 46, at 1139–42.

97. *See In re Dutile*, 935 F.2d 61, 63 (5th Cir. 1991) (“[A]dmiralty and general maritime claims fall within the category of ‘[a]ny other [civil] action’ governed by the second sentence of § 1441(b).” (second and third alterations in original)).

98. *See* 28 U.S.C. § 1441(b) (1952).

99. *See Romero*, 358 U.S. at 372 (“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 savings clause of 1789 to preserve.”).

100. *See WRIGHT ET AL., supra* note 54, at 628. (“[I]n a number of cases federal courts have read the *Romero* [sic] dictum as meaning that maritime litigation brought in state courts cannot be removed to federal courts unless diversity of citizenship or another independent ground of federal subject-matter jurisdiction exists.”).

101. *See* 28 U.S.C. § 1441(b) (2018) (“(1) In determining whether a civil action is removable on the basis of the jurisdiction under section 1332(a) of this title [diversity jurisdiction], the citizenship of defendants sued under fictitious names shall be disregarded.”); H.R. REP. NO. 112-10, at 12 (2011) (“Proposed paragraph 1441(b)(2) restates the substance of the last sentence of current subsection 1441(b), which relates only to diversity.”).

language no longer prevented removal of maritime cases.<sup>102</sup> In making this conclusion, the *Ryan* court overlooked the congressional intent of the JVCA amendment<sup>103</sup> and gave only a superficial, albeit correct, appraisal of the potential limitations to removal within the saving-to-suitors clause.<sup>104</sup> Following the decision in *Ryan*,<sup>105</sup> other courts in the Eastern and Southern Districts of Texas and the Middle District of Louisiana similarly allowed removal of maritime cases.<sup>106</sup> Yet, the decisions from *Ryan* and its progeny were widely criticized and disavowed by other courts,<sup>107</sup> and later even by the judge who decided *Ryan*.<sup>108</sup> The reasoning in *Ryan* was denounced on two major bases: first, it was argued that the JVCA amendment to the removal statute was insufficient to overcome centuries of practice and precedent without the congressional intent to effect such a change;<sup>109</sup> and second, it was argued that in the absence of a prohibition within the FDR,<sup>110</sup> the saving-to-suitors clause remained an additional act of Congress within the meaning of 28 U.S.C. § 1441(a)<sup>111</sup> that barred removal.<sup>112</sup>

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102. *Ryan v. Hercules Offshore, Inc.*, 945 F. Supp. 2d 722, 779 (S.D. Tex. 2013) (“[A]ll of Plaintiffs claims are admiralty claims over which a federal district court has original jurisdiction and the revised removal statute does not limit the removal of these claims.”).

103. *See id.* at 777 (“While it is possible that Congress did not intend for the changes to section 1441 to be substantive, it nevertheless made substantial changes to the text of section 1441(b). The new statute does not contain any ambiguous language.”).

104. *See id.* at 774.

105. *Id.* at 779.

106. *See cases cited supra* note 16.

107. *See cases cited supra* note 17.

108. *See Sanders v. Cambrian Consultants (CC) Am., Inc.*, 132 F. Supp. 3d 853, 858 (S.D. Tex. 2015) (denying removal of a maritime case).

109. *See, e.g., Coronel v. AK Victory*, 1 F. Supp. 3d 1175, 1178 (W.D. Wash. 2014) (“The court concludes, however, that it is the statutory grant of admiralty jurisdiction, 28 U.S.C. § 1333, and more than 200 years of precedent interpreting this grant, that ultimately determine the removability of Plaintiff’s claims.”).

110. *See In re Dutile*, 935 F.2d 61, 63 (5th Cir. 1991) (“The practical effect of [§ 1441(b)] is to prevent the removal of admiralty claims pursuant to § 1441(a) unless there is complete diversity of citizenship . . .”).

111. 28 U.S.C. § 1441(a) (2018) (“*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 . . .” (emphasis added)).

112. *See, e.g., Pierce v. Parker Towing Co.*, 25 F. Supp. 3d 1372, 1383 (S.D. Ala. 2014) (“§ 1333(1) remains an Act of Congress that limits the Court’s removal jurisdiction by ‘saving to suitors’ common law remedies . . .”); *A.E.A. ex rel. Angelopoulos v. Volvo Penta of the Ams., LLC*, 77 F. Supp. 3d 481, 491 (E.D. Va. 2015) (“[T]he saving to suitors clause, which establishes concurrent jurisdiction over maritime cases, is an Act of Congress in which Congress has expressly provided an exception to an otherwise removable action under § 1441.”); *Barry v. Shell Oil Co.*, No. 13-6133, 2014 WL 775662, at \*3 (E.D. La. Feb. 25, 2014) (“[S]ince the removal of Plaintiff’s claim solely on the basis of admiralty jurisdiction would deprive him of the right to pursue his

These arguments boil down to a similar premise as the basis for the historical practice of excluding maritime claims from removal jurisdiction is the saving-to-suitors clause.<sup>113</sup> However, the saving-to-suitors clause is not an outright prohibition on removal because state maritime cases brought pursuant to the saving-to-suitors clause have always been removable with an independent basis for jurisdiction such as diversity.<sup>114</sup> Given the importance of the saving-to-suitors clause within the maritime removal debate, determining how it should be contextualized in the modern judiciary is essential to elucidating the removability of maritime cases.<sup>115</sup>

### III. THE SAVING-TO-SUITORS CLAUSE

#### A. *Creation and Rationale*

Despite the apparent significance of the saving-to-suitors clause to the topic of maritime removal, the saving-to-suitors clause predated the statutory possibility of removing a maritime case by more than a century.<sup>116</sup> Nonetheless, in order to determine whether the saving-to-suitors clause can presently operate as a bar to maritime removal, it is necessary to clarify its historical purpose and scope—an inquiry that begins multiple centuries ago.

The traditional character of admiralty jurisdiction was originally brought to the colonies from England in 1696 with the establishment of vice-admiralty courts.<sup>117</sup> These courts proceeded in the tradition of English admiralty law, which adjudicated maritime disputes without a

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nonmaritime remedy of a jury trial, the saving to suitors clause under these circumstances prohibits the removal of this action.”).

113. See *Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 372 (1959) (“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 savings clause of 1789 to preserve.”).

114. See *Poirrier v. Nicklos Drilling Co.*, 648 F.2d 1063, 1066 (5th Cir. 1981) (“The ‘saving to suitors’ clause does no more than preserve the right of maritime suitors to pursue nonmaritime remedies. It does not guarantee them a nonfederal *forum*, or limit the right of defendants to remove such actions to federal court where there exists some basis for federal jurisdiction other than *admiralty*.” (first and second emphases in original)).

115. See Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76–77 (codified as amended in scattered sections of 28 U.S.C.).

116. The saving-to-suitors clause was enacted in 1789. *Id.* Maritime cases entered the purview of the removal statute as “other suits” in 1911. See Judicial Code of 1911, Pub. L. No. 61-475, § 28, 36 Stat. 1087, 1094.

117. See Raymond S. August, *Trial by Jury in a Court of Admiralty: A Constitutional Right Buried Under Historical Ignorance*, 13 J. MAR. L. & COM. 149, 154 (1982).

jury.<sup>118</sup> Even after the creation of vice-admiralty courts, plaintiffs maintained the option of filing their maritime suits in state courts of common law, which afforded the right to a jury trial.<sup>119</sup> After the Declaration of Independence, vice-admiralty courts subsequently became state admiralty courts.<sup>120</sup> Thereafter, maritime cases were tried either in jury utilizing state admiralty courts, which employed questionable practices, or by regular state courts utilizing jury trials embroiled with local bias.<sup>121</sup> The ham-handed application of maritime law and justice by these courts, which commonly adjudicated *in rem* actions seizing vessels,<sup>122</sup> led to domestic and international strife and a reevaluation of whether jury trials should be employed in maritime cases.<sup>123</sup> As a result, the framers had good reason to institute a juryless federal judiciary to adjudicate maritime cases with the knowledge that jury trials had previously been a source of bias and inconsistency.<sup>124</sup> Indeed, Alexander Hamilton expressed reservations about jury trials for adjudicating *in rem* maritime cases in *The Federalist* 83<sup>125</sup>—a sentiment that was heeded in the newly minted federal judiciary’s command of admiralty jurisdiction.<sup>126</sup>

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118. See Joseph C. Sweeney, *The Silver Oar and Other Maces of the Admiralty: Admiralty Jurisdiction in America and the British Empire*, 38 J. MAR. L. & COM. 159, 164 (2007).

119. See Force, *supra* note 27.

120. Graydon S. Staring, *The Admiralty Jurisdiction of Torts and Crimes and the Failed Search for Its Purposes*, 38 J. MAR. L. & COM. 433, 450 (2007).

121. See Gary T. Sacks & Neal W. Settergren, *Juries Should Not Be Trusted to Decide Admiralty Cases*, 34 J. MAR. L. & COM. 163, 164–65 (2003) (citing 1 THOMAS J. SCHOENBAUM, *ADMIRALTY AND MARITIME LAW* (3d ed. 2001)).

122. See ROBERT FORCE, *ADMIRALTY AND MARITIME LAW* 31 (Kris Markarian ed., Federal Judicial Center 2d ed. 2013) (“A second possibility for vindicating a maritime claim is for the plaintiff to bring an action *in rem* directly against the property—typically a vessel—that relates to the claim. In such cases, the vessel—not the vessel’s owner—is the defendant.”).

123. See Sacks & Settergren, *supra* note 121.

124. See Steven E. Goldman & Michael I. Goldman, *Is the Jury Still Out? The Controversy Over the Traditional Rule Requiring a Non-Jury Trial in Marine Insurance Declaratory Judgment Actions in Federal Court*, 41 J. MAR. L. & COM. 117, 139 (2010).

125. THE FEDERALIST NO. 83 (Alexander Hamilton) (“I feel a deep and deliberate conviction that there are many cases in which the trial by jury is an ineligible one. I think it so particularly in cases which concern the public peace with foreign nations that is, in most cases where the question turns wholly on the laws of nations. Of this nature, among others, are all prize causes [(i.e., *in rem* cases)]. Juries cannot be supposed competent to investigations that require a thorough knowledge of the laws and usages of nations; and they will sometimes be under the influence of impressions which will not suffer them to pay sufficient regard to those considerations of public policy which ought to guide their inquiries.”).

126. See Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77 (codified as amended in scattered sections of 28 U.S.C.) (“And the trial of issues in fact, in the district courts, in all causes except civil causes of admiralty and maritime jurisdiction, shall be by jury.”).

The Judiciary Act of 1789 proceeded to give federal courts “exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction”<sup>127</sup> where such cases were to proceed without a right to a jury trial in the traditional character of admiralty courts.<sup>128</sup> Yet, the drafters of the Act did not want admiralty jurisdiction to become compulsory for adjudicating all maritime claims, and consequently, deprive both plaintiffs of a jury trial within a state forum and states of jurisdiction for maritime claims within their borders.<sup>129</sup> The saving-to-suitors clause was consequently included “probably from abundant caution”<sup>130</sup> to unquestionably preserve a state court’s ability to adjudicate maritime matters.<sup>131</sup> As a result, in order for the saving-to-suitors clause to prevent removal of maritime cases, the specific protections it provides would need to be deprived upon removal to federal court.

### B. *What Exactly Is Saved?*

The safeguards maintained by the saving-to-suitors clause—comprising the jury trial and the state forum—were rational given the nature of the pre-federal judiciary. At this judicial stage, only state courts provided the right to a jury trial in maritime cases,<sup>132</sup> while vice-admiralty courts proceeded exclusively without a jury.<sup>133</sup> Thus, in the pre-federal judiciary, the act of divesting state court jurisdiction would have also eliminated the right to a jury trial in maritime cases, hence the rationale for the explicit protections of the saving-to-suitors clause going forward.<sup>134</sup> The new federal judiciary largely emulated the pre-

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127. *Id.*

128. *See* Sweeney, *supra* note 118 and accompanying text.

129. *See* *Steamboat Co. v. Chase*, 83 U.S. (16 Wall.) 522, 527 (1872) (“Yet ‘the clause was inserted,’ says this court, ‘probably from abundant caution, lest the exclusive terms in which the power is confirmed in the District Court might be deemed to have taken away the concurrent remedy which had before existed.’ The same right would have existed had no such clause been inserted.” (quoting *N.J. Steam Navigation Co. v. Merchs.’ Bank of Bos.*, 47 U.S. (6 How.) 344, 390 (1848))).

130. *Id.* (quoting *N.J. Steam Navigation*, 47 U.S. (6 How.) at 390.).

131. *See* Force, *supra* note 27, at 1023 (“Thus, the Judiciary Act’s grant of concurrent jurisdiction did not create ‘a novel jurisdictional system, but rather merely had codified an old one. In essence, the Saving-to-Suitors Clause merely preserved the status quo.” (quoting STEVEN L. SNELL, *COURTS OF ADMIRALTY AND THE COMMON LAW: ORIGINS OF THE AMERICAN EXPERIMENT IN CONCURRENT JURISDICTION* 319 (2d ed. 2007))).

132. *See* Force, *supra* note 27, at 1022–23.

133. *See* Sweeney, *supra* note 118 and accompanying text.

134. *See* *Steamboat Co.*, 83 U.S. (16 Wall.) at 527 (“Yet ‘the clause was inserted,’ says this court, ‘probably from abundant caution, lest the exclusive terms in which the power is confirmed

federal judiciary by functioning as a juryless court of admiralty<sup>135</sup> while allowing jury trials for maritime cases in state courts, which maintained concurrent jurisdiction.<sup>136</sup> In this framework, it would have been irrelevant whether the saving-to-suitors clause in fact protected the state forum itself or the right to a jury trial because the two were inextricable. In the contemporaneous absence of a mechanism for a defendant to remove a maritime case out of state court, plaintiffs were guaranteed their choice of forum after filing. This changed in theory once maritime claims unsuspectingly entered the purview of removal jurisdiction over a century later.<sup>137</sup>

Theoretically, removing a maritime case to a prototypic, juryless admiralty court would undoubtedly violate the saving-to-suitors clause by necessarily divesting plaintiffs of both their choice of remedy and forum.<sup>138</sup> Yet, the federal judiciary is not constrained in its jurisdiction or its remedies like the vice-admiralty courts from the colonial era,<sup>139</sup> allowing federal courts to adjudicate cases either in admiralty or at law.<sup>140</sup> The first contemplation of maritime case removal based on admiralty jurisdiction should have given proper deference to the versatile federal judiciary, which provides jury trials in most cases.<sup>141</sup> At this point, it would have been necessary to tease apart whether the saving-to-suitors clause protects the state forum—thereby unequivocally preventing removal and ending the analysis—or alternatively, the underlying right to a jury trial. The latter scenario

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in the District Court might be deemed to have taken away the concurrent remedy which had before existed.’ The same right would have existed had no such clause been inserted.” (quoting *N.J. Steam Navigation*, 47 U.S. (6 How.) at 390)).

135. See Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76–77 (codified as amended in scattered sections of 28 U.S.C.).

136. See *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438, 445 (2001) (“Thus, the saving to suitors clause preserves remedies and the concurrent jurisdiction of state courts over some admiralty and maritime claims.”).

137. See Judicial Code of 1911, Pub. L. No. 61-475, § 28, 36 Stat. 1087, 1094–95 (“Any other suit of a civil nature, at law or in equity, of which the district courts of the United States are given jurisdiction by this title . . . may be removed into the district court of the United States . . .”).

138. See *supra* notes 117–118 and accompanying text.

139. See *supra* note 118 and accompanying text.

140. Comment, *Removal to Admiralty*, 69 YALE L.J. 442, 442–43 (1960) (“Pursuant to the initial clause of [the Judiciary Act of 1789], federal admiralty jurisdiction is exercised on the admiralty side of the district courts, with a separate docket and procedure. . . . A maritime plaintiff with a saving-clause action thus can sue in admiralty, in state court, or, if he can meet the jurisdictional requirements, on the law side of federal court.”).

141. Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77 (codified as amended in scattered sections of 28 U.S.C.) (“And the trial of issues in fact, in the district courts, in all causes except civil causes of admiralty and maritime jurisdiction, shall be by jury.”).



preserves the possibility that maritime cases can be removed as long as common law remedies such as jury trials are provided in federal court.

Early Supreme Court cases decided before maritime case removal was even entertained conclusively establish that the saving-to-suitors clause was intended to protect the remedy and not necessarily the forum.<sup>142</sup> This is not surprising considering the plain language of the saving-to-suitors clause states that *remedies* are saved.<sup>143</sup> Consistent with this language, the Supreme Court in 1866 stated in *The Moses Taylor* that, “[i]t is not a remedy in the common-law courts which is saved, but a common-law remedy.”<sup>144</sup> Shortly thereafter, in 1868, the Supreme Court reiterated this stance in *The Belfast*, which concluded that common law remedies are saved “to suitors, and not to the State courts.”<sup>145</sup> Subsequent Supreme Court and circuit court decisions have corroborated this position.<sup>146</sup> Thus, the saving-to-suitors clause does not inherently protect a plaintiff’s choice to litigate in state court. Rather, it protects a maritime plaintiff’s right to a jury trial, which was historically only available in state court.

As a de facto safeguard of the common law *remedy*, the saving-to-suitors clause would only function to protect the state forum—thereby preventing removal—if federal courts sitting in admiralty are wholly incapable of providing jury trials. Despite misconceptions to the contrary, this is not in fact the case.<sup>147</sup>

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142. See *The Moses Taylor*, 71 U.S. (4 Wall.) 411, 431 (1866); *The Belfast*, 74 U.S. (7 Wall.) 624, 644 (1868).

143. 28 U.S.C. § 1333 (2018) (“[S]aving to suitors in all cases all other *remedies* to which they are otherwise entitled.”) (emphasis added).

144. *The Moses Taylor*, 71 U.S. (4 Wall.) at 431.

145. *The Belfast*, 74 U.S. (7. Wall.) at 644.

146. See *Poirrier v. Nicklos Drilling Co.*, 648 F.2d 1063, 1066 (5th Cir. 1981) (“The ‘saving to suitors’ clause does no more than preserve the right of maritime suitors to pursue nonmaritime remedies. It does not guarantee them a nonfederal forum . . .” (emphasis omitted)); *Romero v. Int’l Terminal Operating Co.*, 358 U.S. 354, 407 (1959) (Brennan, J., dissenting in part and concurring in part) (“[T]he common-law remedies saved to suitors could properly be enforced in any tribunal otherwise having jurisdiction; the remedies saved were saved generally to suitors without discrimination as to any tribunal.”); *Red Cross Line v. Atl. Fruit Co.*, 264 U.S. 109, 123–24 (1924) (“The ‘right of a common-law remedy’, [sic] so saved to suitors . . . include[s] all means other than proceedings in admiralty which may be employed to enforce the right or to redress the injury involved.”); *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438, 445 (2001) (“Thus, the saving to suitors clause preserves remedies and the concurrent jurisdiction of state courts over some admiralty and maritime claims.”).

147. See FED. R. CIV. P. 9 advisory committee’s note to 1966 amendment (“One of the important procedural consequences is that in the civil action either party may demand a jury trial, while in the suit in admiralty there is no right to jury trial *except as provided by statute*” (emphasis

#### IV. ADAPTING THE SAVING-TO-SUITORS CLAUSE INTO THE MODERN JUDICIARY

##### A. *Shedding Antiquated Notions*

History's misplaced prohibition on the removal of maritime cases largely arises from the distinction between admiralty jurisdiction<sup>148</sup> and admiralty procedure.<sup>149</sup> The belief that admiralty jurisdiction necessarily begets canonical admiralty procedure has led to the misunderstanding that courts sitting in admiralty can never provide a jury.<sup>150</sup> While there is no right to a jury trial under prototypic admiralty procedure,<sup>151</sup> the Supreme Court has stated that: “[T]he Seventh Amendment does not require jury trials in admiralty cases, [yet] neither that Amendment nor any other provision of the Constitution forbids them. Nor does any statute of Congress or Rule of Procedure, Civil or Admiralty, forbid jury trials in maritime cases.”<sup>152</sup>

In fact, there is no official basis for requiring admiralty cases to proceed without a jury beyond tradition and custom.<sup>153</sup> The absence of jury trials in admiralty cases—primarily for *in rem* cases—was sensible given the intractable jury practices within early state admiralty and common law courts that adjudicated maritime cases.<sup>154</sup> Nonetheless, both the Federal Rules of Civil Procedure and the Supreme Court

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added)); *see, e.g.*, 28 U.S.C. § 1873 (2018) (“In any case of admiralty and maritime jurisdiction . . . concerning any vessel . . . employed in the business of commerce and navigation between places in different states upon the lakes and navigable waters connecting said lakes, the trial of all issues of fact shall be by jury if either party demands it.”).

148. 28 U.S.C. § 1333 (2018) (“The district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty or maritime jurisdiction . . .”).

149. *See* FED. R. CIV. P. 9 advisory committee’s note to 1966 amendment (“One of the important procedural consequences is that in the civil action either party may demand a jury trial, while in the suit in admiralty there is no right to jury trial except as provided by statute.”).

150. *See, e.g.*, *Barry v. Shell Oil Co.*, No. 13-6133, 2014 WL 775662, at \*3 (E.D. La. Feb. 25, 2014) (“[S]ince the removal of Plaintiff’s claim solely on the basis of admiralty jurisdiction would deprive him of the right to pursue his nonmaritime remedy of a jury trial, the saving to suitors clause under these circumstances prohibits the removal of this action.”); *Riley v. Llog Expl. Co.*, No. 14-437, 2014 WL 4345002, at \*4 (E.D. La. Aug. 28, 2014) (“[T]here can be no question that a plaintiff necessarily loses his *right* to a jury trial when a case is removed into admiralty.”).

151. *See* Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77 (codified as amended in scattered sections of 28 U.S.C.) (“And the trial of issues in fact, in the district courts, in all causes except civil causes of admiralty and maritime jurisdiction, shall be by jury.”); *see also supra* notes 117–118 and accompanying text.

152. *Fitzgerald v. U.S. Lines Co.*, 374 U.S. 16, 20 (1963) (footnotes omitted).

153. *See* *Luera v. M/V Alberta*, 635 F.3d 181, 196 (5th Cir. 2011) (“The practice of trying admiralty claims to the bench is simply one of custom and tradition.”); *see also* *Waring v. Clarke*, 46 U.S. (5 How.) 441, 441 (1847) (“Nor is a trial by jury any test of admiralty jurisdiction.”).

154. *See* *Sacks & Settergren*, *supra* note 121, at 164–65 and accompanying text.

recognize the possibility of providing jury trials under admiralty jurisdiction if such a right is granted by statute.<sup>155</sup> For example, the Great Lakes Statute affords the right to a jury trial under admiralty jurisdiction in cases meeting certain criteria.<sup>156</sup> Prototypic admiralty procedure is therefore severable from admiralty jurisdiction within the federal judiciary. As a result, suitors could theoretically maintain their right to a jury trial in federal court following removal based on admiralty jurisdiction if a statute provides for such a right.<sup>157</sup> Fortunately, there is a statute on point: the saving-to-suitors clause.

The saving-to-suitors clause is a statute that secures a maritime plaintiff's right to a jury trial,<sup>158</sup> and there is no indication that this protection is toothless in the federal judiciary.<sup>159</sup> Consequently, the saving-to-suitors clause can serve as a statute that provides a maritime plaintiff with the right to a jury trial in federal court<sup>160</sup> following lawful removal based on admiralty jurisdiction.<sup>161</sup> While this function of

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155. See FED. R. CIV. P. 9 advisory committee's note to 1966 amendment ("One of the important procedural consequences is that in the civil action either party may demand a jury trial, while in the suit in admiralty there is no right to jury trial except as provided by statute."); see also *Fitzgerald*, 374 U.S. at 17 ("[T]he actions for unseaworthiness and for maintenance and cure are traditional admiralty remedies which in the absence of a statute do not ordinarily require trial by jury.").

156. See 28 U.S.C. § 1873 (2018) ("In any case of admiralty and maritime jurisdiction relating to any matter of contract or tort arising upon or concerning any vessel of twenty tons or upward, enrolled and licensed for the coasting trade, and employed in the business of commerce and navigation between places in different states upon the lakes and navigable waters connecting said lakes, the trial of all issues of fact shall be by jury if either party demands it.").

157. See FED. R. CIV. P. 9 advisory committee's note to 1966 amendment ("One of the important procedural consequences is that in the civil action either party may demand a jury trial, while in the suit in admiralty there is no right to jury trial except as provided by statute.").

158. See *Red Cross Line v. Atl. Fruit Co.*, 264 U.S. 109, 123–24 (1924) ("The 'right of a common-law remedy', [sic] so saved to suitors . . . include[s] all means other than proceedings in admiralty which may be employed to enforce the right or to redress the injury involved."); *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438, 454–55 (2001) ("Trial by jury is an obvious, but not exclusive, example of the remedies available to suitors.").

159. See *The Moses Taylor*, 71 U.S. (4 Wall.) 411, 431 (1866) ("It is not a remedy in the common-law courts which is saved, but a common-law remedy."); see also *Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 407 (1959) (Brennan, J., dissenting in part and concurring in part) ("[T]he common-law remedies saved to suitors could properly be enforced in any tribunal otherwise having jurisdiction; the remedies saved were saved generally to suitors without discrimination as to any tribunal.").

160. See FED. R. CIV. P. 9 advisory committee's note to 1966 amendment ("One of the important procedural consequences is that in the civil action either party may demand a jury trial, while in the suit in admiralty there is no right to jury trial *except as provided by statute.*" (emphasis added)).

161. See 28 U.S.C. § 1441(a) (2018) ("[A]ny civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed . . ."); 28 U.S.C.

the saving-to-suitors clause would not have been contemplated by the drafters of the Judiciary Act of 1789, neither would a prohibition on the removal of maritime cases, which is a function many courts have endorsed.<sup>162</sup> Thus, the reformed dominion proposed for the saving-to-suitors clause should not be defeated by occupying a role that was not envisioned when the clause was originally drafted.<sup>163</sup> This solution not only maintains the plaintiff's rights arising from the saving-to-suitors clause but also does not flout the defendant's lawful ability to remove a case within the original jurisdiction of the federal courts.

### B. *Creating a New Era for Maritime Removal*

Resistance to the free removability of maritime cases has arisen from long-standing, routine practice on the issue.<sup>164</sup> Averse to effecting sweeping changes, courts have concocted errant analyses to maintain the prohibition on maritime removal on the theory that history should control.<sup>165</sup> Yet, the judiciary is not a static entity.<sup>166</sup> Congress

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§ 1333 (2018) (“The district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty or maritime jurisdiction . . .”).

162. See, e.g., *Pierce v. Parker Towing Co.*, 25 F. Supp. 3d 1372, 1383 (S.D. Ala. 2014) (“§ 1333(1) remains an Act of Congress that limits the Court’s removal jurisdiction by ‘saving to suitors’ common law remedies . . .”); *A.E.A. ex rel. Angelopoulos v. Volvo Penta of the Ams., LLC*, 77 F. Supp. 3d 481, 491 (E.D. Va. 2015) (“[T]he saving to suitors clause, which establishes concurrent jurisdiction over maritime cases, is an Act of Congress in which Congress has expressly provided an exception to an otherwise removable action under § 1441.”); *Barry v. Shell Oil Co.*, No. 13-6133, 2014 WL 775662, at \*3 (E.D. La. Feb. 25, 2014) (“[S]ince the removal of Plaintiff’s claim solely on the basis of admiralty jurisdiction would deprive him of the right to pursue his nonmaritime remedy of a jury trial, the saving to suitors clause under these circumstances prohibits the removal of this action.”).

163. See *Berton v. Tietjen & Lang Dry Dock Co.*, 219 F. 763, 769 (D.N.J. 1915) (“‘Common-law remedy,’ [as used in the savings clause], is not to be restricted to such forms of remedy as were known in the common-law courts when the Judiciary Act of 1789 was passed.”).

164. See, e.g., *Riley v. Llog Expl. Co.*, No. 14-437, 2014 WL 4345002, at \*4 (E.D. La. Aug. 28, 2014) (“Defendants have cited no case where a federal court presented only with claims arising under the general maritime law has granted the parties a jury trial. Indeed, to do so would require the court to disregard hundreds of years of admiralty tradition, something this Court is not prepared to do.”).

165. See, e.g., *Coronel v. AK Victory*, 1 F. Supp. 3d 1175, 1178 (W.D. Wash. 2014) (“Both parties’ arguments for or against the removal of Plaintiff’s general maritime law claims focus on the language of the removal statute, 28 U.S.C. § 1441. The court concludes, however, that it is the statutory grant of admiralty jurisdiction, 28 U.S.C. § 1333, and more than 200 years of precedent interpreting this grant, that ultimately determine the removability of Plaintiff’s claims.”).

166. *The Structure of the Federal Courts*, FED. JUD. CTR., <https://www.fjc.gov/history/time-line/structure-federal-courts> [<https://perma.cc/C4K4-3J6V>] (“Since the establishment of the federal courts in 1789, Congress has periodically reshaped the judiciary through legislation. Such changes have included the creation and abolition of courts, the authorization of new judicial positions, and the reorganization of the judicial circuits.”).

has, and does, alter the character of the federal courts<sup>167</sup>—the evolution of the removal statute is a prime example.<sup>168</sup> The removal statute currently enables removal based on the district courts' original jurisdiction,<sup>169</sup> which should be interpreted by its plain meaning.<sup>170</sup> Deviations from the statutory standards and exceptions for removal would be inappropriate in the absence of an established and compelling judicial doctrine to the contrary. Given the historical wavering by courts on the issue, the judicially imposed prohibition on maritime removal is not one of them.

Removed maritime cases are not the only example of the federal courts declining to exercise statutorily authorized jurisdiction, yet they are perhaps the least defensible. Federal courts also refuse to adjudicate domestic relations matters under diversity jurisdiction<sup>171</sup> and various judicial abstention doctrines require courts to forgo exercising legitimate grants of jurisdiction.<sup>172</sup> However, these instances of jurisdictional restraint have rationales founded in state sovereignty that, in essence, can only be addressed by yielding to state court resolution.<sup>173</sup> Barring removal of maritime cases is not founded in state sovereignty but rather the straightforward concern of depriving plaintiffs of jury trials under admiralty jurisdiction<sup>174</sup>—curable by

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167. *See id.*

168. *See* Hrdlick, *supra* note 10, at 536 (“The right [to removal] is ‘malleable’ in the sense that the right is not fundamental, and thus has been and should be changed over time to suit prevailing views of both our State and Federal Judiciaries.”).

169. *See* 28 U.S.C. § 1441(a) (2018) (“[A]ny civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed . . .”).

170. *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (“[W]hen ‘the statute’s language is plain, ‘the sole function of the courts’—at least where the disposition required by the text is not absurd—‘is to enforce it according to its terms.’” (quoting *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989))).

171. Anthony B. Ullman, Note, *The Domestic Relations Exception to Diversity Jurisdiction*, 83 COLUM. L. REV. 1824, 1824 (1983).

172. *See* Rebecca E. Swenson, *Application of the Federal Abstention Doctrines to the Domestic Relations Exception to Federal Diversity Jurisdiction*, 1983 DUKE L.J. 1095, 1105–06.

173. *See* Mathew D. Staver, *The Abstention Doctrines: Balancing Comity with Federal Court Intervention*, 28 SETON HALL L. REV. 1102, 1102 (1998) (“The Abstention Doctrines required federal courts to step aside in order to allow the state adjudicatory process to take its course. The purpose of these doctrines is to preserve the balance between state and federal sovereignty.”); *Ankenbrandt v. Richards*, 504 U.S. 689, 714 (1992) (“The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.” (quoting *In re Burrus*, 136 U.S. 586, 593–94 (1890))).

174. *See* FED. R. CIV. P. 9 advisory committee’s note to 1966 amendment (“[I]n the suit in admiralty there is no right to jury trial except as provided by statute.”); *see, e.g., Barry v. Shell Oil Co.*, No. 13-6133, 2014 WL 775662, at \*3 (E.D. La. Feb. 25, 2014) (“[T]he removal of Plaintiff’s claim solely on the basis of admiralty jurisdiction would deprive him of the right to pursue his

affording maritime plaintiffs jury trials following removal. Further, while the domestic relations exception and abstention doctrines have been clearly accepted and established by the judiciary,<sup>175</sup> the most recent higher court decisions evaluating maritime removal have reinforced the uncertainty as to whether exercising jurisdiction in these cases is in fact improper.<sup>176</sup>

Despite instances of judicial preference for caselaw over jurisdiction granting statutes,<sup>177</sup> on the issue of removal, the Supreme Court has advocated for adherence to the plain words of the removal statute and its corresponding exceptions.<sup>178</sup> 28 U.S.C. § 1441(a) states that exceptions to removal based on original jurisdiction must be *expressly* provided by an act of Congress.<sup>179</sup> The Supreme Court has stated that “[t]he need to take the express exception requirement seriously is underscored by examples of indisputable prohibitions of removal in a number of other statutes, e.g., § 1445, which demonstrate that, when Congress wishes to give plaintiffs an absolute choice of forum, it is capable of doing so in unmistakable terms.”<sup>180</sup> The saving-to-suitors clause does not fill the role of an express exception to removal. Not only does it lack an overt prohibition,<sup>181</sup> but it was drafted more than a century before maritime cases would be statutorily cognizable within removal jurisdiction.<sup>182</sup>

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nonmaritime remedy of a jury trial . . .”); *Riley v. Llog Expl. Co.*, No. 14-437, 2014 WL 4345002, at \*4 (E.D. La. Aug. 28, 2014) (“[T]here can be no question that a plaintiff loses his *right* to a jury trial when a case is removed into admiralty.”).

175. See Swenson, *supra* note 172, at 1096–106.

176. See *Lu Junhong v. Boeing Co.*, 792 F.3d 805, 818 (7th Cir. 2015); *Sangha v. Navig8 Ship-management Priv. Ltd.*, 882 F.3d 96, 100 (5th Cir. 2018).

177. See Swenson, *supra* note 172, at 1095; Leonard Birdsong, *Comity and Our Federalism in the Twenty-First Century: The Abstention Doctrines Will Always Be with Us—Get Over It!*, 36 CREIGHTON L. REV. 375, 375–76 (2003).

178. See *Breuer v. Jim’s Concrete of Brevard, Inc.*, 538 U.S. 691, 694–95 (2003).

179. 28 U.S.C. § 1441(a) (2018) (“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 . . .” (emphasis added)).

180. *Breuer*, 538 U.S. at 692.

181. See 28 U.S.C. § 1333 (2018) (“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.”).

182. The saving-to-suitors clause was drafted in 1789. See Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76–77 (codified as amended in scattered sections of 28 U.S.C.) (“[S]aving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it . . .”). Maritime claims did not enter the purview of the removal statute until 1911. See Judicial Code of 1911, Pub. L. No. 61-475, § 28, 36 Stat. 1087, 1094–95 (“Any other suit of a civil nature, at law or in equity, of which the district courts of the United States are given jurisdiction by this title . . . may be removed into the district court of the United States . . .”).

The absence of maritime claims from the removal exemptions of 28 U.S.C. § 1445 does not appear to be in error. Congress has had ample time to add maritime suits to the exemptions since original jurisdiction became the definitive removal standard in 1948,<sup>183</sup> and a federal court first allowed removal of a maritime case on the basis of admiralty jurisdiction in 1956.<sup>184</sup> Moreover, the series of at least a dozen federal court decisions that allowed removal of maritime claims, beginning with *Ryan* in 2013,<sup>185</sup> did not prompt Congress to expressly prohibit this practice. Because the removal statute, as drafted by Congress, already encompasses maritime claims,<sup>186</sup> a delayed legislative proclamation would almost certainly be a prohibition on removal rather than an ancillary allowance. At this point in time, it seems unlikely that Congress will settle the uncertainty. A conclusive answer is far more likely to arise from the judicial branch.

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183. See Act of June 25, 1948, ch. 646, § 1441(a), 62 Stat. 869, 937–38 (codified at 28 U.S.C. § 1441(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 . . .”).

184. See *Davis v. Matson Navigation Co.*, 143 F. Supp. 537, 538–39 (N.D. Cal. 1956) (permitting removal of a maritime case).

185. See *Ryan v. Hercules Offshore, Inc.*, 945 F. Supp. 2d 722, 779 (S.D. Tex. 2013); *Wells v. Abe’s Boat Rentals Inc.*, No. H-13-1112, 2013 WL 3110322, at \*4 (S.D. Tex. June 18, 2013); *Carrigan v. M/V AMC Ambassador*, No. H-13-03208, 2014 WL 358353, at \*2 (S.D. Tex. Jan. 31, 2014); *Exxon Mobil Corp. v. Starr Indem. & Liab. Co.*, No. H-14-1147, 2014 WL 2739309, at \*2 (S.D. Tex. June 17, 2014), *rev’d on other grounds*, 2014 WL 4167807 (S.D. Tex. Aug. 20, 2014); *Exxon Mobil Corp. v. Starr Indem. & Liab. Ins. Co.*, 181 F. Supp. 3d 347, 361 (S.D. Tex. 2015); *Murphy v. Seadrill Ams., Inc.*, No. H-4-1454, 2014 WL 12642104, at \*4 (S.D. Tex. Nov. 14, 2014); *Costanza v. Accutrans, Inc.*, No. 17-5706, 2017 WL 4785004, at \*5 (E.D. La. Oct. 24, 2017); *Bridges v. Phillips 66 Co.*, No. 13-477, 2013 WL 6092803, at \*5 (M.D. La. Nov. 19, 2013); *Harrold v. Liberty Ins. Underwriters, Inc.*, No. 13-762, 2014 WL 688984, at \*4 (M.D. La. Feb. 20, 2014); *Garza v. Phillips 66 Co.*, No. 13-742, 2014 WL 1330547, at \*5 (M.D. La. Apr. 1, 2014); *Provost v. Offshore Serv. Vessels, LLC*, No. 14-89, 2014 WL 2515412, at \*3 (M.D. La. June 4, 2014); *Walker v. BP Prods. N. Am., Inc.*, No. 1-13-CV-257, 2013 WL 11332950, at \*4 (E.D. Tex. Sept. 16, 2013).

186. See 28 U.S.C. § 1441(a) (2018) (“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 . . .”); *id.* § 1333 (“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.”).

No higher court has given a complete answer to the issue,<sup>187</sup> but the uncertainty promulgated by the Fifth and Seventh Circuits<sup>188</sup> is a strong indication that the matter is not as definitive as many district courts have contended.<sup>189</sup> In 2015, the Seventh Circuit in *Lu Junhong v. Boeing Co.*<sup>190</sup> ruled that admiralty jurisdiction could serve as a basis for removal of maritime claims following the JVCA.<sup>191</sup> While the court did not consider whether the saving-to-suitors clause could serve as an impediment to removal, because the plaintiff did not make such an argument, the court did not find the removal of a maritime case to be so egregious as to address the issue sua sponte.<sup>192</sup> The Fifth Circuit similarly lacked strong convictions about the role of the saving-to-suitors clause in the maritime removal debate.<sup>193</sup> In 2018, the Fifth Circuit in *Sangha v. Navig8 Shipmanagement Private Ltd.*<sup>194</sup> stated that it was not clear if the saving-to-suitors clause prohibits removal of maritime claims following the JVCA.<sup>195</sup> Thus, the few higher courts that have considered this particular issue after the JVCA<sup>196</sup> have aided the minority position by casting doubt on the conclusion that the saving-to-suitors clause is a conclusive bar to removing maritime cases.<sup>197</sup>

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187. The Supreme Court's dicta in *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 371–72 (1959), merely discouraged removal of maritime cases under *federal question jurisdiction*. This was a known impossibility since the creation of federal question jurisdiction. See *Watson & Xanthopoulos*, *supra* note 46, at 1139.

188. See *Lu Junhong v. Boeing Co.*, 792 F.3d 805, 818 (7th Cir. 2015); *Sangha v. Navig8 Shipmanagement Priv. Ltd.*, 882 F.3d 96, 100 (5th Cir. 2018).

189. See cases cited *supra* note 17.

190. 792 F.3d 805 (7th Cir. 2015).

191. *Id.* at 818.

192. See *id.*

193. *Sangha*, 882 F.3d at 100.

194. 882 F.3d 96 (5th Cir. 2018).

195. *Id.* at 100 (“[T]he question of subject-matter jurisdiction presented in this case—whether the saving-to-suitors clause of the federal maritime statute prohibits removal of general maritime claims absent an independent basis for federal jurisdiction in light of Congress’s December 2011 amendment to the federal removal statute—is not clear.”).

196. The 11th Circuit, in a case unrelated to removal, recently stated in dicta that maritime cases cannot be removed on the basis of admiralty jurisdiction. *DeRoy v. Carnival Corp.*, 963 F.3d 1302, 1314–15 (11th Cir. 2020). However, the court expressly acknowledged that the basis for this prohibition is a precedent that predates the JVCA and that the court has not considered whether such a holding survives the JVCA. *Id.* at 1314 n.16 (referencing *Armstrong v. Ala. Power Co.*, 667 F.2d 1385 (11th Cir. 1982)).

197. See *Lu Junhong*, 792 F.3d at 818 (“Our conclusion that § 1333(1) supplies admiralty jurisdiction shows that subject-matter jurisdiction exists. Plaintiffs thus could have filed these suits directly in federal court (as many victims of the crash did). If the saving-to-suitors clause allows them to stay in state court even after the 2011 amendment, they are free to waive or forfeit that right—which given the scope of § 1331(1) concerns venue rather than subject matter jurisdiction. Boeing therefore was entitled to remove these suits to federal court.”); *Sangha*, 882 F.3d at 100



Based on the original intent of the saving-to-suitors clause<sup>198</sup> and the need for express exceptions to removal,<sup>199</sup> uncertainty from the higher courts is warranted. It is also worth noting that the Supreme Court recently described the procedural history of a case before it in part by merely stating that the defendants removed the case to federal court by “invoking federal maritime jurisdiction” under 28 U.S.C. § 1333—a practice categorically barred under the predominant view on maritime removal.<sup>200</sup> The preceding lower court decisions from the case unsurprisingly reveal the existence of an independent basis for federal jurisdiction, which the Supreme Court failed to mention,<sup>201</sup> so removal was never at issue in the case. However, the Supreme Court’s seemingly routine description of removal based on admiralty jurisdiction could be an indication that highest court does not consider this manner of removal to implicate a plainly sacrosanct prohibition within the federal judiciary.

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(“[T]he question of subject-matter jurisdiction presented in this case—whether the saving-to-suitors clause of the federal maritime statute prohibits removal of general maritime claims absent an independent basis for federal jurisdiction in light of Congress’s December 2011 amendment to the federal removal statute—is not clear.”).

198. The saving-to-suitors clause has emphatically and repeatedly been deemed a method to protect common law *remedies* and not the state *forum*. See *The Moses Taylor*, 71 U.S. (4 Wall.) 411, 431 (1866) (“It is not a remedy in the common-law courts which is saved, but a common-law remedy”); *The Belfast*, 74 U.S. (7 Wall.) 624, 644 (1868) (Common law remedies are saved “to suitors, and not to the State courts.”); *Poirrier v. Nicklos Drilling Co.*, 648 F.2d 1063, 1066 (5th Cir. 1981) (“The ‘saving to suitors’ clause does no more than preserve the right of maritime suitors to pursue nonmaritime remedies. It does not guarantee them a nonfederal forum, or limit the right of defendants to remove such actions to federal court where there exists some basis for federal jurisdiction other than admiralty.” (emphasis omitted)); *Romero v. Int’l Terminal Operating Co.*, 358 U.S. 354, 407 (1959) (Brennan, J., dissenting in part and concurring in part) (“[T]he common-law remedies saved to suitors could properly be enforced in any tribunal otherwise having jurisdiction; the remedies saved were saved generally to suitors without discrimination as to any tribunal.”); *Red Cross Line v. Atl. Fruit Co.*, 264 U.S. 109, 123–24 (1924) (“The ‘right of a common law remedy’, [sic] so saved to suitors . . . include[s] all means other than proceedings in admiralty which may be employed to enforce the right or to redress the injury involved.”); *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438, 445 (2001) (“Thus, the saving to suitors clause preserves remedies and the concurrent jurisdiction of state courts over some admiralty and maritime claims.”).

199. See *Breuer v. Jim’s Concrete of Brevard, Inc.*, 538 U.S. 691, 694–95 (2003).

200. See *Air & Liquid Sys. Corp. v. DeVries*, 139 S. Ct. 986, 992 (2019) (“Invoking federal maritime jurisdiction, the manufacturers removed the cases to federal court.”).

201. See *DeVries v. Gen. Elec. Co.*, 188 F. Supp. 3d 454, 454 (E.D. Pa. 2016) (“This case was removed in January of 2013 from the Court of Common Pleas of Philadelphia to the United States District Court for the Eastern District of Pennsylvania . . . . The basis of jurisdiction is federal question jurisdiction (pursuant to 28 U.S.C. § 1442).”); *In re Asbestos Prods. Liab. Litig. (No. VI)*, 873 F.3d 232, 235 (3d Cir. 2017) (“The District Court had federal-officer jurisdiction under 28 U.S.C. § 1442(a)(1), and maritime jurisdiction under 28 U.S.C. § 1333(1).”).

An ultimate judicial resolution of this issue will undoubtedly turn on how the modern judiciary's current removal regime will integrate and contextualize both the centuries-old saving-to-suitors clause and canonical admiralty jurisdiction. Both facets of the early federal court system served intelligible purposes for their contemporaneous judicial period as previously described,<sup>202</sup> yet the federal judiciary has evolved significantly since that time.<sup>203</sup> Ensuring that the saving-to-suitors clause and prototypic admiralty jurisdiction are not anachronistically applied in the modern federal judiciary requires flexibility within the confines of the framers' original intent.

## V. CONCLUSION

Removal of maritime cases is shrouded in a long-standing, dogmatic prohibition which courts have fought hard to maintain.<sup>204</sup> Despite the central, albeit errant,<sup>205</sup> role the removal statute's FDR has played in denying removal of maritime claims, 28 U.S.C. § 1441(b) is no longer a colorable impediment following the JVCA.<sup>206</sup> In its absence, erroneous analyses and blatant disregard for the revised removal statute have maintained the prohibition.<sup>207</sup> The FDR has now been supplanted by the saving-to-suitors clause as the primary

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202. See *Goldman & Goldman*, *supra* note 124 and accompanying text; *Lewis*, 531 U.S. at 445 (“Thus, the saving to suitors clause preserves remedies and the concurrent jurisdiction of state courts over some admiralty and maritime claims.”).

203. See *The Structure of the Federal Courts*, *supra* note 166.

204. See, e.g., *Romero*, 358 U.S. at 372 (“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 savings clause of 1789 to preserve.”).

205. See *supra* note 56 and accompanying text.

206. The claw back provision of 28 U.S.C. § 1441(b) (FDR) became applicable to only 28 U.S.C. § 1332 (diversity jurisdiction) following the 2011 amendments to the statute: “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.” The Federal Courts Jurisdiction and Venue Clarification Act of 2011, Pub. L. 112-63, § 103, 125 Stat. 758, 759.

207. See, e.g., *Leloff v. Georgia-Pacific Consumer Prods., Ltd.*, No. 16-cv-00539, 2016 WL 3457166, at \*2 (D. Or. June 23, 2016) (“The ‘saving to suitors’ clause preserves the plaintiff’s choice of forum . . . .”); *Smith v. Marquette Transp. Co.*, No. 16-CV-01545, 2017 WL 3648459, at \*3 (W.D. La. Aug. 1, 2017) (“[A]bsent another jurisdictional basis, this Court lacks subject matter jurisdiction over general maritime claims removed from state court.”); *Coronel v. AK Victory*, 1 F. Supp. 3d 1175, 1178 (W.D. Wash. 2014) (“Both parties’ arguments for or against the removal of Plaintiff’s general maritime law claims focus on the language of the removal statute, 28 U.S.C. § 1441. The court concludes, however, that it is the statutory grant of admiralty jurisdiction, 28 U.S.C. § 1333, and more than 200 years of precedent interpreting this grant, that ultimately determine the removability of Plaintiff’s claims.”).

rationale for excluding maritime claims from removal jurisdiction.<sup>208</sup> Yet, the saving-to-suitors clause is neither an express nor a functional bar on removal because jury trials can be provided under admiralty jurisdiction pursuant to the saving-to-suitors clause itself.<sup>209</sup> This avenue upholds the intent of the saving-to-suitors clause,<sup>210</sup> does not spurn the plain language of the removal statute,<sup>211</sup> and honors the Supreme Court's declaration that exceptions to removal jurisdiction must be express.<sup>212</sup> Still, this strategy requires the arduous task of discarding antiquated notions about admiralty jurisdiction<sup>213</sup> and adapting the original purpose of the saving-to-suitors clause<sup>214</sup> within the context of the modern judiciary.<sup>215</sup> In this framework, it should be clear that maritime claims are removable pursuant to 28 U.S.C. § 1441 provided that remedies such as jury trials are thereafter afforded to suitors in

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208. See, e.g., *A.E.A. ex rel. Angelopoulos v. Volvo Penta of the Ams., LLC*, 77 F. Supp. 3d 481, 491 (E.D. Va. 2015) (“[T]he saving to suitors clause, which establishes concurrent jurisdiction over maritime cases, is an Act of Congress in which Congress has expressly provided an exception to an otherwise removable action under § 1441.”); *Barry v. Shell Oil Co.*, No. 13-6133, 2014 WL 775662, at \*3 (E.D. La. Feb. 25, 2014) (“[S]ince the removal of Plaintiff’s claim solely on the basis of admiralty jurisdiction would deprive him of the right to pursue his nonmaritime remedy of a jury trial, the saving to suitors clause under these circumstances prohibits the removal of this action.”).

209. See FED. R. CIV. P. 9 advisory committee’s note to 1966 amendment (“One of the important procedural consequences is that in the civil action either party may demand a jury trial, while in the suit in admiralty there is no right to jury trial except as provided by statute.”); *Red Cross Line v. Atl. Fruit Co.*, 264 U.S. 109, 123–24 (1924) (“The ‘right of a common-law remedy’, [sic] so saved to suitors . . . include[s] all means other than proceedings in admiralty which may be employed to enforce the right or to redress the injury involved.”); see also *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438, 454–55 (2001) (“Trial by jury is an obvious, but not exclusive, example of the remedies available to suitors.”).

210. See *The Moses Taylor*, 71 U.S. (4 Wall.) 411, 431 (1866) (“It is not a remedy in the common-law courts which is saved, but a common-law remedy.”); *The Belfast*, 74 U.S. (7 Wall.) 624, 644 (1868) (Common law remedies are saved “to suitors, and not to the State courts.”).

211. See 28 U.S.C. § 1441(a) (2018) (“[A]ny civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed . . .”).

212. See *Breuer v. Jim’s Concrete of Brevard, Inc.*, 538 U.S. 691, 692, 696 (2003) (“The need to take the express exception requirement seriously is underscored by examples of indisputable prohibitions of removal in a number of other statutes, e.g., § 1445, which demonstrates that, when Congress wishes to give plaintiffs an absolute choice of forum, it is capable of doing so in unmistakable terms.”).

213. See, e.g., *Barry*, 2014 WL 775662, at \*3 (“[T]he removal of Plaintiff’s claim solely on the basis of admiralty jurisdiction would deprive him of the right to pursue his nonmaritime remedy of a jury trial . . .”); *Riley v. Llog Expl. Co.*, No. 14-437, 2014 WL 4345002, at \*4 (E.D. La. Aug. 28, 2014) (“[T]here can be no question that a plaintiff loses his *right* to a jury trial when a case is removed into admiralty.”).

214. See *The Moses Taylor*, 71 U.S. (4 Wall.) at 431 (“It is not a remedy in the common-law courts which is saved, but a common-law remedy.”); *The Belfast*, 74 U.S. (7 Wall.) at 644 (Common law remedies are saved “to suitors, and not to the State courts.”).

215. See *supra* note 140 and accompanying text.

federal court.<sup>216</sup> Alas, our modern judiciary is not fettered by the outmoded constraints that may have plagued the colonial courts,<sup>217</sup> and its versatility should be utilized for progress and consistency. Where the framers envisioned a consistent judiciary, especially with regard to admiralty matters,<sup>218</sup> it seems wildly inconsistent to consider maritime cases an obscure exception to the original jurisdiction standard for removal.<sup>219</sup> The time has come to relinquish the long-standing dogma that has prevented a plain reading of the removal statute and assimilate the saving-to-suitors clause within the modern judiciary according to its original purpose—to save the remedy, and not the forum.<sup>220</sup>

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216. See *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438, 454–55 (2001) (“Trial by jury is an obvious, but not exclusive, example of the remedies available to suitors.”).

217. See Force, *supra* note 27.

218. See *Goldman & Goldman*, *supra* note 124.

219. See 28 U.S.C. § 1441(a) (2018) (“[A]ny civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed . . .”).

220. See *The Moses Taylor*, 71 U.S. (4 Wall.) 411, 431 (1866) (“It is not a remedy in the common-law courts which is saved, but a common-law remedy.”); *The Belfast*, 74 U.S. (7 Wall.) 624, 644 (1869) (Common law remedies are saved “to suitors, and not to the State courts.”).

