
Salvaging Article III

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Admiralty was once the foundation of our legal and economic survival. In recent years, however, it has come to be viewed as an anachronistic backwater of the law. Unfortunately, this perception belies the reality: admiralty law is as vitally important as ever, not just to the commerce that it supports but in the realities it illuminates about the federal courts and our constitutional structure.

This Article looks at the case study of historic treasure shipwrecks to show how our legal system has strayed increasingly far from the core principles of admiralty that the founders enshrined in Article III of the Constitution. This has troubling implications, not just for treasure hunters salvaging historic wrecks who must now navigate an inconsistent and unconstitutional legal landscape, but for federal courts scholarship, which has persisted in drawing wide-sweeping conclusions that overlook admiralty's role in Article III courts.

This Article thus makes two major contributions: first, it highlights the degree to which federal courts scholarship has ignored admiralty. The majority viewpoint on jurisdiction stripping, for instance, currently holds that Congress has plenary power to remove jurisdiction from the federal courts. Engaging with admiralty precedent immediately demonstrates that this conclusion is incorrect.

Second, it shows how, in recent decades, the neglect of admiralty has led to Congressional action that violates the mandatory federal jurisdiction over admiralty and maritime cases articulated by Article III. It describes how two

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laws, the Abandoned Shipwreck Act and the Sunken Military Craft Act, unconstitutionally remove traditional maritime causes of action from federal courts. While such a removal may be permissible in other areas of federal jurisdiction, this Article draws extensively on admiralty and federal courts theory and precedent to show that such a removal violates Article III in the realm of admiralty and maritime cases. It is time for academics, judges, and Congress to reaffirm the foundational principles of admiralty law, do justice to Article III, and bring current practice into line with historical context.

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INTRODUCTION

“A shipwreck shared is consolation to all.”¹

In 2007, Odyssey Marine, a United States exploration company, spent millions of dollars and years of searching to recover the treasure shipwreck the *Mercedes* and 594,000 silver coins, worth approximately \$500 million, from 3,500 feet of water.² Odyssey brought a salvage action against the vessel, a well-established and historically important claim for compensation when helping to rescue a vessel and intended to reward the risky and difficult efforts of salvors.³ Spain, however, immediately made a contrary claim to the vessel, arguing that, as it was their naval frigate when it sank in 1804, it remained their property and therefore was subject to sovereign immunity.⁴ A U.S. federal judge agreed, finding the Foreign Sovereign Immunities Act was a jurisdictional bar and that Odyssey was entitled to nothing, and in fact owed Spain over \$1 million in legal fees.⁵ The treasure was granted to

¹ DESIDERIUS ERASMUS, *Adagia IV.iii.9*, in 36 COLLECTED WORKS OF ERASMUS 8, 8 (John N. Grant ed., John N. Grant & Betty I. Knott trans., Univ. Toronto Press 2006) (1508); see also Martha’s Vineyard Scuba Headquarters, Inc. v. Unidentified, Wrecked & Abandoned Steam Vessel, 833 F.2d 1059, 1061 (1st Cir. 1987).

² Odyssey Marine Expl., Inc. v. Unidentified Shipwrecked Vessel, 657 F.3d 1159, 1166 (11th Cir. 2011); see also Al Goodman, *U.S. Court Backs Spain Over \$500M Sea Treasure*, CNN (Feb. 4, 2012), <https://www.cnn.com/2012/02/01/world/europe/spain-u-s-treasure-dispute/> [<https://perma.cc/RJM9-VJ5S>].

³ See generally Edward A. Hartnett, *Liberalism, Dependence, and . . . Admiralty*, U. CHI. L. REV. ONLINE 1, 12-15 (2024) (providing more modern context for the incentives created by the law of salvage); G.H. Robinson, *Admiralty Law of Salvage*, 23 CORNELL L. REV. 229 (1938) (setting out the historic foundations of salvage and the incentives it was intended to create).

⁴ *Odyssey Marine Expl., Inc.*, 657 F.3d at 1168.

⁵ See *id.* See generally *Odyssey Marine Ordered to Pay Spain \$1 Million in Black Swan Case*, TAMPA BAY TIMES (Feb. 10, 2014), <https://www.tampabay.com/news/business/odyssey-marine-ordered-to-pay-spain-1-million-in-black-swan-case/2144658/>

Spain and much of it now sits in a Spanish museum, the product of Odyssey's uncompensated efforts.⁶

In 2016 a similar story played out in Florida when Global Marine Exploration (GME) spent three years and four million dollars to find a putatively French vessel, *la Trinité*, that had sunk off of Cape Canaveral in the 1500s.⁷ Just as Odyssey had done, GME brought a salvage claim against the vessel in federal court, arguing that they were entitled to some compensation for discovering the wreck.⁸ France stepped in to argue that the vessel was their sovereign property and, despite sitting for over 500 years shortly off the Florida coast with no attempts to find or recover it by France, that it had not been abandoned.⁹ And just as in Odyssey, the federal court again sided with the foreign sovereign, finding that the traditional admiralty claims of salvage were barred against France's sovereign property.¹⁰

These cases represent common perils for shipwreck litigation in recent years, but they mark a stark departure in law and policy from the admiralty law foundations that have persisted for centuries. While U.S.

⁶ See 'Stolen' Treasure Trove Goes on Show in Spain, LOCAL (May 30, 2014), <https://www.thelocal.es/20140530/spain-odyssey-treasure-shipwreck-court-us> [<https://perma.cc/DU4Z-6W97>].

⁷ Glob. Marine Expl., Inc. v. Unidentified, Wrecked & (for Finders-Right Purposes) Abandoned Sailing Vessel, 348 F. Supp. 3d 1221, 1223 (M.D. Fla. 2018); see also Jill Neimark, *A Shipwreck Off Florida's Coast Pits Archaeologists Against Treasure Hunters*, SMITHSONIAN MAG. (Jan. 22, 2020), <https://www.smithsonianmag.com/history/shipwreck-off-floridas-coast-pits-treasure-archaeologists-against-treasure-hunters-180974018/>.

⁸ See sources cited *supra* note 7.

⁹ See sources cited *supra* note 7. Perhaps the largest irony of France's argument that GME should be entitled to nothing for discovering *la Trinité* is that under French law those that discover ships of historic significance are entitled to a financial award that recognizes their efforts. See Timothy T. Stevens, *The Abandoned Shipwreck Act of 1987: Finding the Proper Ballast for the States*, 37 VILL. L. REV. 573, 588 (1992).

¹⁰ Though it took several cases to reach this stage: unlike in *Odyssey*, the Eleventh Circuit ruled that the Foreign Sovereign Immunities Act was not the root of sovereign immunity in the case of *la Trinité*. See Glob. Marine Expl., Inc. v. Republic of Fr., 33 F.4th 1312, 1325 (11th Cir. 2022). Conveniently, however, the district court was able to find that immunity was instead rooted in the Sunken Military Craft Act on remand. Glob. Marine Expl., Inc. v. Republic of Fr., 696 F. Supp. 3d 1131, 1140 (N.D. Fla. 2023). The ultimate disposition of this case remains unclear as it is currently on appeal before the Eleventh Circuit.

companies are the dominant player in salvage operations worldwide,¹¹ with improvements in technology in recent decades that have led to “a harvest season of long-lost shipwrecks,”¹² the reality is that those seeking to locate and recover historic wrecks, instead of being incentivized through the traditional admiralty law mechanism of salvage, are now penalized for their discoveries due to new legislation enacted by Congress.¹³ This has led to a marked decrease in the number of ships being recovered and salvage claims being brought.¹⁴ These invaluable cultural artifacts and the treasure onboard are now being left to waste away as they are damaged by storms, decay, and fading historical clues.¹⁵

The reasons behind this shift illuminate a broader reality about the role of admiralty law in today’s legal system. What was once a field that was heavily overseen by the federal judiciary, relying on the principles articulated by Article III, has become one where Congress continues to overstep the delicate and pragmatic balance the founders created.¹⁶ At the same time, the expertise and discretion of federal judges in this area has declined, and with it their ability to provide meaningful checks on Congressional action.¹⁷ The increasing role of Congressional legislation

¹¹ See James A.R. Nafziger, *The Evolving Role of Admiralty Courts in Litigation Related to Historic Wreck*, 44 HARV. INT’L L.J. 251, 251 (2003).

¹² John Paul Jones, *Treasure Salvage and the United States Supreme Court: Issues Remaining After Brother Jonathan*, 30 J. MAR. L. & COM. 205, 214 (1999).

¹³ Specifically, the Abandoned Shipwreck Act (ASA) and the Sunken Military Craft Act (SMCA). See *infra* Part III.

¹⁴ Anne G. Giesecke, *The Abandoned Shipwreck Act Through the Eyes of Its Drafter*, 30 J. MAR. L. & COM. 167, 168 (1999).

¹⁵ Paul Hallwood & Thomas J. Miceli, *Murky Waters: The Law and Economics of Salvaging Historic Shipwrecks*, 35 J. LEG. STUD. 285, 286 (2006) (noting that the current legal regime leaves “known wrecks vulnerable to continuing decay while reducing or eliminating any incentive for salvors to locate additional wrecks thereby rendering moot discussion of the best way to preserve their historical character”).

¹⁶ For indications of this shift, see, for example, *Miles v. Apex Marine Corp.*, 498 U.S. 19, 27 (1990) (describing the increasingly important role of Congress and declining role of the courts, “we no longer live in an era when seamen and their loved ones must look primarily to the courts as a source of substantive legal protection”).

¹⁷ See, e.g., John R. Brown, *Admiralty Judges: Flotsam on the Sea of Maritime Law?*, 24 J. MAR. L. & COM. 249, 249 (1993) (lamenting that the role of federal judges has greatly

in dictating maritime and admiralty law has only made maritime law a more complicated field, with judges now faced with impenetrable puzzles regarding the complex interplay between Congress, the Constitution, and common maritime law.¹⁸ A lack of engagement with the foundational principles of admiralty law has led to a legal landscape that is both confusing and constitutionally concerning.¹⁹

This outcome is perhaps unsurprising given the general consensus that admiralty law is a bizarre backwater and, as such, one that has been largely ignored in recent years by scholars, judges, and academics outside of the admiralty bar.²⁰ At the time our Constitution was adopted, the unique legal nature of admiralty stemmed from the privileged position that admiralty held as the law governing the most vital arteries of commerce and international relations.²¹ Over time, however, this uniqueness has relegated admiralty into what many see as an archaic and often forgotten area of law.²² While it remains as

diminished to only “conforming admiralty law to Congressional enactments and filling in gaps in maritime law only when authorized by Congress”).

¹⁸ W. Eugene Davis, *The Role of Federal Courts in Admiralty: The Challenges Facing the Admiralty Judges of the Lower Federal Courts*, 75 TUL. L. REV. 1355, 1358 (2001) (arguing that “the role of the admiralty judge in the twenty-first century is different from — and often more complex than — that of his nineteenth- and twentieth-century counterpart”).

¹⁹ See H.R. REP. NO. 98-338, at 113 (1983) (describing the maritime statutes created by Congress as “poorly organized, duplicative, often obsolete, and difficult to understand and apply”).

²⁰ See Jonathan M. Gutoff, *Federal Common Law and Congressional Delegation: A Reconceptualization of Admiralty*, 61 U. PITT. L. REV. 367, 369 (2000) (“[A]nything having to do with the ships is strange.”); Preble Stolz, *Pleasure Boating and Admiralty: Erie at Sea*, 51 CALIF. L. REV. 661, 665 (1963) (describing the “general aura of magic that surrounds admiralty”); Ernest A. Young, *It’s Just Water: Toward the Normalization of Admiralty*, 35 J. MAR. L. & COM. 469, 469 (2004) (“Admiralty is special — everyone knows this.”).

²¹ See *infra* Part I.A for a lengthy discussion of admiralty’s role at the founding and its important position in international affairs.

²² See, e.g., Brainerd Currie, *Review of the Law of Admiralty*, 26 U. CHI. L. REV. 686, 687 (discussing “shoreside lawyers who consider admiralty a quiet backwater of the law”).

commercially vital²³ and internationally important²⁴ as ever, many law schools no longer teach admiralty.²⁵ Federal judges largely no longer understand admiralty's intricacies,²⁶ despite rapid growth in the types of admiralty claims they see.²⁷ And academics generally ignore admiralty, even as they draw sweeping conclusions about the powers of Article III courts and jurisdiction stripping.²⁸ This Article makes the

²³ Contributing roughly \$476 billion to the U.S. economy in 2022. *U.S. Marine Economy Continues Upward Trend*, NOAA (June 6, 2024), <https://www.noaa.gov/news-release/us-marine-economy-continues-upward-trend> [<https://perma.cc/T6V8-E3AJ>].

²⁴ See Nafziger, *supra* note 11, at 251 (noting, for instance, that “although federal courts sitting in admiralty are as old as the Republic, they are only now emerging as fora for litigation of international issues related to historic wreck at sea”).

²⁵ See Joel K. Goldstein, *Reconceptualizing Admiralty: A Pedagogical Approach*, 29 J. MAR. L. & COM. 625, 626, 630 (1998) (noting lack of admiralty courses in law schools, especially at “[m]any of the most highly-rated American law schools”).

²⁶ David W. Robertson, *Summertime Sailing and the U.S. Supreme Court: The Need for a National Admiralty Court*, 29 J. MAR. L. & COM. 275, 295 (1998) (“[T]he modern Court neither understands admiralty nor regards it as important.”); Brown, *supra* note 17, at 283 (“In the past fifteen years the justices of the Supreme Court have abandoned their [constitutional] role as admiralty judges.”).

²⁷ See Davis, *supra* note 18, at 1375-77 (presenting a detailed list of new challenges and types of claims seen by admiralty courts in recent decades).

²⁸ For a nonexhaustive list of literature dealing with jurisdiction stripping that makes broad statements about the power of Congress to remove jurisdiction from federal courts but fails to engage with Article III's admiralty jurisdictional clause or precedent that present contrary views, see generally Lloyd C. Anderson, *Congressional Control over the Jurisdiction of the Federal Courts: A New Threat to James Madison's Compromise*, 39 BRANDEIS L.J. 417 (2000); Max Baucus & Kenneth R. Kay, *The Court Stripping Bills: Their Impact on the Constitution, the Courts, and Congress*, 27 VILL. L. REV. 988 (1982); Stephen B. Burbank, *The Architecture of Judicial Independence*, 72 S. CAL. L. REV. 315 (1999); Daniel Epps & Alan M. Trammell, *The False Promise of Jurisdiction Stripping*, 123 COLUM. L. REV. 2077 (2023); Richard H. Fallon, Jr., *Jurisdiction-Stripping Reconsidered*, 96 VA. L. REV. 1043 (2010); Brian T. Fitzpatrick, *The Constitutionality of Federal Jurisdiction-Stripping Legislation and the History of State Judicial Selection and Tenure*, 98 VA. L. REV. 839 (2012); Barry Friedman, *Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts*, 104 COLUM. L. REV. 1211 (2004); Michael J. Gerhardt, *The Constitutional Limits to Court-Stripping*, 9 LEWIS & CLARK L. REV. 347 (2005); Shubha Ghosh, *Jurisdiction Stripping of the Federal Circuit?*, 52 AKRON L. REV. 391 (2018); Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895 (1984); Nicole A. Heise, *Stripped: Congress and Jurisdiction Stripping*, 3 FAULKNER L. REV. 1 (2011); Maxim O. Mayer-Cesiano, *On Jurisdiction-Stripping: The Proper Scope of Inferior Federal Courts'*

argument that ignoring admiralty has led to unconstitutional enactments that must be remedied and that ignoring this cornerstone of our legal system precludes federal courts scholars from creating a “unified theory” of Article III and jurisdiction stripping — as they claim to.²⁹

Specifically, two laws passed by Congress in the last several decades as an attempt to manage claims over historic shipwrecks, the Abandoned Shipwreck Act (ASA)³⁰ and the Sunken Military Craft Act (SMCA),³¹ primarily achieve their goals by barring claims under the law of salvage and the law of finds. Together, the law of salvage and law of finds are foundational aspects of admiralty and maritime law.³² While in other areas Congress may have the power to modify and reduce the jurisdiction of Article III courts, centuries of admiralty case law have established that Article III’s grant to federal courts of “all Cases of admiralty and maritime Jurisdiction” prevents Congress from removing traditionally maritime causes of action from the jurisdiction of the federal courts.³³

Independence from Congress, 8 U. PA. J. CONST. L. 559 (2006); Maggie McKinley, Note, *Plenary No Longer: How the Fourteenth Amendment “Amended” Congressional Jurisdiction-Stripping Power*, 63 STAN. L. REV. 1213 (2011); Henry P. Monaghan, *Jurisdiction Stripping Circa 2020: What the Dialogue (Still) Has to Teach Us*, 69 DUKE L.J. 1 (2019); Helen Norton, *Reshaping Federal Jurisdiction: Congress’s Latest Challenge to Judicial Review*, 41 WAKE FOREST L. REV. 1003 (2006); Andrea Olson, *Defining the Article III Judicial Power: Comparing Congressional Power to Strip Jurisdiction with Congressional Power to Reassign Adjudications*, 53 CREIGHTON L. REV. 111 (2019); Michael Stokes Paulsen, *Checking the Court*, 10 N.Y.U. J.L. & LIBERTY 18 (2016); Martin H. Redish, *Congressional Power to Regulate Supreme Court Appellate Jurisdiction Under the Exceptions Clause: An Internal and External Examination*, 27 VILL. L. REV. 900 (1982); Caprice L. Roberts, *Jurisdiction Stripping in Three Acts: A Three String Serenade*, 51 VILL. L. REV. 593 (2006); William W. Van Alstyne, *A Critical Guide to Ex Parte McCordle*, 15 ARIZ. L. REV. 229 (1973); Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001 (1965); Theodore J. Weiman, *Jurisdiction Stripping, Constitutional Supremacy, and the Implications of Ex Parte Young*, 153 U. PA. L. REV. 1677 (2005).

²⁹ See *infra* Part II.

³⁰ Abandoned Shipwreck Act (ASA), 43 U.S.C. §§ 2101–2106.

³¹ Sunken Military Craft Act (SMCA), 10 U.S.C. § 113 note (Sunken Military Craft).

³² See, e.g., JOHN A. EDGINTON, 3A BENEDICT ON ADMIRALTY § 1 (7th ed. 2025) (discussing the history of salvage actions as a core piece of admiralty law since before the time of the Romans).

³³ See *infra* Part I.

Federal courts scholars have long carried out a robust debate on the constitutionality of such jurisdiction stripping.³⁴ Unfortunately, this debate has neglected to look at how jurisdictional issues have played out in admiralty law, precedent which challenges the accepted wisdom of federal courts scholarship.³⁵ Understanding admiralty's approach to jurisdiction provides essential insights into the long-running discussion on jurisdiction stripping, while it also highlights how far Congress has drifted away from constitutionality in its recent maritime legislation.

Part I begins by setting the context of admiralty jurisdiction, showing the history that led to the Constitution's grant to the federal courts of "all Cases of admiralty and maritime Jurisdiction."³⁶ It explains how the need for uniformity among states and consistency with the international law of nations drove this grant.³⁷ It then details the admiralty case law that interpreted this grant over the following 150 years, describing how the Supreme Court understood the role of Congress and the federal judiciary in maritime law.³⁸ It shows how the role of the federal courts was to determine the extent of maritime jurisdiction, and within this jurisdiction Congress had the power to legislate and create new substantive maritime laws and procedures.³⁹ The Court, however, has clearly established that congressional attempts to remove traditional maritime causes of action from federal jurisdiction are *ultra vires* and a violation of Article III.⁴⁰

Part II looks at this conclusion in the context of the broader federal courts literature on jurisdiction stripping. Admiralty precedent challenges the majority view that Congress has plenary power to alter and remove maritime jurisdiction. However, this apparent conflict is a result of recent generations of federal courts scholars effectively ignoring admiralty law and its implications for the broader debate about the permissibility of jurisdiction stripping.⁴¹ This Part details the three

³⁴ See, e.g., Epps & Trammell, *supra* note 28 (describing this debate).

³⁵ See generally sources cited *supra* note 28 and accompanying text.

³⁶ U.S. CONST. art. III, § 2, cl. 1; see *infra* Part I.A.

³⁷ See *infra* Part I.A.

³⁸ See *infra* Part I.B.

³⁹ See *infra* Part I.B.

⁴⁰ See *infra* Part I.B.

⁴¹ See *infra* Part II.

main schools of thought on jurisdiction stripping and shows how, under any of these views, removing traditional maritime causes of action from federal courts is likely to be considered unconstitutional.⁴² This result highlights the importance of ensuring that federal courts scholars consider admiralty in drawing conclusions about the overarching relationship between federal courts and Congress in these jurisdictional puzzles.

Part III turns to modern admiralty law, showing specifically how two recent laws governing historic shipwrecks, the Abandoned Shipwreck Act and the Sunken Military Craft Act, are examples of unconstitutional jurisdiction stripping.⁴³ These laws bar the traditional maritime causes of salvage and finds, eliminating foundational admiralty jurisdiction from the federal courts and, this Article argues, violating Article III.⁴⁴ Inadequate attention to the important role of admiralty by Congress, judges, and academics in recent years has led to this outcome. This Article finishes by arguing that it is essential that modern maritime and federal courts discourse come back into line with admiralty law's foundational dictates.⁴⁵

I. ADMIRALTY'S HISTORICAL FOUNDATIONS

Admiralty's unique and exceptional status in the American legal system stems from the time of the founding and originates in Roman law thousands of years before.⁴⁶ This history provides important context for interpreting admiralty's status under Article III and for appreciating how it is distinct from other areas of federal court jurisdiction. Admiralty departs from traditional legal principles in many ways, leading to some of the most seemingly well-understood legal conclusions not being applicable in this area.⁴⁷

⁴² See *infra* Part II.A.

⁴³ See *infra* Part III.

⁴⁴ See *infra* Part III.A-B.

⁴⁵ See *infra* Conclusion.

⁴⁶ See Allan Erbsen, *Constitutional Spaces*, 95 MINN. L. REV. 1168, 1252 (2011) (coining the term "admiralty exceptionalism").

⁴⁷ See generally Thomas S. Rue, *The Uniqueness of Admiralty and Maritime Law*, 79 TUL. L. REV. 1127 (2005) (discussing the myriad differences between admiralty and "shoreside" law).

Determining the extent, and limits, of admiralty and maritime jurisdiction must begin with looking at the text and history of Article III's grant of jurisdiction to the federal courts.⁴⁸ A textual reading of Article III indicates that this grant was intended to be an exclusive one, giving the federal courts, and not the state courts, jurisdiction over admiralty and maritime claims.⁴⁹ The reasons for Article III's focus on maritime powers rest on the importance of maintaining a uniform approach to admiralty law. The Supreme Court has consistently recognized the importance of this uniformity and the role of the federal courts in ensuring it, beginning in the 1800s⁵⁰ and continuing to today.⁵¹

This Part lays out the history of Article III's grant of jurisdiction over admiralty and maritime matters to the federal judiciary. It shows that under both a historical and a textual reading, Article III creates a nondiscretionary grant of jurisdiction over admiralty and maritime cases to federal courts. It traces the Supreme Court cases of the nineteenth and early twentieth centuries to show how the Court has articulated and reaffirmed this exclusive grant of jurisdiction. Importantly, these cases affirm two core tenets of admiralty jurisdiction: first, that it is the role of the federal courts, not the state courts, to adjudicate maritime cases; and second, that while Congress has some authority to regulate substantive maritime law, it must do so within the jurisdictional boundaries established by the Constitution and the federal courts.

⁴⁸ *Butler v. Bos. & Savannah S.S. Co.*, 130 U.S. 527, 557 (1889) (“[W]e have held that the boundaries and limits of the admiralty and maritime jurisdiction are matters of judicial cognizance, and cannot be affected or controlled by legislation, whether state or national. But within these boundaries and limits the law itself is that which has always been received as maritime law in this country”); *Ex parte Easton*, 95 U.S. 68, 70 (1877) (“In order, therefore, to determine the limits of the admiralty jurisdiction, it becomes necessary to ascertain the true interpretation of the constitutional grant.”).

⁴⁹ *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 347 (1816) (“In respect to the other enumerated cases — the cases arising under the constitution . . . and cases of admiralty and maritime jurisdiction — reasons of a higher and more extensive nature, touching the safety, peace, and sovereignty of the nation, might well justify a grant of exclusive jurisdiction.”).

⁵⁰ *See* *DeLovio v. Boit*, 7 F. Cas. 418, 443 (C.C.D. Mass. 1815) (No. 3,776).

⁵¹ *See* *Great Lakes Ins. SE v. Raiders Retreat Realty Co.*, 601 U.S. 65, 69 (2024).

A definitional note: admiralty and maritime jurisdiction are distinct terms, but there is considerable disagreement about the relative scope of each. Some have stated that admiralty refers to the private law of ships, while maritime law refers more broadly to the legal system surrounding all water-based activities, including marine resource management, commerce, and navigation among other things. Over time, the distinction between these terms has in many cases been eroded. For ease of application, we use the terms admiralty and maritime here interchangeably to refer to all causes within the combined sphere of federal admiralty and maritime jurisdiction.⁵²

A. Admiralty at the Founding

In the 1700s, maritime commerce was the primary method of transportation for people and things, forming “the jugular vein of the Thirteen States.”⁵³ Its important role internationally led to the development of a relatively coherent body of customary international law, *jus gentium*, governing maritime matters.⁵⁴ This *jus gentium* was derived originally from thousands of years of custom, including the Rhodesian Laws of Oleron and the Roman Laws of Justinian.⁵⁵ Both the substantive laws and the procedures of admiralty were unique and relatively consistent across national borders,⁵⁶ encompassing many

⁵² With the recognition that while this distinction is insignificant for the main questions addressed by this paper, in other contexts it may be a critical one.

⁵³ Felix Frankfurter & James M. Landis, *The Business of the Supreme Court of the United States. A Study in the Federal Judicial System*, 38 HARV. L. REV. 1005, 1011 (1925).

⁵⁴ See generally Samuel Rosen, *The Origin and Development of the Modern Maritime Law*, 6 L. SOC'Y J. 240 (1934) (discussing the origins of international maritime law).

⁵⁵ *Id.* at 241-43 (noting that some trace the uniformity of maritime law “is due in no small measure to the fact that during all of the years of the Roman Empire the Mediterranean, at once the centre of the then known world and its chief highway, was in Roman control, and under Roman laws. Because of this the laws of the sea were uniform”).

⁵⁶ See, e.g., Eugene Kontorovich, *Originalism and the Difficulties of History in Foreign Affairs*, 53 ST. LOUIS U. L.J. 39, 46 (2008) (describing the unique nature of admiralty courts at the time as “nationally-sponsored international tribunals”); Rosen, *supra* note 54, at 240 (“There is a peculiar uniformity in this law which causes its rules to transcend national boundaries and gives to it an international or cosmopolitan character. The customs of the sea are observed in all states and in all places, and are characterized by an exact justice, which is seldom found in any other branch of the law.”).

claims that still form the foundations of admiralty law today, such as the law of salvage.⁵⁷ This admiralty law was a pillar of the British legal system that formed the foundations for American law.⁵⁸

The critical role of maritime commerce coupled with a desire to ensure that U.S. approaches to maritime law were consistent with those of the rest of the world drove the establishment of a federal admiralty law.⁵⁹ The need for uniformity in maritime law was the motivating force behind the founders granting jurisdiction over maritime matters exclusively to federal courts in the Constitution.⁶⁰ There was little doubt at the time that this federal jurisdiction over admiralty and maritime matters was necessary.⁶¹ While the primary concern was ensuring admiralty law was uniform across the United States, the founders also sought to ensure the US admiralty law was consistent with international principles.⁶² The founders understood that uniform and

⁵⁷ Nafziger, *supra* note 11, at 260-61 (noting that customary international law, *jus gentium*, forms the basis of salvage and finds causes of action).

⁵⁸ See David J. Bederman, *Admiralty Jurisdiction*, 31 J. MAR. L. & COM. 189, 189 (2000) (“A separate and distinct admiralty jurisdiction has been present in Anglo-American law for nearly 700 years.”).

⁵⁹ THE FEDERALIST NO. 80 (Alexander Hamilton) (“The most bigoted idolizers of state authority have not thus far shewn a disposition to deny the national judiciary the cognizance of maritime causes. These so generally depend on the laws of nations, and so commonly affect the rights of foreigners, that they fall within the considerations which are relative to the public peace.”); see also Young, *supra* note 20, at 471.

⁶⁰ The Thomas Barlum, 293 U.S. 21, 43 (1934); 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 532, 571 (Jonathan Elliot ed., 1836); 1 BENEDICT ON ADMIRALTY §105 (Joshua S. Force & Stephen F. Friedell eds., 2025); Lawrence D. Bradley, Jr., *The Supreme Court and Maritime Jurisdiction*, 25 TUL. MAR. L.J. 207, 207-08 (2000) (quoting THE FEDERALIST NO. 80, at 478 (Alexander Hamilton) (Jacob E. Cooke ed., 1961)); James P. Laughlin, *Choice of Law in the Federal Admiralty Court*, 10:2 J. MAR. L. & COM. 165, 166-67 (1979).

⁶¹ Daniel J. Meltzer, *The History and Structure of Article III*, U. PA. L. REV. 1569, 1570 (1990) (“Constitutional Convention and the state ratifying conventions viewed federal jurisdiction as most vital in actions under federal treaties and national revenue laws or in admiralty.”).

⁶² 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 1664, 1666 (1833) (“It is obvious that this class of (civil admiralty) cases has, or may have, an intimate relation to the rights and duties of foreigners in navigation and maritime commerce There is, then, a peculiar wisdom in giving to the national government a jurisdiction of this sort, which cannot be wielded, except for the general good; and which multiplies the securities for the public peace abroad, and gives commerce and navigation

predictable maritime laws were necessary to enable maritime commerce to thrive.⁶³ Additionally, admiralty at the time was critical for international relations, with major foreign policy decisions frequently being made by admiralty courts.⁶⁴ Granting federal courts jurisdiction over these cases ensured that admiralty law reflected the general law of nations and the rights of foreign nationals.⁶⁵

State jurisdiction over admiralty cases was not appropriate for a multitude of reasons. Some noted that state judges were elected on an annual basis, making them potentially less independent and able to uphold Constitutional principles.⁶⁶ Others argued, perhaps motivated

the most encouraging support at home.”); 1 CONGRESS AND THE COURTS: A LEGISLATIVE HISTORY 1787-1977 91 (1978) (describing how Virginia ratifying convention Governor Randolph endorsed admiralty jurisdiction as a fitting adjunct of national government: “As our national tranquility, reputation, and intercourse with foreign nations may be affected by admiralty decisions, as they ought therefore to be uniform, and as there can be no uniformity if there be thirteen distinct independent jurisdictions, the jurisdiction ought to be in the Federal judiciary.”); see also Matthew P. Harrington, *Necessary and Proper, but Still Unconstitutional: The Oil Pollution Act’s Delegation of Admiralty Power to the States*, 48 CASE W. RES. L. REV. 1, 2-3 (1997).

⁶³ See Frankfurter & Landis, *supra* note 53, at 1011 (“Maritime commerce [is] . . . the jugular vein of the Thirteen States. The need for a body of law applicable throughout the nation was recognized by every shade of opinion in the Constitutional Convention. From this recognition it was an easy step to entrust the development of such law [of admiralty] to a distinctive system of courts, administering the same doctrines, following the same procedure, and subject to the same nationalist influences.”).

⁶⁴ Kontorovich, *supra* note 56, at 45 (noting that “[m]any, and perhaps most, of the foreign relations decisions in the period of the Articles of Confederation, and even in the first years of the Constitution, arose in admiralty”).

⁶⁵ See THE FEDERALIST NO. 80 (Alexander Hamilton); see also David J. Bederman, *Uniformity, Delegation, and the Dormant Admiralty Clause*, 28 J. MAR. L. & COM. 1, 3 (1997) (noting that Hamilton’s views may have reflected the desire to “protect the fledgling United States from the diplomatic consequences flowing from certain kinds of admiralty controversies, most notably questions having to do with the capture of enemy or neutral vessels in time of war”) [hereinafter Bederman, *Dormant Admiralty Clause*].

⁶⁶ Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: Early Implementation of and Departures from the Constitutional Plan*, 86 COL. L. REV. 1515, 1535 (1986) (“To assign the [final] jurisdiction of some of these very cases to the State courts, to judges, who, in many instances, hold their places for a limited period; whereas, the constitution, for the greater security of the citizen, and to insure the independence of the federal judges, has expressly declared that they shall hold their commissions during good behaviour. To judges who are exposed every year to a diminution of salary by the State Legislatures; whereas, the constitution, to remove from the federal judges all

by personal experience,⁶⁷ that admiralty issues were not well suited to being tried by jury.⁶⁸ Others spoke about the national importance of admiralty as preclusive of state involvement.⁶⁹ Regardless of the reasoning, the belief was universal: admiralty matters were the province of the federal courts.⁷⁰

The federalization of admiralty jurisdiction was accomplished in Article III, section 2, clause 1 of the Constitution, which states:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State, —

dependence on the Legislative or Executive, has protected them from any diminution in their compensation.”).

⁶⁷ Prior to his appointment to the bench, Justice Wilson was an attorney in an admiralty capture case. A Pennsylvania jury granted a low award which was increased significantly on appeal to the federal Court of Appeals. Unfortunately, Pennsylvania refused to recognize the federal decision. See Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741, 774-75, n.113 (1984).

⁶⁸ See JONATHAN ELLIOT, 2 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 353 (1888) (“We find it essentially necessary from the ample experience we have had in the courts of admiralty with regard to captures. Those gentlemen who, during the late war, had their vessels retaken, know well what a poor chance they would have had when those vessels were taken in their states and tried by juries, and in what a situation they would have been if the Court of Appeals had not been possessed of authority to reconsider and set aside the verdicts of those juries.”).

⁶⁹ See Wythe Holt, “*Federal Courts as the Asylum to Federal Interests*”: *Randolph’s Report, the Benson Amendment, and the “Original Understanding” of the Federal Judiciary*, 36 BUFF. L. REV. 341, 344-48 (1987) (describing that, in 1790, the House of Representatives asked Attorney General Randolph to study the recently created federal judicial system and report his conclusions and Randolph’s thesis was that the nature of admiralty litigation shuts out the jurisdiction of the State courts, as such, on the vital principles of the Union).

⁷⁰ See *supra* notes 46-49 (discussing the unanimous view of the states that admiralty jurisdiction must be in the federal courts).

between Citizens of different States, — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.⁷¹

In seeking to understand the extent of admiralty power, Article III creates the first guidepost.⁷² This grant clearly gives the federal judiciary jurisdiction over “all Cases of admiralty and maritime Jurisdiction.”⁷³ Article III also creates two distinct categories of jurisdiction in the federal courts: jurisdiction over *all cases* and possible jurisdiction over *controversies*.⁷⁴ Admiralty and maritime cases, in addition to jurisdiction over matters arising under the Constitution and those affecting ambassadors, fall into the first category.

Justice Story was the first to articulate the argument that Article III’s grant of jurisdiction over *all cases* is nondiscretionary and thus may not be delegated to state courts or other branches of government. In *Martin v. Hunter’s Lessee*, Story argued that Article III’s grant of all cases must be interpreted to be exclusive to the federal courts,

How otherwise could the jurisdiction extend to *all* cases arising under the constitution, laws, and treaties of the United States, or to *all cases* of admiralty and maritime jurisdiction? If some of these cases might be entertained by state tribunals, and no appellate jurisdiction as to them should exist, then the appellate power would not extend to *all*, but to *some* cases. If state

⁷¹ U.S. CONST. art. III, § 2, cl. 1.

⁷² See *Steamer St. Lawrence*, 66 U.S. (1 Black) 522, 527 (1861) (noting that boundaries of admiralty jurisdiction are “to be ascertained by a reasonable and just construction of the words used in the Constitution, taken in connection with the whole instrument, and the purposes for which admiralty and maritime jurisdiction was granted to the Federal Government”).

⁷³ See generally Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205 (1985) (discussing broadly the jurisdiction granted by Article III and distinguishing between the grant over “all Cases” and “controversies”); Steven G. Calabresi & Gary Lawson, *The Unitary Executive, Jurisdiction Stripping, and the Hamdan Opinions: A Textualist Response to Justice Scalia*, 107 COLUM. L. REV. 1002 (2007) (describing Article III’s grant of federal jurisdiction in the context of jurisdiction stripping cases).

⁷⁴ For a further discussion of this distinction and how it has been interpreted in the Federal Courts literature, see *infra* Part II.A.

tribunals might exercise concurrent jurisdiction over all or some of the other classes of cases in the constitution without control, then the appellate jurisdiction of the United States might, as to such cases, have no real existence, contrary to the manifest intent of the constitution. Under such circumstances, to give effect to the judicial power, it must be construed to be exclusive⁷⁵

As one of the areas where Article III grants the federal judiciary jurisdiction over all cases, Story interpreted this to mean that admiralty and maritime cases must be heard by federal courts.⁷⁶

While the Constitution granted federal courts jurisdiction over admiralty matters, Congress retained the authority to determine how admiralty jurisdiction is allocated within the federal court system.⁷⁷ In *Romero v. International Terminal Operating Co.*, the Court recognized that:

Article III, s 2, cl. 1 (3d provision) of the Constitution and section 9 of the Act of September 24, 1789, have from the beginning been the sources of jurisdiction in litigation based upon federal maritime law. . . . It empowered Congress to confer admiralty and maritime jurisdiction on the ‘Tribunals inferior to the Supreme Court’ which were authorized by Art. I. s 8, cl. 9.⁷⁸

Congress has codified this approach in 28 U.S.C § 1333, granting district courts “original jurisdiction, exclusive of the courts of the

⁷⁵ *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 339 (1816).

⁷⁶ *See id.* at 337 (“The admiralty and maritime jurisdiction is of the same exclusive cognizance; and it can only be in those cases where, previous to the constitution, state tribunals possessed jurisdiction independent of national authority, that they can now constitutionally exercise a concurrent jurisdiction.”).

⁷⁷ Congress might have vested that original jurisdiction with the inferior federal courts that they may from time to time establish. Or if no inferior courts were created, the conditional residual of “all admiral and maritime cases” might be left to vest with the U.S. Supreme Court to hear in original jurisdiction. Alternatively, they may have allowed the states to originally hear a case in admiralty and then vest the U.S. Supreme Court with appellate jurisdiction and confine the opinions of state court judges via Art. VI, § 1, cl. 2.

⁷⁸ *Romero v. Int’l Terminal Operating Co.*, 358 U.S. 354, 360 (1959).

States, of any civil case of admiralty or maritime jurisdiction.”⁷⁹ Moving forward, if Congress wished to divest admiralty and maritime jurisdiction from the district courts it created in the Judiciary Act of 1789,⁸⁰ and instead leave the Supreme Court with jurisdiction over these matters it could do so. What it could not do is completely divest all federal courts of Article III’s mandatory assignment of “all Cases of admiralty and maritime Jurisdiction” to federal courts.⁸¹

Constitutionally, the only clear creation of federal authority over maritime issues is in Article III’s grant to the federal courts. Congress itself is given no explicit general power over admiralty and maritime matters.⁸² In the words of Professor Akhil Amar:

The only express grant of admiralty power to the national government appears in Article III, a fact that strongly suggests a special role for national judges in admiralty. Congress, on the other hand, was given no explicit substantive power to legislate generally in admiralty; it thus would have been especially peculiar to have committed the scope of admiralty jurisdiction to the discretion of that branch.⁸³

However, Congress was clearly granted *some* authority over maritime matters. Where this power stems from, and its extent, was the subject of much judicial scrutiny in the following years.

B. The Supreme Court’s Interpretation of Article III’s Admiralty Grant

In the century and a half following the adoption of the Constitution, the Supreme Court was faced with interpreting and clarifying Article III’s grant of admiralty jurisdiction. Unfortunately, this proved to be far

⁷⁹ 28 U.S.C. § 1333.

⁸⁰ Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76-77 (1789).

⁸¹ See U.S. CONST. art. III, § 2, cl. 1; Amar, *supra* note 73.

⁸² Although Congress does have an enumerated, yet very limited power, for codifying criminal penalties for piracies and felonies on the high seas. See U.S. CONST. art. I, § 8, cl. 10.

⁸³ Amar, *supra* note 73, at 253.

from an easy task.⁸⁴ The lack of clarity in the Constitution over what admiralty law encompassed as well as who should create its rules led to ongoing confusion from both judges and commentators.⁸⁵

Nonetheless, looking to the early years of Supreme Court decisions helps to elucidate some key principles about admiralty jurisdiction that support Story's conclusion that Article III creates a mandatory grant over admiralty matters to the federal courts. In interpreting this grant of jurisdiction, two major questions arose immediately: first, what exactly was within the admiralty jurisdiction; and second, what relative power did Congress and the judiciary have over admiralty actions.⁸⁶

On the first point, one of the early questions faced by courts was whether Article III's grant encompassed only those causes of action allowed in British admiralty courts. In two seminal cases, Justice Story rejected this approach finding that admiralty in the new United States was an expansive area. First, in *DeLovio v. Boit*, he argued for a body of admiralty law construed broadly:

⁸⁴ Some have noted about the attempts to tease out admiralty's jurisdictional issues that "one might tack a sailboat into a fog bank with more confidence." *Ballard Shipping Co. v. Beach Shellfish*, 32 F.3d 623, 624 (1st Cir. 1994).

⁸⁵ Courts and commentators have hypothesized various reasons for this confusion. *See, e.g.*, *Steamer St. Lawrence*, 66 U.S. (1 Black) 522, 526-27 (1861) ("[T]he extent of the jurisdiction conferred depending very much upon the character of the government in which they were created; and this circumstance, with the general terms of the grant, rendered it difficult to define the exact limits of its power in the United States. This difficulty was increased by the complex character of our Government, where separate and distinct specified powers of sovereignty are exercised by the United States and a State independently of each other within the same territorial limits. And the reports of the decisions of this court will show that the subject has often been before it, and carefully considered, without being able to fix with precision its definite boundaries . . ."); Allan Erbsen, *Constitutional Spaces*, 95 MINN. L. REV. 1168, 1248 (2011) ("Deciphering admiralty's content and location is difficult because admiralty jurisdiction is the only space that the Constitution mentions without any express indication of who controls it or what should happen within it. The Constitution's imprecision helps to explain why three puzzles about admiralty have intrigued commentators while resisting a satisfying resolution.").

⁸⁶ It is worth noting that there was a third question frequently presented to the Courts: to what degree could states pass laws that supplemented or amended the federal admiralty law? This question has been the subject of considerable discussion in the admiralty literature, though less so in recent decades, and is not the focus of this Article.

The language of the Constitution will therefore warrant the most liberal interpretation; and it may not be unfit to hold, that it had reference to that maritime jurisdiction, which commercial convenience, public policy, and national rights, have contributed to establish, with slight local differences, over all Europe; that jurisdiction, which, under the name of consular courts, first established itself upon the shores of the Mediterranean, and, from the general equity and simplicity of its proceedings, soon commended itself to all the maritime states⁸⁷

Justice Story followed this in *Martin v. Hunter's Lessee*, where he built on his argument that the maritime jurisdiction of federal courts should be interpreted as broadly as possible. In doing so, he also clearly laid out the cases that were in the sphere of admiralty and maritime jurisdiction at the time:

[T]he admiralty jurisdiction embraces all questions of prize and salvage, in the correct adjudication of which foreign nations are deeply interested; it embraces also maritime torts, contracts, and offences, in which the principles of the law and comity of nations often form an essential inquiry. All these cases, then, enter into the national policy, affect the national rights, and may compromise the national sovereignty. The original or appellate jurisdiction ought not, therefore, to be restrained, but should be commensurate with the mischiefs intended to be remedied, and, of course, should extend to all cases whatsoever.⁸⁸

These cases established the understanding that there was a concrete body of maritime law that existed at the time of the founding.⁸⁹ This general U.S. maritime law was a hybrid of national and international

⁸⁷ *DeLovio v. Boit*, 7 F. Cas. 418, 443 (C.C.D. Mass. 1815) (No. 3,776).

⁸⁸ *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 335 (1816).

⁸⁹ *See* *Zych v. Unidentified Wrecked & Abandoned Vessel, Believed to Be the Seabird (Zych III)*, 19 F.3d 1136, 1139 (7th Cir. 1994); *see also* *Detroit Trust Co. v. The Thomas Barlum*, 293 U.S. 21, 43 (1934) (stating that "the grant presupposed a 'general system of maritime law' which was familiar to the lawyers and statesmen of the country, and contemplated a body of law with uniform operation"); *R.M.S. Titanic, Inc. v. Haver*, 171 F.3d 943, 960 (4th Cir. 1999) ("The body of admiralty law referred to in Article III did not depend on any express or implied legislative action. Its existence, rather, preceded the adoption of the Constitution.").

law,⁹⁰ and importantly, one that was distinct from other causes of law and equity.⁹¹ Understanding the substance and boundaries of admiralty law thus required courts to draw on both international *jus gentium* as well as U.S. maritime law history and tradition.⁹² This was a difficult process, but one that courts found was clearly intended by the Constitution to be in the hands of the judiciary.⁹³ Early interpretation of maritime law was thus driven by the federal courts, who were expected to determine the limits and substance of maritime law without deference to state law or legislative pronouncements.⁹⁴ Many of the early decisions courts faced in determining the extent of maritime jurisdiction focused on difficult questions of what exactly it means for

⁹⁰ See James A. R. Nafziger, *The Evolving Role of Admiralty Courts in Litigation Related to Historic Wreck Focus: Emerging Fora for International Litigation (Part 2)*, 44 HARV. INT'L L.J. 251, 252 (2003).

⁹¹ The status of admiralty as a distinct body of law, separate from that heard by courts of law and equity, was derived from the British admiralty system. See *Bains v. The James & Catherine*, 2 F. Cas. 410, 413 (C.C.D. Pa. 1832) (No. 756) (“The jurisdiction of the courts of admiralty in England, is a part of the royal prerogative conferred on the lord high admiral by the king’s commission, (4 Co. Inst. 124) and exercised by his deputies and inferior officers forming courts of different grades, from the highest of which an appeal lies to the king in council; but not being courts of record, their proceedings cannot be reviewed according to the course of the common law, and no act of parliament had provided for an appeal to the house of lords, as from the high court of chancery. Vide 3 Bl. Comm. 69.”).

⁹² See *The Lottawanna*, 88 U.S. (21 Wall.) 558, 576 (1874) (“To ascertain, therefore, what the maritime law of this country is, it is not enough to read the French, German, Italian and other foreign works on the subject, or the codes which they have framed; but we must have regard to our own legal history, constitution, legislation, usages and adjudications as well. The decisions of this court illustrative of these sources, and giving construction to the laws and Constitution, are especially to be considered; and when these fail us, we must resort to the principles by which they have been governed.”).

⁹³ *Id.* (“The question as to the true limits of maritime law and admiralty jurisdiction is, undoubtedly, . . . exclusively a judicial question, and no State law or act of Congress can make it broader, or (it may be added) narrower, than the judicial power may determine those limits to be.”).

⁹⁴ Laughlin, *supra* note 60, at 168-69 (“[A]t the time the Constitution was adopted, admiralty was one of the few areas in which the Supreme Court was not expected to conform its decisions to preexisting state law. In other words, the Court was expected to ascertain the limits of a general maritime law independent, really, of decisional and legislative law, and to delimit those portions applicable to a particular case.”).

something to be maritime, for instance in determining the geographic limits of maritime jurisdiction.⁹⁵

Having established to some extent the boundaries of maritime jurisdiction, it was then up to the Court to determine which branches had control over admiralty and maritime matters. While Article III clearly granted federal courts jurisdiction over all admiralty cases, the Constitution created no clear role for Congress in admiralty and maritime matters.⁹⁶ It was in the hands of the federal courts to interpret Article III and determine what the respective functions of Congress and the judiciary were intended to be, while recognizing that from the earliest days, Article III's maritime grant of jurisdiction was intended to be an exclusive one.⁹⁷

In the decades following the Constitution's adoption, the Court heard a number of cases that established that Congress did have some power in admiralty, specifically the power to modify and supplement admiralty law within jurisdictional limits.⁹⁸ There was general disagreement about the roots of this power: while some decisions found Congress's authority to stem unquestionably from the commerce clause,⁹⁹ in other cases the Court found Congress's maritime power to be distinct from

⁹⁵ See, e.g., *Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443 (1851) (holding that all navigable waters fell within admiralty and maritime jurisdiction).

⁹⁶ See discussion *supra* Part I.A.

⁹⁷ See, e.g., *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 347 (1816) ("[I]n respect to the other enumerated cases — the cases arising under the constitution, . . . and cases of admiralty and maritime jurisdiction — reasons of a higher and more extensive nature, touching the safety, peace, and sovereignty of the nation, might well justify a grant of exclusive jurisdiction.").

⁹⁸ See *In re Garnett*, 141 U.S. 1, 13-14 (1891) (citing these cases and noting that "[t]hese quotations are believed to express the general, if not unanimous, views of the members of this court for nearly twenty years past; and they leave us in no doubt that, while the general maritime law, with slight modifications, is accepted as law in this country, it is subject to such amendments as congress may see fit to adopt").

⁹⁹ See, e.g., *The Lottawanna*, 88 U.S. (21 Wall.) 558, 577 (1874) ("Congress, undoubtedly, has authority under the commercial power, if no other, to introduce such changes as are likely to be needed."); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 190 (1824) ("All America understands, and has uniformly understood, the word 'commerce,' to comprehend navigation.").

commerce,¹⁰⁰ for instance stemming from the necessary and proper clause.¹⁰¹ While the roots of Congressional authority to legislate in maritime areas did not ultimately have considerable impact on the question of admiralty jurisdiction, the confusion over this basic issue is indicative of the broader perplexity over maritime law at the time.

The extent of Congressional power and how it interacted with the federal courts remained a thorny question that was frequently before the Supreme Court in the following century.¹⁰² In addressing this question, the principle of uniformity that initially drove the founders to grant jurisdiction over admiralty cases to the federal courts solidified itself as one of the core principles guiding the interpretation of admiralty jurisdiction.¹⁰³ Specifically, many of the admiralty cases in the 1800s dealt with the constitutionality of congressional attempts to legislate on maritime matters. In several early cases, for instance, both state and federal legislatures attempted to allow state worker's

¹⁰⁰ Erbsen, *supra* note 85, at 1251; *see, e.g., In re Garnett*, 141 U.S. 1, 12 (1891) ("It is unnecessary to invoke the power given to congress to regulate commerce with foreign nations, and among the several states, in order to find authority to pass the law in question. The act of Congress which limits the liability of shipowners was passed in amendment of the maritime law of the country, and the power to make such amendments is coextensive with that law."); Stanley Morrison, *The Remedial Powers of the Admiralty*, 43 YALE L.J. 1, 5 (1933) ("But it eventually became settled that the power of legislation is derived by implication from the constitutional grant of judicial power over admiralty and maritime cases.").

¹⁰¹ *See* *Detroit Trust Co. v. The Thomas Barlum*, 293 U.S. 21, 42-44 (1934); *see also* David W. Robertson, *Our High Court of Admiralty and Its Sometimes Peculiar Relationship with Congress*, 55 ST. LOUIS U. L.J. 491, 499-500 (2011) (describing Congress's source of power as deriving from a combination of Article III, § 2 and the necessary and proper clause, art. 1, § 8, cl. 18).

¹⁰² *See In re Garnett*, 141 U.S. at 12 (noting that "the subject has frequently been up for consideration by this court for many years past").

¹⁰³ *See* *DeLovio v. Boit*, 7 F. Cas. 418, 443 (C.C.D. Mass. 1815) (No. 3,776) ("The advantages resulting to the commerce and navigation of the United States, from a uniformity of rules and decisions in all maritime questions, authorize us to believe that national policy, as well as juridical logic, require the clause of the constitution to be so construed, as to embrace all maritime contracts, torts and injuries, or, in other words, to embrace all those causes, which originally and inherently belonged to the admiralty, before any statutable restriction.") (Justice Story writing to emphasize the importance of uniformity).

compensation claims for maritime injuries.¹⁰⁴ The Supreme Court, however, repeatedly struck down these attempts as violations of Article III, citing the foundational need for uniformity in maritime law.¹⁰⁵

In order to ensure that uniformity is maintained, the Supreme Court in a series of cases repeatedly recognized that Congress does not have the authority to limit admiralty and maritime jurisdiction.¹⁰⁶ Removing causes of action from federal jurisdiction and instead granting these to the states raised serious uniformity concerns due to different state laws on the issue. This conclusion derived from Story's earliest decisions in *DeLovio v. Boit* and *Martin v. Hunter's Lessee* and laid the groundwork for the *Lochner*-era cases that defined these limits most clearly. In these early cases, a clear principle evolved: Congress has the power to legislate on maritime matters, but this legislation must be within the boundaries established by the Constitution's grant over "all Cases of maritime and admiralty Jurisdiction" to federal courts.¹⁰⁷ Within the boundaries of this grant, Congress had the power to make minor modifications,

¹⁰⁴ See, e.g., *Washington v. W.C. Dawson & Co.*, 264 U.S. 219 (1924) (holding that a state workers compensation law from Washington could not be applied to maritime workers); *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 163-64 (1920) (invalidating a Congressional Act that attempted to extend the saving to suitors clause to allow maritime workers to bring claims under state workers compensation laws); *S. Pac. Co. v. Jensen*, 244 U.S. 205 (1917) (overturning an attempt to apply a New York workers compensation law to maritime workers).

¹⁰⁵ See, e.g., *Washington*, 264 U.S. at 227-28 ("The grant of admiralty and maritime jurisdiction looks to uniformity; otherwise wide discretion is left to Congress."); *Knickerbocker Ice Co.*, 253 U.S. at 164 ("The definite object of the grant was to commit direct control to the Federal Government; to relieve maritime commerce from unnecessary burdens and disadvantages incident to discordant legislation; and to establish, so far as practicable, harmonious and uniform rules applicable throughout every part of the Union.").

¹⁰⁶ *The Lottawanna*, 88 U.S. (21 Wall.) 558, 576 (1874) ("The question as to the true limits of maritime law and admiralty jurisdiction is . . . exclusively a judicial question, and no State law or act of Congress can make it broader or narrower than the judicial power may determine those limits to be.").

¹⁰⁷ See *Butler v. Bos. & Savannah S.S. Co.*, 130 U.S. 527, 557 (1889) ("We have held that the boundaries and limits of the admiralty and maritime jurisdiction are matters of judicial cognizance, and cannot be affected or controlled by legislation, whether state or national. But within these boundaries and limits the law itself is that which has always been received as maritime law in this country, with such amendments and modifications as Congress may from time to time have adopted.").

supplements, or changes to procedure.¹⁰⁸ But it did not have the power to reshape these boundaries, as defining those was the role of the judiciary.¹⁰⁹

In *Southern Pacific Co. v. Jensen*, the Court found that state legislation, and by extension congressional legislation, is invalid if it “contravenes the essential purpose expressed by an act of Congress or works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations.”¹¹⁰

The Court built upon this in *Knickerbocker Ice Co. v. Stewart*, which came as a challenge to “[a]n act to amend sections twenty-four and two hundred and fifty-six of the Judicial Code, relating to the jurisdiction of the District Courts, so as to save to claimants the rights and remedies under the workmen’s compensation law of any state.”¹¹¹ The Supreme Court struck down this congressional attempt to allow state law remedies for maritime claims noting that Congress’s:

power to legislate concerning rights and liabilities within the maritime jurisdiction, and remedies for their enforcement, arises from the Constitution The definite object of the grant was to commit direct control to the federal government, to relieve maritime commerce from unnecessary burdens and disadvantages incident to discordant legislation, and to establish, so far as practicable, harmonious and uniform rules applicable throughout every part of the Union The subject was intrusted to it to be dealt with according to its discretion — not for delegation to others.¹¹²

These cases culminated in the Supreme Court’s clearest articulation of the limits on Congress’s ability to change maritime jurisdiction in

¹⁰⁸ *See id.*

¹⁰⁹ *See* *Detroit Trust Co. v. The Thomas Barlum*, 293 U.S. 21, 43-44 (1934) (“Boundaries were to be determined in the exercise of the judicial power in recognition of the purpose of the grant . . . in amending and revising the maritime law, the Congress necessarily acts within a sphere restricted by the concept of the admiralty and maritime jurisdiction.”).

¹¹⁰ *S. Pac. Co. v. Jensen*, 244 U.S. 205, 216 (1917).

¹¹¹ *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 155 (1920).

¹¹² *Id.* at 164.

Panama Railroad Company v. Johnson.¹¹³ In 1924, the Supreme Court was asked to rule on the constitutionality of the newly passed Jones Act, which allowed injured seamen a cause of action in state court.¹¹⁴ The defendant argued that the Jones Act was unconstitutional, violating Article III's grant of maritime jurisdiction to federal courts by creating a new, nonmaritime common law alternative claim for seamen.¹¹⁵ Providing this nonmaritime alternative would in effect "destroy the entire constitutional jurisdiction of the [admiralty] courts."¹¹⁶

The Supreme Court ultimately upheld the act but only because it was able to construe it so that federal maritime causes of action were still available.¹¹⁷ Seamen thus were able to choose between bringing claims in federal admiralty courts or state courts:

Rightly understood, the statute neither withdraws injuries to seamen from the reach and operation of the maritime law, nor enables the seamen to do so. On the contrary, it brings into that law new rules drawn from another system and extends to injured seamen a right to invoke, at their election, either the relief accorded by the old rules or that provided by the new rules. The election is between alternatives accorded by the maritime law as modified, and not between that law and some nonmaritime system.¹¹⁸

Had the Act in *Panama Railroad* removed causes of action from admiralty jurisdiction and allowed plaintiffs only the option of bringing

¹¹³ See *Panama R.R. Co. v. Johnson*, 264 U.S. 375, 385-87 (1924).

¹¹⁴ The Jones Act was passed June 5, 1920. Found today at 46 U.S.C. § 30104 (2022). The incident at issue in *Panama Railroad* occurred just four months later. *Panama R.R. Co. v. Johnson*, 289 F. 964, 967 (2d Cir. 1923), *aff'd*, 264 U.S. 375 (1924).

¹¹⁵ See Brief for Plaintiff-in-Error [Defendant] at *12, *Panama R.R. Co. v. Johnson*, 264 U.S. 375 (1924) (No. 369) (arguing that under the Jones Act, "a cause of action essentially maritime in its nature is bodily removed, or at the election of one of the parties, may be removed to a common law court, there to be decided, not according to maritime principles, but according to the very different common law principles, as modified or extended, in the case of personal injuries to railway employees").

¹¹⁶ Brief for Plaintiff-in-Error [Defendant] at *12, *Panama R.R. Co. v. Johnson*, 264 U.S. 375 (1924) (No. 369).

¹¹⁷ *Panama R.R. Co.*, 264 U.S. at 388-89.

¹¹⁸ *Id.*

claims in “some nonmaritime system,” likely state courts, this would have raised grave constitutional concerns because:

[I]t restricts the enforcement of rights founded on them to actions at law, and thereby encroaches on the admiralty jurisdiction intended by the Constitution. It must be conceded that the construction thus sought to be put on the statute finds support in some of its words, and also that if it be so construed a grave question will arise respecting its constitutional validity¹¹⁹

Panama Railroad’s resulting dictate, that there are “boundaries to the maritime law and admiralty jurisdiction which inhere in those subjects and cannot be altered by legislation, as by excluding a thing falling clearly within them or including a thing falling clearly without” presents the foundational principle for courts seeking to understand Congress’s ability to alter maritime jurisdiction.¹²⁰ Leading maritime treatises and casebooks all agree without question: “Congress cannot fundamentally change the basis of federal admiralty jurisdiction, for example, by excluding cases that were formerly clearly within the jurisdiction.”¹²¹ Statutes are thus constitutional only when they do not “encroach on the admiralty jurisdiction intended by the Constitution, but permit that jurisdiction to be invoked and exercised as it has been from the beginning.”¹²²

In the years after *Panama Railroad*, the court continued to reinforce the principles that Congress may act to modify or supplement the admiralty law but it must do so within the boundaries of admiralty law.¹²³ The Court made it clear that it was the role of federal judges, not

¹¹⁹ *Id.* at 389-90.

¹²⁰ *See id.* at 386.

¹²¹ THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW 5 (6th ed. 2019); *see also* 1 BENEDICT ON ADMIRALTY § 110 (2024).

¹²² *Panama R.R. Co.*, 264 U.S. at 391.

¹²³ *See, e.g.,* *Romero v. Int’l Terminal Operating Co.*, 358 U.S. 354, 360-61 (1959) (describing Article III as doing three things: “(1) It empowered Congress to confer admiralty and maritime jurisdiction on the ‘Tribunals inferior to the Supreme Court’ which were authorized by art. I., § 8, cl. 9. (2) It empowered the federal courts in their exercise of the admiralty and maritime jurisdiction which had been conferred on them, to draw on the substantive law ‘inherent in the admiralty and maritime jurisdiction,’ and

Congress, to determine what these boundaries are.¹²⁴ And in interpreting whether congressional attempts to alter maritime jurisdiction were lawful, the court would look to whether the law at issue furthers the need to ensure uniformity in maritime law.¹²⁵ When Congress passes laws of general applicability to maritime matters there are fewer concerns about potential uniformity issues, but the Court has struck down congressional action where “there was no attempt to prescribe general rules.”¹²⁶ Even those most sympathetic to congressional authority to prescribe maritime law recognize that there are limits to this power, namely that Congress may not legislate in such a way that it interferes with Article III’s grant to the federal courts.¹²⁷

At the same time as *Panama Railroad* and its predecessors established that it was a violation of Article III to remove admiralty jurisdiction from the federal courts, another line of cases found that congressional action that did the opposite by expanding admiralty jurisdiction beyond what it was at the founding did not violate Article III. The reason for this contrary outcome stems from the recognition of Congress’s power to modify substantive admiralty law. In a seminal opinion, *The Thomas*

to continue the development of this law within constitutional limits. (3) It empowered Congress to revise and supplement the maritime law within the limits of the Constitution”) (Justice Frankfurter’s famous description of Article III).

¹²⁴ See, e.g., *Steamer St. Lawrence*, 66 U.S. (1 Black) 522, 528 (1861) (noting that it is “the province of this court to determine what cases came within the admiralty and maritime jurisdiction of the United States”).

¹²⁵ See *Great Lakes Ins. SE v. Raiders Retreat Realty Co.*, 601 U.S. 65, 83 (2024) (Thomas, J., concurring) (“This need for uniformity has been the “touchstone” for determining the scope of admiralty jurisdiction and the extent to which state law can be given effect in admiralty cases.”); *Miles v. Apex Marine Corp.*, 498 U.S. 19, 29-30 (1990) (discussing the court’s interpretation of the Jones Act in *Moragne v. States Marine Lines*, “[a]s the Court concluded in *Moragne*, the extension of the DOHSA wrongful death action to territorial waters furthers rather than hinders uniformity in the exercise of admiralty jurisdiction. 398 U.S. 375, 396, n. 12”); Laughlin, *supra* note 60, at 176 (discussing the adoption of a uniformity driven inquiry in *Southern Pacific Co. v. Jensen* and noting the Supreme Court’s subsequent decisions that build on this case and are “relying always on the desired uniformity”). Some have gone so far as to call this uniformity requirement the “dormant admiralty clause.” Bederman, *supra* note 65.

¹²⁶ See *Washington v. W.C. Dawson & Co.*, 264 U.S. 219, 228 (1924).

¹²⁷ See, e.g., Davis, *supra* note 18, at 1374 (recognizing that “Congress is given the power to change the law in its considered judgment, as long as the boundaries of the admiralty and maritime jurisdiction set forth in the Constitution are not violated”).

Barlum, the Court upheld an expansion of admiralty to include ship mortgages on the grounds that Congress could expand substantive admiralty law and incidental expansions of admiralty jurisdiction that stem from these substantive changes are permissible.¹²⁸ Other attempts to expand admiralty jurisdiction, such as through the Admiralty Extension Act, similarly do not violate Article III so long as the expansion of jurisdiction is incidental to an expansion of substantive admiralty law.¹²⁹ Unfortunately, far from simplifying the rules, these outcomes set up another critical question for admiralty courts to answer: what was the distinction between modifications to substantive admiralty law and modifications to admiralty jurisdiction? Numerous scholars noted the difficult problem this raised given Supreme Court precedent at the time.¹³⁰

Removal of jurisdiction, which raises Article III concerns, must be distinguished from alteration to the procedures or remedies of admiralty, which generally do not raise the same concerns, what some have termed the substance-jurisdiction distinction.¹³¹ Congress has the authority to modify substantive admiralty law and procedure, such as by altering the requirements for how salvage is carried out.¹³² Courts have

¹²⁸ See *Detroit Trust Co. v. The Thomas Barlum*, 293 U.S. 21, 50-52 (1934); see also David W. Robertson & Michael F. Sturley, *The Admiralty Extension Act Solution*, 34 J. MAR. L. & COM. 209, 253-55 (2003) (describing the basis for the *Thomas Barlum* decision).

¹²⁹ See generally Robertson & Sturley, *supra* note 128 (discussing the Admiralty Extension Act and its role in expanding substantive admiralty law, arguing that this extension was necessary to remedy confusion about the proper forum in cases where activities occurred at the boundary of land and sea).

¹³⁰ See, e.g., Stanley Morrison, *The Constitutionality of the Ship Mortgage Act of 1920*, 44 YALE L.J. 1, 4 (1934) (“The reasoning upon the problem has been too often obscured by a seeming failure to distinguish clearly between statutory changes in or additions to the substantive maritime law and the delineation of the constitutional limits of jurisdiction — in other words, between the relative functions of the Congress and the judiciary. This is unfortunate, because a clear understanding of the distinction is fundamental in the determination of the question of constitutionality.”).

¹³¹ See Robertson & Sturley, *supra* note 128, at 258-60 (detailing this distinction and the academic and judicial support for the concept).

¹³² *Lathrop v. Unidentified, Wrecked & Abandoned Vessel*, 817 F. Supp. 953, 962 (M.D. Fla. 1993) (finding that “[c]ongressional enactments restricting the *manner* in which a potential salvor excavates property located on federally owned or managed lands does not offend these sound constitutional limitations”).

found that Congress also may permissibly expand admiralty law by, for instance, including criminal actions within its boundaries.¹³³ Judges can also make substantive admiralty law.¹³⁴ However, as in other areas these judge-made principles are subordinate to statutes and the constitution.¹³⁵ Recognizing that modifications to substantive admiralty law are constitutionally permissible, the United States has been careful to argue in past cases that congressional action is modifying substantive admiralty law, not interfering with admiralty jurisdiction.¹³⁶

Similarly, modifying remedies (so long as a traditional remedy is not removed completely) does not run afoul of Article III. Historically, admiralty remedies were ascertained in a separate proceeding after liability had been established.¹³⁷ The Supreme Court has upheld the availability of state law remedies to maritime matters so long as there remains “availability of a federal forum in the first instance and by

¹³³ See *United States v. Flores*, 289 U.S. 137, 159 (1933) (upholding ability of Congress to statutorily define maritime crimes).

¹³⁴ See *Nw. Airlines, Inc. v. Transp. Workers Union of Am.*, 451 U.S. 77, 95-96 (1981) (“We consistently have interpreted the grant of general admiralty jurisdiction to the federal courts as a proper basis for the development of judge-made rules of maritime law.”).

¹³⁵ See *id.* (“[W]e consistently have emphasized that the federal lawmaking power is vested in the legislative, not the judicial, branch of government; therefore, federal common law is ‘subject to the paramount authority of Congress’ . . . [e]ven in admiralty, where the federal judiciary’s lawmaking power may well be at its strongest, it is our duty to respect the will of Congress.”).

¹³⁶ See, e.g., *Lathrop*, 817 F. Supp. at 962 (“Simply put, the United States argues that several Congressional enactments have modified the *substantive law* of admiralty. By these enactments — the Rivers and Harbors Act, the Antiquities Act, and several U.S. Park Service Regulations — Congress has restricted the *manner* in which a potential salvor can excavate abandoned shipwrecks located on federal lands.”).

¹³⁷ See 28 U.S.C. § 1292(a)(3) (giving court of appeals jurisdiction over “[i]nterlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed”); *Martha’s Vineyard Scuba Headquarters, Inc. v. Unidentified, Wrecked & Abandoned Steam Vessel*, 833 F.2d 1059, 1063 (1st Cir. 1987) (describing this process and “the penchant of admiralty courts to bifurcate the trial of certain maritime matters. Liability would first be adjudicated. If a party were found liable, the case would then be shipped to a commissioner or master to fix damages”).

review in this Court to provide assurance that the federal interest is correctly assessed and accorded due weight.”¹³⁸

Case law thus establishes the primacy of the federal judiciary in adjudicating maritime cases and delineating what matters fall within, and without, the maritime jurisdiction, while Congress is given the power to regulate substantively within these boundaries in ways that do not conflict with Article III.¹³⁹ Ensuring uniformity in addressing these questions continues to be the central concern of the Court in cases as recent as 2024.¹⁴⁰

The judiciary thus has two different roles within admiralty and maritime cases: the first is the overarching role envisioned by Article III to establish the boundaries of admiralty and maritime jurisdiction.¹⁴¹ In interpreting the Constitution, judicial action in this sphere preempts Congressional enactments. However, the judiciary also has a second role: interpreting and applying the maritime legislation, so long as it represents permissible modifications to substance or procedure created by Congress.¹⁴² In this area, the judiciary’s role is more circumspect and ultimately constrained by the limits created by Congress.¹⁴³ Much of the

¹³⁸ *Kossick v. United Fruit Co.*, 365 U.S. 731, 739 (1961).

¹³⁹ *The Lottawanna*, 88 U.S. (21 Wall.) 558, 576 (1874) (“The question as to the true limits of maritime law and admiralty jurisdiction is, undoubtedly, . . . exclusively a judicial question, and no State law or Act of Congress can make it broader, or (it may be added) narrower, than the judicial power may determine those limits to be. But what the law is within those limits, assuming the general maritime law to be the basis of the system, depends on what have been received as law in the maritime usages of this country, and on such legislation as may have been competent to affect it.”); 14A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 3671.2 (4th ed. 2025) (“First, the federal courts have made it clear that, although congressional power to change the substantive law is coextensive with the field of admiralty, the extent of that field is a matter of constitutional interpretation by the Judicial Branch.”).

¹⁴⁰ *See* *Great Lakes Ins. SE v. Raiders Retreat Realty Co.*, 601 U.S. 65, 83 (2024).

¹⁴¹ *See The Lottawanna*, 88 U.S. at 576; *The St. Lawrence*, 66 U.S. (1 Black) 522, 528 (1861).

¹⁴² *The Lottawanna*, 88 U.S. at 576–77.

¹⁴³ *Miles v. Apex Marine Corp.*, 498 U.S. 19, 27 (1990) (“In this era, an admiralty court should look primarily to these legislative enactments for policy guidance. We may supplement these statutory remedies where doing so would achieve the uniform vindication of such policies consistent with our constitutional mandate, but we must also keep strictly within the limits imposed by Congress. Congress retains superior authority in these matters, and an admiralty court must be vigilant not to overstep the

confusion about the role of the judiciary in admiralty over the last two centuries stems from a lack of clarity regarding which of these capacities federal judges are acting in.¹⁴⁴

II. HARMONIZING ADMIRALTY JURISDICTION WITH FEDERAL COURTS THEORY

Admiralty case law clearly sets out the principle that Congressional attempts to remove traditional maritime causes of action from federal courts violate Article III. While this result is internally accepted by the admiralty bar, it seems to have been largely ignored by some federal judges and the federal court scholars who study them. This is concerning for several reasons, not least of which being that ignoring this precedent leads to Congressional actions and judicial decisions that are not well grounded in admiralty history and raise serious constitutional concerns. And from an academic standpoint, ignoring admiralty has led to some glaring oversights on the part of federal courts scholars.

This Part attempts to harmonize admiralty precedent with traditional perspectives on jurisdiction stripping, drawing on precedent from outside of admiralty as well as broader federal courts scholarship. It argues that *Panama Railroad's* finding that Article III prevents the removal of admiralty jurisdiction from federal courts is consistent with all of the major theories of jurisdiction stripping, thus providing further theoretical support for *Panama Railroad's* holding.

The discussion in the federal courts literature around the constitutionality of removing jurisdiction from the federal courts, so-called jurisdiction stripping, is robust.¹⁴⁵ This Article does not seek to

well-considered boundaries imposed by federal legislation. These statutes both direct and delimit our actions.”).

¹⁴⁴ For a lengthy discussion of the debate over the role of judges in admiralty law, see generally Robert Force, *An Essay on Federal Common Law and Admiralty*, 43 ST. LOUIS. U. L.J. 1367 (1999) (discussing the roles admiralty judges play in applying commercial law, personal injury law, environmental law, insurance law, etc., in addition to core admiralty law).

¹⁴⁵ Jurisdiction stripping being defined broadly as removing jurisdiction from some Article III court and often giving it to a different body, e.g., a state court or administrative agency. Epps & Trammell, *supra* note 28, at 2085.

provide an exhaustive review of this “immense”¹⁴⁶ discussion, what some have called “one of the most hotly contested issues in all of American constitutional law.”¹⁴⁷ Instead, it addresses what the jurisdiction stripping literature illuminates about the jurisdictional questions of admiralty law. It also highlights some areas where the federal courts literature would do well to pay more heed to the implications of centuries of admiralty case law.

A. Theoretical Approaches to Jurisdiction Stripping

There are three major camps in the debate on jurisdiction stripping. The first is the traditional view, which argues that Article III itself does not impose significant internal limits on Congress’s ability to create, modify, or restrict the jurisdiction of the federal courts but other parts of the Constitution may impose external limits.¹⁴⁸ This view has classically been championed by commentators building on the foundations of *Sheldon v. Sill* and *Ex parte McCordle*.¹⁴⁹ The second view encompasses the more functionalist approach championed by Henry Hart, which would uphold Congressional changes to jurisdiction so long as they do not interfere with the essential role of the Supreme Court, or potentially other federal courts.¹⁵⁰ Lastly, Justice Story and Akhil Amar articulate the argument that Article III creates some mandatory vesting of authority in the federal courts, at least relating to ambassadors, federal questions, and admiralty, and Congress does not have the power to remove this jurisdiction.¹⁵¹

Hart’s essentialist and Story’s mandatory vesting views comport easily with the *Panama Railroad* holding that legislation removing traditional maritime causes of action from federal jurisdiction is a violation of Article III. And the foundations of the traditionalist

¹⁴⁶ *Id.* at 2088.

¹⁴⁷ Calabresi & Lawson, *supra* note 73, at 1014 n.65.

¹⁴⁸ See Epps & Trammell, *supra* note 28, at 2088–89 (describing this view).

¹⁴⁹ *Ex parte McCordle*, 74 U.S. (7 Wall.) 506, 515 (1869); *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 448 (1850).

¹⁵⁰ See Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1365 (1953).

¹⁵¹ *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 328–29 (1816); Amar, *supra* note 73, at 206.

viewpoint, *Sheldon v. Sill* and *Ex parte McCardle*, present holdings that are inapposite to admiralty and maritime law despite what the sweeping claims of some federal courts scholars might seem to indicate. Looking through each of these views reinforces the theoretical foundations for the admiralty holding that Congress may not remove traditionally maritime causes of action from the jurisdiction of the federal courts.

1. Traditional View

The traditional view, that Congress has plenary authority to alter and remove the jurisdiction of the federal courts subject only to external constraints, has been said to be widely adopted by the federal courts.¹⁵² It is thus the natural starting place when trying to situate admiralty's approach to jurisdiction within the broader federal courts framework. However, looking at the roots of the traditional theory, it is clear that this view was founded on case law dealing with Congress's power to alter jurisdiction surrounding enumerated Article III controversies and as such is incongruent with and cannot be easily applied to Article III's grant to the federal courts of all admiralty and maritime cases.

Sheldon v. Sill sets out the foundational understanding of Congress's ability to alter the jurisdiction of the inferior federal courts. In *Sheldon*, the Court was asked to review the constitutionality of an Act that effectively removed a class of actions that could have been brought under diversity jurisdiction from the inferior federal courts.¹⁵³ The Court found that this was not a violation of Article III, noting that Congress "may withhold from any court of its creation jurisdiction of any of the enumerated controversies."¹⁵⁴ Here it is important to note the context of the decision, namely that the *Sheldon* Court was examining an inferior federal court that was ordained and established by an act of Congress.¹⁵⁵ The enumerated controversy at hand, diversity jurisdiction,

¹⁵² Epps & Trammell, *supra* note 28, at 2092.

¹⁵³ *Sheldon*, 49 U.S. at 448.

¹⁵⁴ *Id.* at 449.

¹⁵⁵ *See id.* at 448-49 ("It must be admitted, that if the Constitution had ordained and established the inferior courts, and distributed to them their respective powers, they could not be restricted or divested by Congress. But as it has made no such distribution, one of two consequences must result, — either that each inferior court created by Congress must exercise all the judicial powers not given to the Supreme Court, or that

did not have mandatory application of vesting within any federal court, unlike admiralty, and certainly not one whose jurisdiction could be limited by the act creating the inferior court.

This result is not applicable to cases of admiralty and maritime law, which Article III affords a different role, for two foundational reasons: first, Article III grants federal courts with jurisdiction over “*all Cases of admiralty and maritime Jurisdiction.*”¹⁵⁶ not solely over some controversies, such as the diversity jurisdiction controversy at issue in *Sheldon*. The distinction between cases and controversies in Article III is not a trivial one.¹⁵⁷

Second, while *Sheldon* states that Congress may withhold jurisdiction from the courts of its creation, namely the district or circuit courts, it does not follow that it may withhold jurisdiction over maritime causes from *all* federal courts. In fact, as *Panama Railroad* and its predecessors illustrate, the Supreme Court has interpreted Article III to require that some federal court be available to hear admiralty and maritime cases, either through original jurisdiction or on appeal.¹⁵⁸ With this boundary in mind, Congress may alter which federal courts have jurisdiction over maritime matters through legislation but it may not remove the jurisdiction of the federal courts completely. Moreover, in the three categories of *all cases*, there is another federal court forum that the constitution had created, namely the Supreme Court, wherein the judicial power “shall be vested.” Thus, *Sheldon’s* holding comports with the general understanding in maritime law that Congress does have the power to modify which of the federal courts of its creation may hear maritime cases.¹⁵⁹ But *Sheldon* does not, and cannot, be used to stand for

Congress, having the power to establish the courts, must define their respective jurisdictions. The Constitution has defined the limits of the judicial power of the United States, but has not prescribed how much of it shall be exercised by the Circuit Court; consequently, the statute which does prescribe the limits of their jurisdiction, cannot be in conflict with the Constitution, unless it confers powers not enumerated therein.”).

¹⁵⁶ U.S. CONST. art. III, § 2, cl. 1 (emphasis added).

¹⁵⁷ See *infra* Part II.A.3 for a discussion of this view.

¹⁵⁸ For a detailed discussion of how the Supreme Court has interpreted this provision to require that some form of federal judicial review be available for maritime cases, see generally *infra* Part I.B.

¹⁵⁹ *See* *DeLovio v. Boit*, 7 F. Cas. 418, 442 (C.C.D. Mass. 1815) (No. 3,776).

the broader proposition that Congress may remove maritime causes of action from all federal courts.¹⁶⁰

The second case relied on by the traditionalist viewpoint that Congress has plenary authority to alter the jurisdiction of federal courts, *Ex parte McCardle*,¹⁶¹ builds on *Sheldon* to show that Congress has not only the ability to alter the jurisdiction of the lower federal courts, but also the jurisdiction of the Supreme Court. *McCardle* was decided on the issue of the Supreme Court's appellate jurisdiction, holding that Congress was empowered in Article III to make "such exceptions and regulations" as it deemed necessary to the Court's jurisdiction.¹⁶² It is also important to note the context of *McCardle*, wherein an implied constitutional right, habeas corpus, was in fact adjudicated by a federal Article III court in the first instance.

The resulting issue was whether the Supreme Court would hear the case a second time on appeal. The congressional act challenged in *McCardle* had removed that appellate jurisdiction from the Supreme Court and they subsequently dismissed for lack of jurisdiction for a federal court to pronounce on the federal case a second time, noting that "the appellate jurisdiction of this court is not derived from acts of Congress. It is, strictly speaking, conferred by the Constitution. But it is conferred 'with such exceptions and under such regulations as Congress shall make.'"¹⁶³ In finding that this Act was permissible, the court relied on the fact that "the act of 1868 does not except from that jurisdiction any cases but appeals from Circuit Courts under the act of 1867. It does not affect the jurisdiction which was previously exercised."¹⁶⁴

McCardle then, like *Sheldon*, is a far cry from establishing complete plenary power for Congress to strip jurisdiction subject only to external constraints. *McCardle* was decided within the internal constraints of Article III. Congress had the power to alter the appellate jurisdiction of the Supreme Court, but nowhere did this case stand for the proposition that Congress could have, for instance, stripped all federal habeas

¹⁶⁰ See *infra* Part II.A.3 for a detailed discussion of this viewpoint.

¹⁶¹ *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868).

¹⁶² *Id.* at 512-13.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 515.

petitions from federal court review.¹⁶⁵ Applying this perspective to maritime cases, then, does not conflict with the longstanding precedent which holds that while Congress may modify which federal courts are available to hear maritime cases, Article III prevents it from removing maritime cases completely from the jurisdiction of federal courts.

2. Essential Functions

The second major perspective on the permissibility of jurisdiction stripping was articulated by Henry Hart.¹⁶⁶ Under Hart's argument, congressional action that strips jurisdiction from the federal courts violates Article III when it acts in a way that interferes with the essential function of the Supreme Court.¹⁶⁷ The clearest example of this in practice would be some kind of legislation that would limit the ability of the Supreme Court to review constitutional questions.¹⁶⁸

In the admiralty context, attempts to remove federal court jurisdiction instead raise the concern of uniformity, the preservation of which was viewed as an essential function of the federal courts by the founders.¹⁶⁹ Removing admiralty jurisdiction would also conflict with the ability of an Article III court to carry out its mandate that "all Cases of admiralty and maritime jurisdiction" shall be heard by the federal courts.

Under an essentialist viewpoint then, removing admiralty and maritime jurisdiction from the federal courts potentially eviscerates Article III's ratified compact. It prevents the federal courts from carrying out their essential function of ensuring that admiralty and

¹⁶⁵ Unless of course there were a time of temporary suspension during a rebellion or invasion and public safety required it. U.S. CONST. art. 1, § 9. Later cases seem also to suggest that there must be some federal forum for habeas relief that Congress could not with plenary power revoke jurisdiction of from the federal courts under the judicial power vested by Article III. *Sae* *Boumediene v. Bush*, 553 U.S. 723, 782 (2008).

¹⁶⁶ *See* Hart, *supra* note 150, at 1360-65.

¹⁶⁷ *See id.* at 1365.

¹⁶⁸ *See, e.g.*, Lawrence Gene Sager, *Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 55-57 (1981) (arguing that Congress may not eliminate the "essential functions" of the federal courts, such as their availability to review state court decisions on federal constitutional claims).

¹⁶⁹ *See supra* Part I.A.

maritime causes are adjudicated in such a way to prevent widely different application and strife between and among separate states. The importance of this uniformity has echoed itself throughout Supreme Court cases.¹⁷⁰ It also pragmatically echoes the founders' concerns with tranquility among the newly formed states and their commercial trading partners, including foreign nations that were vital to trading, which was the economic and commercial engine for these newly formed United States. Under Hart's view, interfering with these essential functions by removing the jurisdiction of the federal courts should constitute a violation of Article III.

3. Mandatory Vesting

Lastly, Justice Story and Professor Akhil Amar interpreted Article III's *all cases* language to create a mandatory, nondelegable grant of jurisdiction to the federal courts.¹⁷¹ It is Story's rhetoric that guided the admiralty decisions establishing that Congress did not have the power to remove traditional causes of action from federal jurisdiction.¹⁷² This theoretical view then not only is reconcilable with admiralty precedent but forms its foundation. It is worth noting that federal courts scholars have been somewhat dismissive of the Story-Amar theory, for instance stating that "the federal courts never have seriously entertained these

¹⁷⁰ See, e.g., *Ableman v. Booth*, 62 U.S. (21 How.) 506, 517-18 (1859) ("But the supremacy thus conferred on this Government [by the supremacy clause] could not peacefully be maintained, unless it was clothed with judicial power, equally paramount in authority to carry it into execution; for if left to the courts of justice of the several States, conflicting decisions would unavoidably take place And it is manifest that this ultimate appellate power in a tribunal created by the Constitution itself was deemed essential to secure the independence and supremacy of the General Government in the sphere of action assigned to it; [and] to make the Constitution and laws of the United States uniform, and the same in every State."); *Dodge v. Woolsey*, 59 U.S. (18 How.) 331, 350 (1855) ("[O]ur national union would be incomplete and altogether insufficient for the great ends contemplated, unless a constitutional arbiter was provided to give certainty and uniformity, in all of the States, to the interpretation of the constitution and the legislation of congress."); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 416 (1821) ("[T]he necessity of uniformity, as well as correctness in expounding the constitution and laws of the United States, would itself suggest the propriety of vesting in some single tribunal, the power of deciding, in the last resort, all cases in which they are involved.").

¹⁷¹ See Amar, *supra* note 73, at 238-259.

¹⁷² See *supra* Part I for a discussion of these cases.

readings.”¹⁷³ This conclusion is starkly inconsistent with the admiralty law precedent. Federal courts have not only seriously entertained this reading, they have consistently enshrined it in the holdings of admiralty law.¹⁷⁴

Story’s articulation of the mandatory vesting theory is found throughout his decisions, many of which were admiralty cases and are discussed in Part I.¹⁷⁵ Professor Akhil Amar more recently built on Story’s analysis, arguing that Article III’s language creates a clear distinction between cases and controversies. This forms the mandatory requirement that “some federal court — supreme or inferior — be open, at trial or on appeal, to hear and resolve finally any given federal question, admiralty, or public ambassador case.”¹⁷⁶ Under this interpretation, Congress may create inferior federal courts and give these federal courts jurisdiction over admiralty cases.¹⁷⁷ But Congress may not remove admiralty cases from the entire gambit of federal court jurisdiction such that no federal court has original or appellate jurisdiction over them.¹⁷⁸

Article III’s grant of authority over all cases is distinct from its grant of permissible authority to invest or divest jurisdiction over some controversies. The other categories of federal jurisdiction created by Article III, including for instance diversity jurisdiction, do not use the word “all.” Amar has interpreted this to mean that jurisdiction “may,

¹⁷³ Epps & Trammell, *supra* note 28, at 2090.

¹⁷⁴ See *supra* Part I, which details how the Supreme Court has followed from Story’s early precedent in its later cases dealing with Article III authority in admiralty.

¹⁷⁵ See *supra* text accompanying notes 89–96.

¹⁷⁶ Amar, *supra* note 73, at 206.

¹⁷⁷ As they did in the Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76–77.

¹⁷⁸ Amar, *supra* note 73, at 230 (noting that “if Congress chooses to make exceptions to the Supreme Court’s appellate jurisdiction in admiralty or federal question cases, it must create an inferior-federal court with jurisdiction to hear such excepted cases at trial or on appeal; to do otherwise would be to violate the commands that the judicial power ‘shall be vested’ in the federal judiciary, and ‘shall extend to all’ federal question and admiralty cases”); Calabresi & Lawson, *supra* note 73, at 1014 (“Section 2 of Article III then specifies that this judicial power ‘shall extend’ to ‘all cases’ arising under federal law or admiralty . . . Within this class of disputes, the Supreme Court must have either original or appellate jurisdiction . . . Congress has no power to reduce this constitutionally granted jurisdiction.”).

but need not extend to all cases in the last six [categories].”¹⁷⁹ The resulting case law has interpreted this to mean that Congress has a greater ability to modify the jurisdiction of the federal courts with regards to these controversies. This is the exact logic used in *Sheldon v. Sill* — namely that if Congress had discretion to vest a controversies jurisdiction with an inferior federal court, one that it might or might not create, then surely it could strip or not vest a particular type of controversies jurisdiction with a court of its own creation.¹⁸⁰ This logical path of jurisdiction stripping does not axiomatically follow when a mandatory grant of admiralty jurisdiction shall be vested with an Article III court.

Some early history lends weight to the mandatory vesting theory. Early courts agreed that while Congress had the power to create inferior courts, it did not have the power to remove jurisdiction granted by the Constitution from the federal courts.¹⁸¹ Around the same time, some states provided suggested constitutional amendments as part of their ratification letters that Congress in fact only be able to create inferior courts in admiralty.¹⁸² However, the first Congress rejected this, noting

¹⁷⁹ Amar, *supra* note 73, at 240.

¹⁸⁰ See *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 448-49 (1850).

¹⁸¹ See, e.g., *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 33 (1812) (“The judicial power of the United States is a constituent part of those concessions — that power is to be exercised by Courts organized for the purpose, and brought into existence by an effort of the legislative power of the Union. Of all the Courts which the United States may, under their general powers, constitute, one only, the Supreme Court, possesses jurisdiction derived immediately from the constitution, and of which the legislative power cannot deprive it. All other Courts created by the general Government possess no jurisdiction but what is given them by the power that creates them, and can be vested with none but what the power ceded to the general Government will authorize them to confer.”).

¹⁸² 2 DEP’T OF STATE, DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 272 (1894) (quoting the Ratification of the Constitution by the State of Virginia; June 26, 1788: “That the judicial power of the United States shall be vested in one supreme Court, and in such courts of Admiralty as Congress may from time to time ordain and establish in any of the different States.”; the Ratification of the Constitution by the State of North Carolina; November 21, 1789: “That the judicial power of the United States shall be vested in one supreme court, and in such courts of admiralty as Congress may from time to time ordain and establish in any of the different states.”; and the Ratification of the Constitution by the State of New York; July 26, 1788: “That the Congress shall not constitute ordain or establish any Tribunals or Inferior

that to do so would violate Article III's grant of jurisdiction over federal question and ambassador cases.¹⁸³

*B. Jurisdiction over Other Enumerated Areas: Federal Question
Jurisdiction*

Beyond admiralty, Article III enumerates only two other areas where federal courts shall be given jurisdiction over all cases: "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority," and "all Cases affecting Ambassadors, other public Ministers and Consuls."¹⁸⁴ Looking to how Courts have understood jurisdiction and the role of Congress in altering and restricting these areas provides insight into how the maritime grant should be interpreted. The principal objection to the argument that Congress may not remove causes of action from admiralty jurisdiction hinges on the fact that complete federal question jurisdiction, another enumerated *all cases* area in Article III, was not granted to the federal courts until nearly a century after the Constitution was adopted.¹⁸⁵

Federal question cases¹⁸⁶ stand apart from admiralty because it was not until 1875 that Congress officially gave the federal courts original

Courts, with any other than Appellate Jurisdiction, except such as may be necessary for the Tryal of Causes of Admiralty and Maritime").

¹⁸³ 1 JOSEPH GALES, ANNALS OF CONGRESS 831-32 (Gales & Seaton eds., 1834) ("It is declared by that instrument that the judicial power of the United States shall be vested in one supreme, and in such inferior courts as Congress shall from time to time establish. Here is no discretion, then, in Congress to vest the judicial power of the United States in any other tribunal than in the Supreme Court and the inferior courts of the United States . . .").

¹⁸⁴ U.S. CONST. art. III, § 2.

¹⁸⁵ See Jurisdiction and Removal Act of March 3, 1875, § 1, 18 Stat. 470. See also the history of the state conflict regarding this power by Charles Warren, *Legislative and Judicial Attacks on the Supreme Court of the United States- A History of the Twenty Fifth Section of the Judiciary Act*, 47 AM. L. REV. 1, 3-4 (1913).

¹⁸⁶ Using the term federal question to refer to cases "arising under this Constitution, the Laws of the United States, and Treaties made" is widely accepted, though not without controversy. Paul J. Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157, 157 n.6 (1953) ("The term 'federal question' is generally accepted as a convenient label for jurisdiction over cases 'arising under' national law. Although its accuracy is open to question . . .").

jurisdiction over these cases.¹⁸⁷ One view is that this 1875 Act occurring so late in the constitutional interpretative history suggests that Congress need not concern itself with vesting “all federal question” jurisdiction.¹⁸⁸ However, there are other equally probable considerations at play here that may indicate that it was pragmatic constraints that prevented this vesting, not constitutional ones.

First, it is important to note that while federal courts did not have original jurisdiction until 1875, the Judiciary Act of 1789 gave the Supreme Court appellate jurisdiction to hear federal question cases.¹⁸⁹ At the founding, there is strong indication that Congress did not want to greatly expand the number of federal courts and judges that would be needed to handle every possible federal question that might arise in a new union of states that were highly distrusting of centralized power.¹⁹⁰ Moreover, Article VI of the Constitution had already conscripted all state judges to act as the bulwark of federal law, Constitution, and precedent to effectuate the people rights.¹⁹¹

Thus, the Constitution had already created a path to ensure that federal questions would be handled in a uniform way by state judges with appellate review by the Supreme Court. This process both had the benefit of not enlarging the federal judiciary at a time when centralized power authority was highly suspicious and creating a process that was arguably more efficient at identifying federal questions. At the time, whether a federal question was material to the case often did not manifest until late in litigation.¹⁹² Because of this, the appropriate process seemed to be to allow state courts to carry out initial proceedings, leaving the Supreme Court for appellate review once the

¹⁸⁷ Paul J. Mishkin, *The Federal “Question” in the District Courts*, 53 COLUM. L. REV. 157, 157 (1953).

¹⁸⁸ A view which would seem to support the idea that the *all cases* language of Article III does not create the mandatory vesting argued for by Story and Amar.

¹⁸⁹ Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73.

¹⁹⁰ See generally Michael G. Collins, *Article III Cases, State Court Duties, and the Madisonian Compromise*, 1995 WIS. L. REV. 39 (1995) (presenting a historical account detailing perspectives on the role of state and federal courts at the time of the founding).

¹⁹¹ See U.S. CONST. art. VI, cl. 2.

¹⁹² Mishkin, *supra* note 187, at 163 (noting that “it may often be difficult to determine the presence and materiality of a federal question until some point long after the litigation has started”).

information had been properly culled over years of litigation and allowing the real issues and whether they were truly “arising under” to manifest.¹⁹³ This process was the one used until 1875, when Congress vested federal courts with original jurisdiction over federal question cases.¹⁹⁴ Nonetheless, scholars recognize that this approach prioritized substance over form and may be at odds with a purely textual reading.¹⁹⁵

However, over the next century, seven states denied the constitutional right of the Supreme Court to decide cases on writs of error.¹⁹⁶ During this same time, ten bills were introduced into Congress to deprive the Supreme Court of this appellate jurisdiction.¹⁹⁷ This occurred because numerous state court judges had refused to comply with federal court mandates to transfer their case to the federal courts. In fact, *Martin v. Hunter’s Lessee* was about the jurisdiction of the Supreme Court and the purview of the state courts who wanted independence from section twenty-five of the judiciary act, though perhaps not acknowledging that a constitutional provision, and not merely a statutory provision, also commanded their obedience.¹⁹⁸ Many of these questions were echoed more generally throughout this period, with states’ rights as the founding principle and rallying cry between states and a potentially oppressive federal government.¹⁹⁹ It was not

¹⁹³ See *id.* (“To include within the jurisdiction of the lower federal courts all cases which might conceivably turn finally upon an issue of national law would create an impossible situation. The pattern which such cases present at the outset, when the choice of trial forum must be settled, is common to legion other cases which, involving only issues of state law, belong only in a state court. Moreover, even if it were possible to identify the cases which might finally turn on questions of federal law, still there would often remain the preliminary issues of state law to be resolved in order to present- or obviate-the federal questions.”).

¹⁹⁴ See *id.* at 157 (describing how this process was perhaps intended to be the exclusive approach for federal question cases by the founders).

¹⁹⁵ See, e.g., *id.* (arguing that “to require their inclusion within the same phrase of the statute conferring original federal jurisdiction merely because the terminology is the same, would be to allow form to eclipse problems of substance”).

¹⁹⁶ Warren, *supra* note 185, at 3-4.

¹⁹⁷ *Id.* at 4.

¹⁹⁸ U.S. CONST. art. VI, § 2; *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 323-24 (1816).

¹⁹⁹ See generally Gregory Ablavsky, *Empire States: The Coming of Dual Federalism*, 128 YALE L.J. 1792 (2018) (discussing the evolution of state sovereignty and its tensions with

until the Civil War that federal supremacy was purchased with the blood and ashes of the populace. Perhaps Congress was a bit wearing of inciting this conflict with the states sooner that it had arrived.²⁰⁰

By 1875, things were different. With the passing and ratification of the Fourteenth Amendment, numerous reconstruction acts, and the Civil Rights Act of 1875, it seemed that “Congress had become convinced that the necessity of evading local prejudice was greater than the necessity of relieving the federal courts of their heavy burden . . . and there seems little doubt that this same fear of local prejudice motivated the proponents of the change in 1875.”²⁰¹ By 1875 there were rampant abuses of civil rights violations against African Americans, and Congress sought to put a stop to them by law and with the adjudication in an impartial federal court in the first instance.²⁰² This necessity for immediate justice led to Congress enshrining original jurisdiction for federal question issues in the federal courts.

Importantly, the delay in vesting complete federal question jurisdiction with the federal courts was spurred by pragmatic considerations, but the constitutional issues with this delay were alleviated by the fact that even before original jurisdiction was vested, the Supreme Court retained appellate jurisdiction. This delay, thus, does not support the view that Article III’s language creates a grant that *all cases* may be exercised by any of the federal courts only at Congress’s discretion.

III. THE UNCONSTITUTIONALITY OF MODERN ADMIRALTY LAW

Together, admiralty precedent and a textual reading of Article III under both the Hart and Amar-Story approaches support the view that

federal sovereignty, the only other legitimate sovereign in what Ablavsky terms America’s system of “dual federalism”).

²⁰⁰ See James H. Chadbourn & A. Leo Levin, *Original Jurisdiction of Federal Questions*, 90 U. PA. L. REV. 639, 642 (1942) (“[T]he elected representatives of the people were to postpone the exercise by congress of the full extent of its judicial powers . . . until such time as the exigencies of a given situations clearly demonstrated the necessity therefore.”).

²⁰¹ G. Merle Bergman, *Reappraisal of Federal Question Jurisdiction*, 46 MICH. L. REV. 17, 28 (1947).

²⁰² *Id.* at 29-32.

Congress may not remove traditionally maritime causes of action from federal jurisdiction. To do so would be to obviate Article III's grant of "all Cases of admiralty and maritime Jurisdiction" to the federal judiciary and would undermine the need for uniformity that drove the founders to enshrine this grant in the Constitution.

Unfortunately, while admiralty precedent has clearly established limits on Congress's ability to remove admiralty jurisdiction, in recent decades this precedent has been neglected by Congress, by federal judges, and by federal court academics.²⁰³ This neglect has been particularly apparent on the part of Congress, who left unchecked over the past decades have passed several statutes that are driving the stark erosion of federal admiralty jurisdiction. It is time for the federal judiciary to halt this erosion, ensuring that they maintain their constitutionally proscribed jurisdiction and provide appropriate checks on Congressional action in the maritime sphere.²⁰⁴

Two laws dealing with shipwrecks clearly bring these issues of constitutionality to light: the 1987 Abandoned Shipwreck Act (ASA)²⁰⁵ and the 2004 Sunken Military Craft Act (SMCA).²⁰⁶ The ASA was a Congressional attempt to clarify the rights over sunken shipwrecks in response to several high-profile shipwreck cases, including the *Atocha*,²⁰⁷ which led to litigation that went all the way to the U.S. Supreme Court.²⁰⁸ The SMCA was a post-9/11 attempt to protect US

²⁰³ See, e.g., Robertson, *supra* note 26, at 295 ("[T]he modern Court neither understands admiralty nor regards it as important . . .").

²⁰⁴ For a further discussion of how federal judges have abdicated their duty to declare maritime law and provide appropriate review of congressional action, see generally Brown, *supra* note 17.

²⁰⁵ 43 U.S.C. § 2103.

²⁰⁶ 10 U.S.C. § 113 note (Sunken Military Craft).

²⁰⁷ Alex Lemaire, *The World's Most Valuable Shipwreck: The Nuestra Senora de Atocha*, MAR. EXEC. (July 20, 2020, 12:07 PM), <https://maritime-executive.com/editorials/the-world-s-most-valuable-shipwreck-the-nuestra-senora-de-atocha> [https://perma.cc/7A6D-NTRK].

²⁰⁸ Arguments over states' rights to submerged lands that had been brewing for years. See, e.g., *Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Sailing Vessel*, 640 F.2d 560, 566 (5th Cir. 1981) (in which the state of Florida and the federal government made respective claims to a shipwreck, the *Atocha*, located on state submerged lands).

military secrets and weapons onboard ships, aircraft, and spacecraft that might sink.²⁰⁹

In the case of historic shipwrecks, improved detection technology with the development of recreational scuba diving in the 1960s opened the gates to underwater exploration. Combined with increased capabilities for undersea exploration submersibles in the following decades, more shipwrecks with unprecedented historic treasure were being discovered and everyone, including state governments, wanted a share of the riches. In response to this, Congress passed ASA, and two decades later, SMCA, which together worked to limit ownership claims and the jurisdiction of the federal courts over these vessels by barring traditional maritime claims under the law of salvage or the law of finds.

This Part begins by detailing the historic roots of the law of salvage and finds, showing how salvage in particular has been a durable and central feature of admiralty law since long before the United States was founded. It illustrates the equitable rationale behind the law of salvage and its importance in incentivizing critical and risky actions to save property lost at sea. It then discusses in detail how both ASA and SMCA have attempted to bar claims under these traditional maritime causes, drawing on history and precedent to argue that the removal of these claims is a violation of Article III.

A. Law of Salvage and Law of Finds

Salvage actions are a uniquely maritime action, sitting outside common law, equity, and historically not seen as arising under federal law.²¹⁰ Salvage actions incentivize the rescue of ships and cargo at sea,

²⁰⁹ SMCA was passed as part of Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, a massive, nearly 400-page bill that funded U.S. military needs while conducting simultaneous wars in Afghanistan, Iraq, and the global War on Terror. The SMCA provisions were tucked in between the section on landmines, the Soviet Union, and increased costs for Operation Iraqi Freedom and Enduring Freedom. *See* Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, §§ 1301–1511. Congressional records suggest that SMCA itself was subject to effectively no discussion or committee consideration before it was appended to the appropriations bill and passed into law.

²¹⁰ *United States v. Ames*, 99 U.S. 35, 35-36 (1878) (“Admiralty courts proceed according to the principles, rules, and usages which belong to the admiralty as contradistinguished from the courts of common law.”); *Am. Ins. Co. v. 356 Bales of*

rewarding one who comes to an imperiled vessel's assistance, the salvor, with a portion of what they save.²¹¹ This type of action is exclusive to maritime law, recognizing both the heightened risk to vessels at sea as well as the heightened risk to their potential salvors compared to similar rescues on land.²¹²

Salvage has been legally codified since at least the time of the Byzantines, making it indisputably one of the foundational causes of admiralty law.²¹³ There is no question that American courts consider salvage claims clearly within the scope of admiralty and maritime jurisdiction.²¹⁴ In fact, in rem salvage claims were viewed as exclusively the province of admiralty courts and therefore were some of the few maritime actions where it was essential that the federal courts have exclusive jurisdiction.²¹⁵

Cotton, 26 U.S. (1 Pet.) 511, 530 (1828) ("A case of salvage does not, strictly speaking, arise under the laws and Constitution of the United States, as the right to salvage depends on the principles of maritime law . . ."); *Governor of Ga. v. Madrazo*, 26 U.S. (1 Pet.) 110, 117 (1828) ("The grant distinguishes between common law and equity jurisdiction, and admiralty jurisdiction. They are given by distinct clauses, and to a different extent; and are treated as separate powers.").

²¹¹ 3A JOSHUA S. FORCE & ROBERT J. ZAPF, *BENEDICT ON ADMIRALTY* § 1 (2025).

²¹² See Christopher Bordelon, *Saving Salvage: Avoiding Misguided Changes to Salvage and Finds Law*, 7 S.D. INT'L L.J. 173, 174-75 (2005).

²¹³ 3A FORCE & ZAPF, *supra* note 211, at § 1 (noting that salvage actions have been "a recognized part of commercial transportation almost from the time when seafarers sailed their vessels out of safe harbors and ventured forth upon the sea"); Nafziger, *supra* note 11, at 260 (describing the historical articulation of salvage law in the Rhodian Code and the Law of Oleron).

²¹⁴ *Mason v. Blaireau*, 6 U.S. (2 Cranch.) 240, 249 (1804) (salvage claims should be settled in admiralty courts in "civilized nations"); *Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Sailing Vessel*, 640 F.2d 560, 566 (5th Cir. 1981) ("Claims arising out of salvage operations efforts to rescue or recover ships disabled or abandoned at sea or to retrieve their cargo are, unquestionably, within the admiralty jurisdiction of the federal courts.").

²¹⁵ With no state common law remedies available to plaintiffs under the Saving to Suitors Clause. See *Steamboat Co. v. Chase*, 83 U.S. (16 Wall.) 522, 534 (1872) ("Questions of the kind cannot arise in suits *in rem* to enforce maritime liens, as the common law is not competent to give such a remedy, and the jurisdiction of the admiralty courts in such cases is exclusive."); STORY, *supra* note 62, at § 1672 ("The reasonable interpretation of the Constitution would seem to be, that it conferred on the national judiciary the admiralty and maritime jurisdiction, exactly according to the nature, and extent, and modifications in which it existed in the jurisprudence of the

Salvage actions require three simple factors: 1) a marine peril that puts property at risk, 2) voluntary service, and 3) some degree of success.²¹⁶ Salvage, like other maritime actions, can be brought as an *in rem* claim, allowing salvors a lien against a vessel or its cargo, or an *in personam* claim against the owner.²¹⁷ Determining the size of the award is left to the discretion of admiralty judges, who balance six factors to ascertain what percentage of the property saved a salvor is entitled to.²¹⁸ Salvage is intended to be a flexible system, one that is adaptable and responsive to evolving social concerns in addition to unique maritime circumstances.²¹⁹

Unfortunately, this flexibility combined with ongoing confusion about salvage has led to a body of law that is currently far from the uniformity that the founders envisioned as necessary.²²⁰ This is

common law. Where the jurisdiction was exclusive, it remained so; where it was concurrent, it remained so. Hence the States could have no right to create courts of admiralty, as such, or to confer on their own courts the cognizance of such cases as were exclusively cognizable in admiralty courts.”); Rory Bahadur, *Maritime Removal: An Unlikely Heuristic for Anchoring Three Non-Textual Principles of Original Federal Jurisdiction*, 43 J. MAR. L. COM. 195, 214-15 (2012) (noting that “the early Supreme Court and Justice Joseph Story concluded that §9 of the Judiciary Act of 1789 gave state courts (the former colonial common law courts) concurrent jurisdiction over all *in personam* maritime claims and the federal courts truly only had jurisdiction, exclusive of the courts of the state, in *in rem* admiralty actions”).

²¹⁶ *The Sabine*, 101 U.S. 384, 384 (1879).

²¹⁷ 3A FORCE & ZAPP, *supra* note 211, at § 143.

²¹⁸ The Supreme Court articulated these factors clearly in *The Blackwall* in 1869 and they remain effectively unchanged to this day. *The Blackwall*, 77 U.S. (10 Wall.) 1, 14 (1869) (listing the factors judges must weigh in determining a salvage award, “(1) The labor expended by the salvors in rendering the salvage service; (2) The promptitude, skill, and energy displayed in rendering the service and saving the property; (3) The value of the property employed by the salvors in rendering the service, and the danger to which such property was exposed; (4) The risk incurred by the salvors in securing the property from the impending peril; (5) The value of the property saved; 6) The degree of danger from which the property was rescued”).

²¹⁹ See, e.g., Craig Forrest, *Historic Wreck Salvage: An International Perspective*, 33 TUL. MAR. L.J. 347, 362 (2009) (“[A]s a system of law, salvage law is not rigid, but capable of adapting to new situations, and able to take into account the need to preserve the archaeological value of historic wreck.”).

²²⁰ See *id.* at 360-61 (“The course of U.S. treasure salvage jurisprudence has not, however, been smooth sailing and evinces a number of contradictions which undermine any contention of uniformity in the body of salvage law applied.”).

particularly true in looking at whether and how salvage awards will be granted to shipwrecks.

Historic shipwrecks present several issues for courts attempting to apply salvage awards. First, courts have faced a threshold question about whether shipwrecks are property in “marine peril” and thus properly the subject of salvage actions. Courts have repeatedly held that, as a matter of law, vessels that are lost, i.e. their location is not known, are in marine peril.²²¹ Thus, discovering the location of a shipwreck may be sufficient to entitle a salvor to an award considering the investment of time and effort that often goes into these operations.²²² Courts have also recognized that sunken wrecks remain in marine peril once they have been discovered due to the continued degradation that will occur over time from exposure to the elements²²³ and because of the danger to the owner’s property interest in the vessel.²²⁴

The next issue in salvaging historic wrecks stems from the reality that many, if not most, of the historic ships in service during the fifteenth through nineteenth centuries were government owned, or operating on government service under letters of marque.²²⁵ This has raised challenges based on sovereign immunity, requiring judges to answer the question of whether salvage actions may be properly brought against government vessels. Case law, however, clearly establishes that salvage

²²¹ *Platoro Ltd. v. Unidentified Remains of a Vessel, etc.*, 695 F.2d 893, 901 (5th Cir. 1983); *see also* *Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Sailing Vessel*, 569 F.2d 330, 336-37 (5th Cir. 1978).

²²² *See* *Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Sailing Vessel*, 640 F.2d 560, 572 (5th Cir. 1981) (directing the district court to consider these factors when determining whether salvage rights had been established).

²²³ *Treasure Salvors*, 569 F.2d 330 at 337; *see also* *Platoro Ltd.*, 695 F.2d at 901 n.9.

²²⁴ Bordelon, *supra* note 212, at 184.

²²⁵ Many scholars note that, historically, most ocean-going vessels in the fifteenth through nineteenth centuries were owned and operated by state navies or government authorities. *See* KENNETH J. HAGAN, *THIS PEOPLE’S NAVY: THE MAKING OF AMERICAN SEA POWER* 16-17 (1991) (discussing the prevalence of privateers operating under letters of marque in the early days of the American republic); N.A.M. RODGER, *THE COMMAND OF THE OCEAN* 84-97, 127-29, 151-54, 194-200, 213-23 (2004) (discussing the routine arming of merchantmen, naval impressment of commercial vessels, the quasi-military fleets of chartered companies, and the extensive government chartering of merchant ships for transport and logistics).

claims against government vessels have long been granted.²²⁶ Sovereign immunity was not a well-accepted principle in maritime law at the time of the founding.²²⁷ Courts recognized that while sovereign vessels were sometimes immune in maritime tort cases, governments could be sued in maritime contracts and salvage cases.²²⁸ These courts also found specifically that in rem salvage actions could be brought against sovereign vessels, so long as the property was not currently in the possession of the sovereign.²²⁹

Historic shipwrecks also raise the question of abandonment. Admiralty courts, at least in the last fifty years, have recognized two possible causes of action for vessels: salvage actions if the vessel has an owner, and law of finds actions if the vessel has been abandoned.²³⁰

²²⁶ See *infra* Part III.B.

²²⁷ David J. Bederman, *Admiralty and the Eleventh Amendment*, 72 NOTRE DAME L. REV. 935, 940 (1997).

²²⁸ See George De Forest Lord, *Admiralty Claims Against the Government*, 19 COLUM. L. REV. 467, 483 (1919) (“To re-enumerate the rights and remedies of an individual having claims against a government owned vessel: 1. If the vessel is a warship: a. There is no remedy *in rem* or *in personam* for an admiralty tort, and b. The government may be sued *in personam* in contract express or implied and in suits for damages liquidated or unliquidated not sounding in tort. This covers cases of salvage and towage.”).

²²⁹ *E.g.*, *The Johnson Lighterage Co.*, 231 F. 365, 368 (D.N.J. 1916) (Discussing that a lighter with a cargo of ammunition, the property of the Russian government, was libeled for salvage while in possession of the lighterage company. It was decided that while the courts of this country were without jurisdiction in suits *in personam* against the United States or a friendly nation or sovereign, or *in rem* against the property in its possession, the cargo in this case was not in possession of the sovereign and consequently did not enjoy any such immunity).

²³⁰ *Martha's Vineyard Scuba Headquarters, Inc. v. Unidentified, Wrecked & Abandoned Steam Vessel*, 833 F.2d 1059, 1065 (1st Cir. 1987) (noting that the law of finds applies “in cases where (1) articles have been presumptively abandoned, i.e., either affirmatively renounced, or so long lost that time can be presumed to have eroded any realistic claim of original title, and (2) those articles are now in hand”); *Klein v. Unidentified Wrecked & Abandoned Sailing Vessel*, 758 F.2d 1511, 1514 (11th Cir. 1985); *Chance v. Certain Artifacts Found & Salvaged from The Nashville*, 606 F. Supp. 801, 804 (S.D. Ga. 1984), *aff'd sub nom.* *Chance v. Certain Artifacts*, 775 F.2d 302 (11th Cir. 1985) (but noting that the law of finds has been applied only by “modern courts”); *Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Sailing Vessel*, 640 F.2d 560, 571 (5th Cir. 1981) (“[U]nder the law of finds, a finder acquires title to lost or abandoned property by “occupancy”, i.e. by taking possession of the property and exercising dominion and control over it.”).

Whereas the salvage award is merely a percentage of the property saved, under the law of finds finders are entitled to full ownership of abandoned property.²³¹ Many of the shipwrecks at issue in recent litigation sank hundreds of years ago, forcing courts to grapple with the question of whether the vessels have been abandoned and therefore whether the law of finds should apply instead of salvage. The threshold question of abandonment is thus a critical issue faced by the courts.

The Supreme Court has held that the admiralty law definition of abandonment should be used to determine abandonment under ASA.²³² This definition also controls whether a salvage or a law of finds claim is appropriate. Admiralty law distinguishes between several types of property and applies different standards of abandonment to each.²³³ Most of the property associated with historic sunken vessels falls into the category of derelict property, or property that has long ago sunken to the ocean floor. Abandonment there is defined as property that 1) has no hope of being recovered and 2) the owner has no intent of reclaiming.²³⁴ Vessels may be considered abandoned by implication when a period of time passes without any action by the owner to recover the vessel or take other actions consistent with ownership.²³⁵ The length of time that creates some presumption of abandonment is a factual question and one that varies considerably between courts, with some finding implied abandonment after as little as sixty-six years.²³⁶

²³¹ The law of finds originates in the common law finders doctrines, not in maritime law. See *Klein*, 758 F.2d at 1514 (describing the history: “The common law of finds generally assigns ownership of the abandoned property without regard to where the property is found”). However, courts and Congress now both view the law of finds as an aspect of maritime law when it is applied to shipwrecks. See *Zych v. Unidentified, Wrecked & Abandoned Vessel, Believed to Be SB Seabird (Zych II)*, 811 F. Supp. 1300, 1313 (N.D. Ill. 1992).

²³² *Cal. v. Deep Sea Rsch.*, 523 U.S. 491, 508 (1998).

²³³ For instance, *flotsam*, *jetsam*, *ligan*, and *derelict* property. See, e.g., 3A FORCE & ZAPF, *supra* note 211, at §§ 42, 131.

²³⁴ *Nunley v. M/V Dauntless Colocotronis*, 863 F.2d 1190, 1198 (5th Cir. 1989).

²³⁵ For holdings finding vessels can be abandoned by implication, see, for example, *Fairport International Exploration v. Shipwrecked Vessel Known as the Captain Lawrence*, 105 F.3d 1078, 1085 (6th Cir. 1997); *Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Sailing Vessel*, 569 F.2d 330, 337 (5th Cir. 1978); *State by Ervin v. Massachusetts Co.*, 95 So. 2d 902, 905 (Fla. 1956).

²³⁶ *Wiggins v. 1100 Tons of Italian Marble*, 186 F. Supp. 452, 457 (E.D. Va. 1960).

Requiring express abandonment would defeat the application of the law of finds, as owners rarely make explicit statements of abandonment.²³⁷ Prior to the 1980s, and the high-profile discovery of the *Atocha*, foreign governments accepted that their long-lost vessels from the 1500–1800s had been abandoned, and as such they were not in the practice of contesting salvage claims in court.²³⁸

B. Abandoned Shipwreck Act

The legal regime governing shipwrecks changed dramatically in 1987, when Congress passed the Abandoned Shipwreck Act (ASA). ASA was passed to clarify confusion about state ownership of shipwrecks after states were granted title to submerged lands within three miles of their coasts and “the natural resources within such lands” in the 1953 Submerged Lands Act (SLA).²³⁹ While SLA did not specify whether “natural resources” included shipwrecks, many states passed laws that stated their claims to these wrecks.²⁴⁰

ASA was a Congressional attempt to clarify the resulting confusion and clearly grant the states the title “to any abandoned shipwreck that is embedded in submerged lands of a State.”²⁴¹ The transfer of title to the states took place immediately after the enactment of ASA.²⁴² Thus, any wrecks that on April 28, 1988, were abandoned and embedded in the submerged lands of a state became the property of the state at that time.

²³⁷ Bordelon, *supra* note 212, at 181–82.

²³⁸ See, e.g., Fla. Dep’t of State v. Treasure Salvors, Inc., 621 F.2d 1340 (5th Cir.), *aff’d in part, rev’d in part*, 458 U.S. 670 (1982); Platoro Ltd. v. Unidentified Remains of a Vessel, 614 F.2d 1051 (5th Cir. 1980), *cert. denied*, 449 U.S. 901 (1980); MDM Salvage, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel, 631 F. Supp. 308 (S.D. Fla. 1986); Cobb Coin Co. v. Unidentified, Wrecked and Abandoned Sailing Vessel, 525 F. Supp. 186 (S.D. Fla. 1981).

²³⁹ Submerged Lands Act (SLA), 43 U.S.C. §§ 1301–1315.

²⁴⁰ Denise Feingold, *The Abandoned Shipwreck Act of 1987 Navigating Turbulant Constitutional Waters*, 10 U. BRIDGEPORT L. REV. 361, 366 (1990).

²⁴¹ 43 U.S.C. § 2105(a)(1).

²⁴² MERCH. MARINE & FISHERIES COMM., ABANDONED SHIPWRECK ACT OF 1987, H.R. REP. NO. 100-514, pt. II, at 5 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 365, 374.

In addition to transferring ownership of abandoned shipwrecks to the states, ASA barred salvage and finds claims against these wrecks.²⁴³ This portion of ASA was an attempt to appease the states by transferring title to long ago abandoned shipwrecks to them and to appease the archaeological community by providing for additional measures to ensure the preservation of historic shipwrecks.²⁴⁴ ASA required that each state create a permitting regime that governed salvage in an attempt to ensure that salvage was carried out using methods approved by the archaeological community.²⁴⁵ ASA thus effectively removed salvage claims from the federal courts and simultaneously satisfied the states who had asked for legislation that would provide them a better profit-sharing agreement than they had received during the *Atocha* litigation.²⁴⁶

While the removal of salvage and finds claims was partially intended to prevent damage to historically valuable ships by unscrupulous salvors,²⁴⁷ it immediately raised constitutional concerns.²⁴⁸ Senators worried that the removal of these claims would be a violation of Article III. However, they hoped that redefining shipwrecks so that they were no longer viewed as ships but as embedded natural resources would allow the wrecks to fall outside the purview of federal admiralty law and

²⁴³ 43 U.S.C. § 2106(a) (“The law of salvage and the law of finds shall not apply to abandoned shipwrecks.”).

²⁴⁴ See H.R. REP. NO. 100-514, pt. II, at 2, 5-6, as reprinted in 1988 U.S.C.C.A.N. 370, 373-75 (describing Congressional motivation behind ASA, including clarifying title issues); Sabrina L McLaughlin, *Roots, Relics and Recovery: What Went Wrong With the Abandoned Shipwreck Act of 1987*, 19 COLUM.-VLA J.L. & ARTS 149, 150-51 (1994) (describing the preservationist goals of ASA).

²⁴⁵ See 43 U.S.C. § 2103.

²⁴⁶ See Fla. Dep’t of State v. Treasure Salvors, Inc., 621 F.2d 1340, 1349-50 (5th Cir. 1980), *aff’d in part, rev’d in part*, 458 U.S. 670 (1982) (striking the original profit-sharing agreement, which would have given the State of Florida twenty-five percent of the recovery of the *Atocha*, as unenforceable and leaving the State with no claim to the found artifacts).

²⁴⁷ Feingold, *supra* note 240, at 367-68.

²⁴⁸ See H.R. REP. NO. 100-514, pt. II, at 8, as reprinted in 1988 U.S.C.C.A.N. 365, 377 (“The Committee also believes that it is acting fully within its authority under Art. III, S 2 of the Constitution and the Necessary and Proper Clause . . . by modifying admiralty law in this way.”).

therefore not raise Article III concerns.²⁴⁹ It is thus an important foundation of ASA's legal logic that the embedded wrecks in question were not viewed as part of admiralty law, with previous cases noting that states did not have the right to claim these wrecks if doing so would have been in conflict with traditional admiralty principles.²⁵⁰

In the years since its passage, several federal courts have heard challenges on these grounds to ASA's constitutionality. In the first of these cases, *Zych I*, the Seventh Circuit was asked to determine an issue of first impression: whether ASA's elimination of salvage and finds claims was constitutional.²⁵¹ The court followed the reasoning of *Panama Railroad*, finding that removing causes of actions that were previously cognizable from admiralty jurisdiction would be a violation of Article III's mandate.²⁵² The court reasoned that whether ASA was constitutional would therefore hinge on whether claims against the shipwrecks could previously have been brought under admiralty law.²⁵³ Unfortunately, the court was unable to answer this question definitively, finding, in their eyes, arguments on both sides that these claims may or may not have been allowed.²⁵⁴ In light of the inconclusive answer, the court deferred that question until a determination had been made that the wreck in question was definitively embedded and subject to ASA.²⁵⁵ The court also importantly found that if the first factor of *Panama Railroad* was not violated, there is no way the second factor could be.²⁵⁶

²⁴⁹ See Feingold, *supra* note 240, at 369 ("By denying salvage rights and remedies formerly given in admiralty cases, the states will be able to defeat constitutionally granted federal jurisdiction.").

²⁵⁰ See *Cobb Coin Co. v. The Unidentified, Wrecked & Abandoned Sailing Vessel*, 525 F. Supp. 186, 200 (S.D. Fla. 1981).

²⁵¹ See *Zych v. Unidentified, Wrecked & Abandoned Vessel, Believed to Be the Seabird (Zych I)*, 941 F.2d 525, 528 (7th Cir. 1991).

²⁵² See *id.* at 531 ("Thus it is only if cases involving abandoned shipwrecks were not clearly within admiralty jurisdiction even previous to passage of the ASA that Congress could re-draw the boundary of admiralty jurisdiction in a manner which excluded those cases from the federal courts.").

²⁵³ See *id.*

²⁵⁴ See *id.*

²⁵⁵ See *id.* at 532.

²⁵⁶ See *id.*

The question of whether claims against abandoned shipwrecks were cognizable in admiralty law prior to ASA was addressed on remand by the district court.²⁵⁷ The first question faced by the court was whether salvage actions could previously have been brought against similar abandoned vessels. The court found they could not, noting that “the Fourth Circuit adopted the prevailing view and held that the law of finds applies in cases of abandoned shipwrecks where no party has appeared to assert a contrary claim of ownership.”²⁵⁸ Thus, the district court reasoned that an abandoned vessel would be subject only to the law of finds and consequently salvage claims could not have been brought prior to ASA. While this finding is consistent with the modern practice of some federal courts, it unfortunately does not accurately reflect the historic practice of salvage, which was frequently used to make claims against historic, abandoned vessels.²⁵⁹

Having determined that the law of finds was the appropriate avenue, the district court then considered whether a finds action could properly have been brought against the vessel at issue. The court relied on Fourth Circuit and Eleventh Circuit dicta recognizing an “embeddedness exception” to the law of finds.²⁶⁰ Under this exception, drawn from how the common law of finds has evolved on land, abandoned property that is embedded in land becomes the property of the land’s owner, not the property of the finder.²⁶¹ Under the language of ASA, shipwrecks must be both abandoned and embedded in the submerged land of a state for ASA to apply, rendering them automatically subject to this exception. Accordingly, the district court found that valid law of finds claims could not have been brought against these types of embedded shipwrecks prior to ASA’s passage.²⁶² Finding that both law of salvage and law of finds claims could not have been brought, the court reasoned, in a

²⁵⁷ *Zych II*, 811 F. Supp. 1300 (N.D. Ill. 1992), *aff’d sub nom. Zych III*, 19 F.3d 1136 (7th Cir. 1994).

²⁵⁸ *Zych II*, 811 F. Supp. at 1310.

²⁵⁹ See, e.g., *Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Vessel*, 569 F.2d 330, 337 (5th Cir. 1978) (allowing claim against Spanish shipwreck from the 1600s).

²⁶⁰ *Zych II*, 811 F. Supp. at 1314.

²⁶¹ *Klein v. Unidentified Wrecked & Abandoned Sailing Vessel*, 758 F.2d 1511, 1514 (11th Cir. 1985).

²⁶² *Zych II*, 811 F. Supp. at 1315.

decision that commentators have described as “glib,”²⁶³ that ASA did not remove any previously available claims and thus could survive constitutional scrutiny.²⁶⁴ The circuit court upheld this finding on appeal.²⁶⁵

The constitutionality of ASA was raised again after *Sunken Treasure Inc. (STI)* found an abandoned, embedded shipwreck in the territorial waters of the U.S. Virgin Islands.²⁶⁶ STI brought a maritime action seeking a salvage award to the vessels, in which the United States subsequently intervened to argue that under ASA the shipwreck was the property of the United States. Unlike many other ASA cases, there was no dispute here about whether the shipwreck was in fact abandoned and embedded.²⁶⁷ Instead, STI brought a facial challenge to the constitutionality of ASA, arguing that it removed traditional admiralty causes of action from federal jurisdiction and violated the requirement that admiralty law be uniform.²⁶⁸

The district court rejected both of these claims, adopting the reasoning of the Seventh Circuit in *Zych* and holding that, because law of salvage and law of finds claims would not have been cognizable against this wreck prior to ASA, ASA did not in fact remove any causes of action from admiralty law. Just as in *Zych*, the court found that salvage claims were inapplicable to abandoned shipwrecks and instead the law of finds should be used. However, the law of finds has “a long-standing exception to the doctrine provid[ing] that shipwrecks embedded in the submerged lands of a state are state property, title vesting to the state as a matter of law.”²⁶⁹

Both of the conclusions that form the basis for believing that abandoned shipwrecks would not have been subject to salvage and finds prior to the passage of ASA are legally questionable. The courts find that

²⁶³ Jones, *supra* note 12, at 225 (noting the “air of clever sophistry to the Seventh Circuit’s delimiting of the law of salvage”).

²⁶⁴ *Zych II*, 811 F. Supp. at 1314.

²⁶⁵ *Zych III*, 19 F.3d 1136, 1143 (7th Cir. 1994).

²⁶⁶ See *Sunken Treasure, Inc. v. Unidentified, Wrecked & Abandoned Vessel*, 857 F. Supp. 1129, 1130-31 (D.V.I. 1994).

²⁶⁷ See *id.* at 1132.

²⁶⁸ See *id.*

²⁶⁹ *Id.* at 1134.

it is clear that the law of salvage does not apply to vessels that have clearly been abandoned because the element of continuous ownership is not met. Unfortunately, instead of looking to case precedent, the *Zych* court reaches this conclusion purely on logic, noting that “application of the law of salvage to abandoned shipwrecks would be absurd, because salvage law is premised upon the assumption of continuing ownership over the submerged articles, an element not present where a historic shipwreck has been abandoned.”²⁷⁰ While the court may be correct that this appears to be legally inconsistent, in practice prior to the passage of ASA courts had no issue applying salvage to abandoned vessels.²⁷¹ Many have recognized that salvage is the primary mechanism for recovering underwater cultural heritage, including shipwrecks, both in the United States and internationally.²⁷²

Meanwhile, *Zych*’s conclusion that embeddedness constitutes an exception to the law of finds rests on equally shaky foundations. In the years after *Zych*, the Supreme Court ruled in *California v. Deep Sea Research* that vessels that were embedded in the lands of a state but not in the constructive possession of the state may be subject to valid salvage claims.²⁷³ This raises the real possibility that the “exception” to the law of finds has been overstated, in turn undermining the constitutionality of ASA.

The distinction between changes to substantive law and changes to jurisdiction remains a critical one. While removing jurisdiction over maritime matters from federal court violates Article III, congressional modification of substantive law may not. The court in *Zych* correctly found that ASA’s removal of salvage claims amounts to a removal of jurisdiction, not a modification of substantive law.²⁷⁴ Both the courts in

²⁷⁰ *Zych II*, 811 F. Supp. 1300, 1310 (N.D. Ill. 1992).

²⁷¹ See generally *Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Vessel*, 569 F.2d 330, 337 (5th Cir. 1978) (finding a law of finds claim was appropriate against a Spanish shipwreck sunk in 1622); 3A FORCE & ZAPP, *supra* note 211, at § 42 (discussing this practice generally).

²⁷² Craig J. S. Forrest, *Has the Application of Salvage Law to Underwater Cultural Heritage Become a Thing of the Past?*, 34 J. MAR. L. & COM. 309, 327 (2003).

²⁷³ *California v. Deep Sea Rsch.*, 523 U.S. 491, 507-08 (1998); Russell G. Murphy, *The Abandoned Shipwreck Act of 1987 in the New Millennium: Incentives to High Tech Privacy?*, 8 OCEAN & COASTAL L.J. 167, 182-83 (2003).

²⁷⁴ *Zych I*, 941 F.2d 525, 531 (7th Cir. 1991).

Zych and *Sunken Treasure* recognized that, because salvage and finds actions are the only admiralty causes under which finders of shipwrecks can bring an admiralty claim, removing these claims equates to removing federal admiralty jurisdiction.²⁷⁵ Importantly, the district court in *Zych* had initially argued that the removal of salvage and finds claims only altered the substantive law of admiralty and did not impact jurisdiction.²⁷⁶ The Seventh Circuit reversed on this point.²⁷⁷

Both *Zych* and *Sunken Treasure* also summarily dismiss any uniformity concerns, noting that because ASA does not actually modify admiralty jurisdiction, it has no impact on the uniformity of the legal landscape.²⁷⁸ ASA, however, does remove core causes from admiralty and provides few, if any, substitutes.²⁷⁹ Existing state law causes, like quantum meruit, are not reasonable substitutes.²⁸⁰ Moreover, state law remedies vary widely across states and are far from uniform.²⁸¹ The state remedies available in lieu of salvage claims are not only not uniform, they frequently do not provide plaintiffs with the remedies that they would

²⁷⁵ *Id.* at 530 (“The ASA eliminates the only two admiralty grounds upon which finders of wrecks like *Zych* traditionally have claimed relief in federal court, the law of salvage and the law of finds.”); *Sunken Treasure, Inc. v. Unidentified, Wrecked & Abandoned Vessel*, 857 F. Supp. 1129, 1132 (D.V.I. 1994) (“It is undisputed among the parties that the ASA eliminates the laws of salvage and finds as causes of action in cases relating to abandoned shipwrecks that fall within the ASA’s statutory framework. 43 U.S.C. § 2106(a). Inasmuch as these two doctrines provide abandoned shipwreck salvors and finders with what is effectively their sole basis for stating a claim under the laws of admiralty, this exclusion effectively divests federal courts of jurisdiction over disputes relating to such shipwrecks.”).

²⁷⁶ *Zych II*, 811 F. Supp. 1300, 1308 (N.D. Ill. 1992).

²⁷⁷ *Zych I*, 941 F.2d. at 534.

²⁷⁸ For a critique of this logic, see Bederman, *Dormant Admiralty Clause*, *supra* note 65, at 31-32.

²⁷⁹ See, e.g., McLaughlin, *supra* note 244, at 167-70 (discussing the issues with this approach).

²⁸⁰ *Id.* at 168-69 (“Yet the award is manifestly inadequate to inspire the discovery of sunken ships and the recovery of their cargo. The incentive system of admiralty necessitates a more generous award.”).

²⁸¹ Hallwood & Miceli, *supra* note 15, at 294 (“In practice, however, while more than 30 states have passed legislation regarding the management of historic wrecks in their waters, the laws are not uniform and generally establish inadequate incentives for private salvage.”); Murphy, *supra* note 273, at 185-88 (describing the patchwork of state preservation laws).

be entitled to under traditional maritime salvage rules.²⁸² This creates a situation that is confusing at best for private salvors, who often do not know what legal regimes they may be subject to.²⁸³ It also presents a situation that is directly in contrast to the uniformity in maritime law that the founders sought to create with their grant of jurisdiction over maritime matters to the federal courts.

In addition to academic concerns about its constitutionality,²⁸⁴ ASA has been widely criticized both for not sufficiently protecting historic wrecks²⁸⁵ as well as providing inadequate incentives to salvors.²⁸⁶ Some go so far as to argue that the legal regime created by ASA actually encourages illegal salvage.²⁸⁷ In any event, in the absence of incentives

²⁸² Feingold, *supra* note 240, at 394.

²⁸³ Murphy, *supra* note 273, at 173 (“The ASA has spawned extensive state bureaucracies charged with administering state laws and regulations that are often confusing and contradictory. Today, a law-abiding salvor committed to historic shipwreck exploration must make an informed guess at which state’s law will apply (based on location of the wreck), obtain authority from the state to search or recover, and rely on state law for compensation.”).

²⁸⁴ See generally *id.* (arguing that ASA unconstitutionally removes jurisdiction from the federal courts); Feingold, *supra* note 240 (similarly arguing that ASA raises constitutional concerns by removing traditional admiralty jurisdiction from the federal courts and allowing state laws to preempt federal admiralty law).

²⁸⁵ Murphy, *supra* note 273, at 190.

²⁸⁶ Hallwood & Miceli, *supra* note 15, at 296 (arguing that we must strike “a reasonable balance between the importance of establishing proper scientific standards for salvaging and preserving historic wrecks and the need to give salvors a financial incentive to search for them. Current U.S. law seems to fall short in this respect”); Christopher R. Bryant, *The Archaeological Duty of Care: The Legal, Professional, and Cultural Struggle Over Salvaging Historically Significant Shipwrecks*, 65 ALB. L. REV. 97, 111 (2001) (“[B]arring [them] from salvaging historic shipwrecks will bring about an end to the discovery and salvage or recovery of such shipwrecks in any meaningful number.”); McLaughlin, *supra* note 244, at 151 (“[ASA] renounced the incentive rationale and other traditional principles of Federal admiralty law, but offered nothing in their stead.”); Murphy, *supra* note 273, at 176 (“Without the law of salvage and finds, and a federal court armed with the power to award them, a wrecker faces a colossal disincentive to search because of the unpredictability of the ASA/state law rewards system.”).

²⁸⁷ Murphy, *supra* note 273, at 168 (finding that “current law regulating historic shipwrecks not only discourages lawful search and recovery but actually encourages covert, unauthorized and illegal salvage operations”); see also Forrest, *supra* note 219, at 320 (“It has been argued that any attempt to “protect” cultural heritage by its elevation

for salvors, historic shipwrecks are unlikely to be discovered or recovered, leading to the irreversible loss of cultural artifacts.²⁸⁸

C. *Sunken Military Craft Act*

Like ASA, the Sunken Military Craft Act (SMCA) removes claims under both the law of salvage and the law of finds from the purview of Article III courts. Specifically, SMCA bars law of salvage and law of finds claims against “any sunken warship, naval auxiliary, or other vessel that was owned or operated by a government on military noncommercial service when it sank.”²⁸⁹ While ASA was passed with the intent of clarifying state’s right to abandoned wrecks, SMCA was passed in the wake of 9/11 as a measure to protect the security of sunken U.S. military ships, airplanes, and spacecraft.²⁹⁰ The hope was that by granting foreign ships immunity from salvage claims, foreign states would grant the United States the same privileges. This was likely an important consideration for the “coalition of the willing” during the wars in Iraq, Afghanistan, and the War on Terror.

Unfortunately, this removal of salvage and finds claims raises the same constitutionality issues as ASA. Salvage and finds are not only two of the most foundational elements of admiralty law, in fact, “the laws of salvage and finds generally are the only admiralty causes of action that would confer federal jurisdiction over a shipwreck case.”²⁹¹ Thus, by

to a legal position above that of a commodity, so as to eliminate the market, only results in that market going underground.”); Bordelon, *supra* note 212, at 177.

²⁸⁸ Adam P. Samansky, *The Practical Effects of Federal Legislation Altering and Amending the Substantive Admiralty Law of Salvage and Finds: The Portland Model*, 37 SUFFOLK U. L. REV. 513, 513-14 (2004) (“[S]hipwrecks will fall prey to the ravages of the sea because the states lack the financial incentives and resources to successfully launch vastly expensive and risky search and recovery efforts for lost and abandoned shipwrecks. This federal legislation, therefore, may lead to the permanent loss of historically, scientifically, culturally, socially, and economically valuable artifacts . . .”).

²⁸⁹ Sunken Military Craft Act (SMCA), Pub. L. No. 108-375, §§ 1406, 1408, 118 Stat. 1811 (2004) (codified at 10 U.S.C. § 113 note (Sunken Military Craft))

²⁹⁰ *See generally* COMM. ON ARMED SERVS., NATIONAL DEFENSE AUTHORIZATION ACT FOR 2005, H.R. REP. NO. 108-491, Pt. 1 (2004) (discussing the goals of SMCA to protect US military assets).

²⁹¹ *Zych II*, 811 F. Supp. 1300, 1315 (N.D. Ill. 1992).

barring these causes of action, SMCA dramatically, and potentially unconstitutionally, limits the jurisdiction of federal courts.²⁹²

SMCA flatly eliminates claims under the law of finds and recognizes that “no salvage rights or awards” will be cognizable.²⁹³ This removes the traditional and quintessential salvage cause of action in admiralty. Without a cause of action, plaintiffs are left without an admiralty claim and must resort to state law instead,

[w]here no remedy exists for an injury in the admiralty courts the fact that such courts exist and exercise jurisdiction in other causes of action leaves the State courts as free to exercise jurisdiction in respect to an injury not cognizable in the admiralty as if the admiralty courts were unknown to the Constitution and had no existence in our jurisprudence.²⁹⁴

The only way SMCA can survive constitutional scrutiny is if the claim at issue could not historically have been brought under admiralty law.²⁹⁵ However, there is remarkably clear evidence that this type of suit historically would have been allowed. American admiralty law consistently allowed salvage claims against both sunken and floating military craft prior to the SMCA.²⁹⁶ This included United States ships as

²⁹² *Sunken Treasure v. Unidentified, Wrecked & Abandoned Vessel*, 857 F. Supp. 1129, 1135 (D.V.I. 1994) (“[B]ecause the laws of salvage and finds generally are the only admiralty causes of action that would confer federal jurisdiction over a shipwreck case, the court would be required to dismiss the action for lack of jurisdiction”); *see also Zych I*, 941 F.2d 525, 531 (7th Cir. 1991) (“[D]epriving those who find embedded shipwrecks of causes of action based on the law of salvage and the law of finds divests federal courts of their admiralty jurisdiction over the same claims.”).

²⁹³ 10 USC § 113 note (Sunken Military Craft) at § 1406(c)–(d).

²⁹⁴ *Steamboat Co. v. Chase*, 83 U.S. (16 Wall.) 522, 530 (1872).

²⁹⁵ For an analogous argument in the context of ASA, *see Zych I*, 941 F.2d. at 531–32.

²⁹⁶ *See* *State ex rel. Bruton v. Flying “W” Enters.*, 160 S.E.2d 482 (N.C. 1968) (wrecks of several Confederate blockade runners); *State ex rel. Ervin v. Mass. Co.*, 95 So. 2d 902, 903 (Fla.), *cert. denied*, 355 U.S. 881 (1957) (United States battleship wreck); *Piscataqua River Towing Co. v. United States*, 1932 A.M.C. 351 (D. Mass. 1932) (salvage award allowed against military submarine); *Bull Insular S.S. Co. v. United States*, 1926 A.M.C. 1019, 62 Ct. Cl. 338 (1926) (salvage award allowed against Army Transport vessel); *The Progressive*, 275 F. 360 (E.D.N.Y. 1921) (salvage award allowed against military destroyer). Notably, the US also allowed foreign nationals to bring claims for salvage against U.S. government vessels acting on military service. *Atl. Transp. Co. v. United States*, 42 F.2d 583 (1930) (salvage award allowed for British salvors against U.S. military

well as those owned and operated by foreign governments on military noncommercial service.²⁹⁷ The Eleventh Circuit has recognized and adopted this precedent, allowing salvage claims against military craft as recently as four years prior to the passage of SMCA. In 2000, the court held that a private salvor could potentially recover for salvage services that had been performed to recover a Navy torpedo bomber that crashed off the coast of Florida.²⁹⁸ Ultimately the Court found this particular award was barred, but only because the U.S. government had explicitly rejected salvage services.²⁹⁹ The Court recognized that otherwise the salvage claim was legally cognizable.

SMCA thus removes claims that would otherwise have been allowed under salvage from federal admiralty law. This, at the very least, raises constitutional concerns under *Panama Railroad's* first factor.³⁰⁰ These are exacerbated when considering *Panama Railroad's* second factor, which states that Article III's grant of jurisdiction over admiralty cases to federal courts was intended to provide uniformity over maritime matters.³⁰¹ Legislation that leads to piecemeal application of maritime

cargo transport vessel); *Prince Line, Ltd. v. United States*, 61 Ct. Cl. 632 (1926) (salvage awards for British salvors allowed against government transport vessel).

²⁹⁷ *Ex parte Easton*, 95 U.S. 68, 72-73 (1877) ("Wide differences of opinion have existed as to the extent of the admiralty jurisdiction; but it may now be said, without fear of contradiction, that it extends to all contracts, claims, and services essentially maritime, among which are . . . the claims of material-men and others for the repair and outfit of ships belonging to foreign nations or to other States . . .").

²⁹⁸ *Int'l Aircraft Recovery, LLC v. Unidentified, Wrecked & Abandoned Aircraft*, 218 F.3d 1255, 1263-64 (11th Cir. 2000).

²⁹⁹ However, the court did find that the salvor was entitled to the value of their services prior to the U.S. government's refusal.

³⁰⁰ See Bederman, *supra* note 66, at 20-28, for a discussion of *Panama Railroad's* first "non-delegation" factor stating that "there are boundaries to the maritime law and admiralty jurisdiction which inhere in those subjects and cannot be altered by legislation, as by excluding a thing falling clearly within them or including a thing falling clearly without." *Panama R.R. Co. v. Johnson*, 264 U.S. 375, 386 (1924).

³⁰¹ *Panama Railroad's* second factor focuses on uniformity, "Another is that the spirit and purpose of the constitutional provision require that the enactments — when not relating to matters whose existence or influence is confined to a more restricted field, as in *Cooley v. Board of Wardens*, 52 U.S. (12 How.) 299, 319 (1852) — shall be coextensive with and operate uniformly in the whole of the United States." *Panama R.R.*, 264 U.S. at 386-87.

law will also be deemed unconstitutional.³⁰² If SMCA bars all salvage and finds claims, that amounts to barring all claims available to plaintiffs under admiralty law. This leaves salvors with only remedies in state law, the very nonuniform situation that Article III's grant of jurisdiction to the federal judiciary was intended to prevent.

As with ASA, SMCA's removal of salvage and finds claims reduces the uniformity of maritime law. The Supreme Court has repeatedly emphasized the importance of maintaining uniformity in admiralty law nationally, what Justice Thomas calls "a singularly important concept in admiralty law."³⁰³ Federal admiralty law becomes nonuniform when a litigant has no choice but to invoke state law remedies. These state law remedies vary widely between states, leading to a patchwork landscape that is far from uniform.³⁰⁴ In other cases, the Supreme Court has upheld the availability of state law remedies to maritime matters so long as there remains "availability of a federal forum in the first instance and by review in this Court to provide assurance that the federal interest is correctly assessed and accorded due weight."³⁰⁵ SMCA removes the availability of a federal forum, leaving only state remedies available to plaintiffs.

Despite barring salvage and finds claims, SMCA does provide that if a foreign state requests, the Secretary of the Navy and Secretary of State can oversee "archaeological, historical, or educational" activities directed at a foreign sunken military craft through a permitting program.³⁰⁶ From a legal standpoint, this administrative solution is not, and cannot be, a replacement for the jurisdiction granted to federal courts under Article III. It is clear that substituting an administrative remedy for a judicial one is not a valid approach under Article III.³⁰⁷

³⁰² *Id.* at 386.

³⁰³ *Great Lakes Ins. SE v. Raiders Retreat Realty Co.*, 601 U.S. 65, 83 (2024).

³⁰⁴ Hallwood & Miceli, *supra* note 15, at 294 ("In practice, however, while more than 30 states have passed legislation regarding the management of historic wrecks in their waters, the laws are not uniform and generally establish inadequate incentives for private salvage.").

³⁰⁵ *Kossick v. United Fruit Co.*, 365 U.S. 731, 739 (1961).

³⁰⁶ 10 USC § 113 note (Sunken Military Craft) at § 1403.

³⁰⁷ *Crowell v. Benson*, 285 U.S. 22, 56-57 (1932) ("The recognition of the utility and convenience of administrative agencies for the investigation and finding of facts within their proper province, and the support of their authorized action, does not require the

Permitting does not provide the same remedies as salvage and law of finds actions. And while the actions of executive agencies can complement the authority of the federal courts, executive action cannot be used to replace Article III's specifically enumerated grant of exclusive federal court jurisdiction to all admiralty and maritime claims.³⁰⁸

From a practical perspective, while foreign sovereigns can in theory elect to allow permitting, this is a specious power and one that does not provide a meaningful substitute for salvage or finds claims. Often the most difficult, expensive, and riskiest parts of shipwreck salvage lie in finding the location of sunken vessels. For historic wrecks a salvor likely does not know what ship he has found or who it might belong to until some recovery has been undertaken. By this point, the hardest and most costly work has already been completed, but it is only at this stage that a salvor could petition a foreign sovereign for a permit to continue salvage operations. It is no surprise that a foreign sovereign would choose to say no to this request and instead take the information on the wreck's location and begin their own salvage operations. They might then be able to retain the entire benefit of the salvor's efforts without having to compensate them. This is precisely the circumstance that admiralty's salvage awards have historically and equitably prevented.

CONCLUSION

Congress justified both ASA and SMCA as relatively minor encroachments on the historic rules of admiralty that were necessary to appease its constituent audiences. The decades since the passage of this legislation show the consequences of this experiment: there have been demonstrably fewer salvage claims as these laws actively prevent these claims and disincentivize the efforts of potential salvors.³⁰⁹ One of the

conclusion that there is no limitation of their use, and that the Congress could completely oust the courts of all determinations of fact by vesting the authority to make them with finality in its own instrumentalities or in the executive department. That would be to sap the judicial power as it exists under the federal Constitution, and to establish a government of a bureaucratic character alien to our system . . .").

³⁰⁸ *Id.*

³⁰⁹ Samansky, *supra* note 288, at 513 (discussing how this legislation has turned what was a system based on incentives for salvors to one based on civil and criminal penalties

justifications for the constitutionality of ASA was, for instance, that it only applied to a very limited number of shipwrecks, leaving the remainder of the United States's 50,000 shipwrecks subject to admiralty jurisdiction.³¹⁰ This argument cannot stand when additional laws, like SMCA, are passed that further remove jurisdiction and when the impacts of this legislation on salvage claims are empirically demonstrable. Safe and responsible salvage is an appropriate goal. However, disincentivizing exploration and erasing Article III jurisdiction from the federal courts is not the proper tool to accomplish it.

While academics have recognized specifically that removing the availability of salvage causes of action is likely unconstitutional in the context of the Abandoned Shipwreck Act,³¹¹ this has been ignored by Congress, who instead of reconsidering its approach have doubled down and passed new legislation that further removes salvage and finds actions. These two laws are also indicative of a new, and problematic, era in admiralty law where federal judges have increasingly deferred to Congressional interpretations of maritime jurisdiction.³¹² However, the legal foundations have been clearly stated, any removal of salvage actions is a violation of Article III grants.³¹³ It is time that judges take heed of these foundational admiralty law principles and jurisdictional debates to do justice to Article III.

This removal of salvage and finds actions not only raises constitutional issues, it has created a system that disincentives the discovery and recovery of invaluable cultural heritage. SMCA and ASA together have shifted the salvage system from one that rewards and

for them instead); Giesecke, *supra* note 14, at 168 (describing the reduction in the number of salvage claims after the passage of ASA).

³¹⁰ Stevens, *supra* note 9, at 596-97.

³¹¹ Feingold, *supra* note 240, at 393 ("The boundaries within which Congress may act do not include removing the rights of salvors to recovery of fees or the right to federal admiralty jurisdiction, as Congress may not exclude anything falling exclusively under admiralty law when legislating in this area.").

³¹² Brown, *supra* note 17, at 257 (noting that the "Supreme Court has recently abandoned its Constitutional duty of enunciating maritime law in favor of conforming admiralty law to Congressional enactments and filling in gaps in maritime law only when authorized by Congress").

³¹³ Feingold, *supra* note 240, at 397.

incentivizes salvors to one that punishes them.³¹⁴ It is no surprise that salvage claims have dropped dramatically in recent decades. This is not an indication of a well-functioning legal system, which current laws governing shipwrecks are far from,³¹⁵ but instead reflects the fact that fewer and fewer exploration companies are willing to take on the risks of locating historic wrecks given the likely outcome is millions of dollars in fees and penalties.³¹⁶ Even the most staunch defenders of protecting historic shipwrecks have in recent years recognized that salvage law is not incompatible with this goal, and in fact may help to further it by incentivizing the discovery of wrecks that would otherwise be lost to the sands of time.³¹⁷ Courts, for instance, can consider additional factors to the Blackwall framework, such as “the degree to which the salvors have worked to protect [both] the historical and archaeological value of the wreck and items salvaged,” that can work to further this goal.³¹⁸ Congress could instead focus its efforts to ensure that federal statutes worked to incentivize responsible and competent recovery plans.

While salvage and finds of historic shipwrecks may seem like a legal curiosity confined to a niche practice area, we argue here that they are examples of foundational admiralty Article III jurisdiction. The Constitution explicitly vests federal courts with the authority to hear all cases of admiralty and maritime jurisdiction, and the historical understanding of that grant placed admiralty at the core of the federal judicial project. As such, admiralty law offers unique insight into the

³¹⁴ Samansky, *supra* note 288, at 513.

³¹⁵ *See supra* Part III.

³¹⁶ *See generally* Hallwood & Miceli, *supra* note 15 (discussing the economic structures and incentives behind salvage of historic wrecks).

³¹⁷ *See* Ole Varmer & Caroline M. Blanco, *The Case for Using the Law of Salvage to Preserve Underwater Cultural Heritage: The Integrated Marriage of the Law of Salvage and Historic Preservation*, 49 J. MAR. L. & COM. 401, 401-02 (2018) (arguing that in the years since Varmer published *The Case Against the “Salvage” of the Cultural Heritage*, 30 J. MAR. L. & COM. 279 (1999), arguing against the use of salvage to recover historic wrecks, the increasing incorporation of historic preservation principles into salvage law makes salvage a viable option for historic wreck recovery).

³¹⁸ *Columbus-Am. Discovery Grp. v. Atl. Mut. Ins. Co.*, 974 F.2d 450, 468 (4th Cir. 1992); *see also* Bordelon, *supra* note 212, at 205-09 (arguing for the widespread inclusion of this principle as a seventh factor in ascertaining salvage awards for historic shipwrecks).

structural design of Article III and the permissible limits of congressional control over jurisdiction.

Yet over time, admiralty has become marginalized in both practice and theory. Congress has enacted laws — such as ASA and the SMCA — that effectively strip federal courts of their historic role in adjudicating salvage and finds claims, despite clear precedent holding that such claims are constitutionally within the federal judicial power. Modern federal courts scholars, meanwhile, have largely ignored admiralty in their jurisdiction-stripping debates, leading to frameworks that fail to account for the constitutional limits that admiralty jurisprudence reveals.

Reviving admiralty's constitutional significance thus offers more than a doctrinal correction. It provides a crucial test case for evaluating congressional encroachments on judicial power. Any unified theory of Article III — whether grounded in essential functions, mandatory vesting, or traditional judicial roles — must reckon with admiralty. To ignore it is to overlook a category of cases that the Constitution not only anticipated but prioritized.

As the federal courts continue to face jurisdictional challenges and as Congress explores new limits on judicial authority, admiralty stands as a reminder that some jurisdictional grants are not optional or easily displaced. Recognizing and enforcing these constitutional boundaries is essential not only for preserving maritime law, but for safeguarding the separation of powers more broadly. In this light, restoring admiralty to its rightful place in federal courts discourse is not just an act of historical fidelity — it is a constitutional necessity.