University of Chicago Law School

Chicago Unbound

Journal Articles

Faculty Scholarship

1960

The Romero Case and Some Problems of Federal Jurisdiction

Philip B. Kurland

Follow this and additional works at: https://chicagounbound.uchicago.edu/journal_articles

Part of the [Law Commons](#)

Recommended Citation

Philip B. Kurland, "The Romero Case and Some Problems of Federal Jurisdiction," 73 Harvard Law Review 817 (1960).

This Article is brought to you for free and open access by the Faculty Scholarship at Chicago Unbound. It has been accepted for inclusion in Journal Articles by an authorized administrator of Chicago Unbound. For more information, please contact unbound@law.uchicago.edu.

HARVARD LAW REVIEW

THE ROMERO CASE AND SOME PROBLEMS
OF FEDERAL JURISDICTION †

Philip B. Kurland *

In Romero v. International Terminal Operating Co., the Supreme Court last term decided a case which has important implications in many different areas of federal jurisdiction. The author's discussion involves a consideration of both the meaning of "arising under the laws" in 28 U.S.C. § 1331, and the various confusing uses which the Court has made of the term "pendent jurisdiction."

WHATEVER place the name Francisco Romero may come to have in the world of philosophy¹ or bullfighting,² in the lawyer's domain it will, from now on, denote a case of major importance in the field of federal jurisdiction.³ The law's Francisco Romero, a Spanish seaman on a Spanish ship temporarily berthed in New York harbor at Hoboken, New Jersey, was severely injured while engaged in his duties aboard the vessel as it was being prepared to receive its cargo of wheat. The injury resulted, as such injuries often do, in a lawsuit. Romero asserted that his injury entitled him to compensation from one or more of four defendants: (1) a Spanish corporation which owned the ship; (2) a New York corporation alleged to be operating, controlling, and managing the ship; (3) a Delaware corporation which was the stevedoring con-

† I am indebted to my colleague Professor Brainerd Currie for his invaluable assistance in the preparation of this article, with some of which he disagrees. See Currie, *The Silver Oar and All That*, 27 U. CHI. L. REV. 1 (1959). For an excellent analysis of some of the implications of the *Romero* case, see also *The Supreme Court, 1958 Term*, 73 HARV. L. REV. 84, 138-46 (1959).

* Professor of Law, The Law School, The University of Chicago. A.B., University of Pennsylvania, 1942; LL.B., Harvard, 1944.

¹ See HARRIS, FRANCISCO ROMERO ON PROBLEMS OF PHILOSOPHY (1959).

² See Graves, *Enter the Leaden Age of Bullfighting*, N.Y. Times, Sept. 13, 1959, § 6 (Magazine), p. 28.

³ *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959).

tractor; and (4) another New York corporation, also a contractor, engaged in the installation of boards to receive the cargo. Against the first defendant Romero asserted claims under the Jones Act,⁴ for unseaworthiness,⁵ and for maintenance and cure.⁶ Against the second defendant he asserted all of these claims plus one based on general maritime tort.⁷ The third and fourth defendants were sued only for maritime tort.

⁴ 41 Stat. 1007 (1920), 46 U.S.C. § 688 (1958).

⁵ "Seaworthy" and 'unseaworthy' are words which may be easily defined by general language. The difficulty arises when it is sought to fit facts to definition or apply definition to facts. An appreciation, therefore, of the history of these terms and of their application to new requirements, helps serve to understand their true significance. The basic thought is that the vessel shall be equipped to perform the duty which she owes to the human beings aboard of her and the cargo which she carries." *Adams v. Bortz*, 279 Fed. 521, 523 (2d Cir. 1922). See also *Lester v. United States*, 234 F.2d 625 (2d Cir. 1956); *Tetreault, Seamen, Seaworthiness and the Rights of Harbor Workers*, 39 CORNELL L.Q. 381 (1954); *Benbow, Seaworthiness and Seamen*, 9 MIAMI L.Q. 418 (1955). On the question whether the doctrine of seaworthiness implies absolute liability, see *Mitchell v. Trawler Racer, Inc.*, 265 F.2d 426, 429-33 (1st Cir. 1959).

⁶ "The ancient duty of a vessel and her owner to provide maintenance and cure for seamen injured or falling ill while in service was recognized and, to some extent, defined by this Court in *The Osceola*, 189 U.S. 158, 175. See also *Chelentis v. Luckenbach S.S. Co.*, 247 U.S. 372; *Pacific S.S. Co. v. Peterson*, 278 U.S. 130. The duty, which arises from the contract of employment, *Cortes v. Baltimore Insular Line*, 287 U.S. 367, 371, does not rest upon negligence or culpability on the part of the owner or master, *id.*; *The City of Alexandria*, 17 Fed. 390 (D.C.); *The Mars*, 149 Fed. 729, 731 (C.C.A.); *Sorenson v. Alaska S.S. Co.*, 243 Fed. 280 (D.C.), *aff'd* 247 Fed. 294 (C.C.A.); *Brown v. The Bradish Johnson*, Fed. Cas. No. 1992, 1 Woods 301 (C.C.), nor is it restricted to those cases where the seaman's employment is the cause of the injury or illness. *The Wensleydale*, 41 Fed. 829 (D.C.); *The Bouker No. 2*, 241 Fed. 831 (C.C.A.). It is not an award of compensation for the disability suffered, *The Wanderer*, 20 Fed. 140, 143 (C.C.), although breach of the duty may render the owner liable for the consequential damages suffered by the seaman. *Cortes v. Baltimore Insular Line*, *supra*, 371. The maintenance exacted is comparable to that to which the seaman is entitled while at sea, *The Henry B. Fiske*, 141 Fed. 188, 192 (D.C.); *The Mars*, 145 Fed. 446, 447, (D.C.), *aff'd* 149 Fed. 729 (C.C.A.); *The Bouker No. 2*, *supra*, 836, and 'cure' is care, including nursing and medical attention during such period as the duty continues. *Whitney v. Olsen*, 108 Fed. 292, 297 (C.C.A.) and cases cited; *Daugherty v. Thompson-Lockhart Co.*, 211 Fed. 224, 227 (D.C.)." *Calmar S.S. Corp. v. Taylor*, 303 U.S. 525, 527-28 (1938). See also Comment, *Admiralty Right to Maintenance and Cure*, 38 ILL. L. REV. 193 (1943); Comment, *Maintenance and Cure*, 50 MICH. L. REV. 435 (1952); *Currie, Eino, A Sailor*, 53 THE BRIEF 157 (1957).

⁷ "The admiralty jurisdiction of the federal courts embraces two principal subjects—maritime contracts and maritime torts. The latter . . . are civil wrongs committed on navigable waters. The place where torts are committed, and not their nature, is decisive on the question of admiralty jurisdiction. *The Belfast v. Boon*, 7 Wall. 624, 637 . . ." *Berwind-White Coal Mining Co. v. City of New York*, 135 F.2d 443, 446 (2d Cir. 1943).

When Romero filed his case, several aspects of the "jurisdictional" law were well settled. A claim under the Jones Act could be filed in a federal district court either on the "law side" or in admiralty.⁸ If it was filed "at law" the plaintiff was entitled to a jury.⁹ The Jones Act claim could also be brought in a state court,¹⁰ where a jury would be available. The other three claims could be brought independently in admiralty,¹¹ without a jury, or "at law" with a jury in the state courts or, if diversity-of-citizenship jurisdiction existed, in the federal courts.¹² The questions which had not been settled were (1) whether the three nonstatutory maritime claims were by themselves cognizable on the "law side" of the federal courts; (2) whether they were cognizable on the "law side" of the federal courts when joined with a Jones Act claim; and (3) whether, if cognizable "at law" because of the joinder, they were to be tried by a jury. By filing his lawsuit on the "law side" of the United States District Court for the Southern District of New York, Romero raised these issues. The circuits were in conflict on the questions. The First Circuit had answered the first question in the affirmative.¹³ The Second and Third Circuits had clearly said no to the first question.¹⁴ The Second, Third, and Seventh Circuits had reached an unhappy compromise on the second and third questions.¹⁵

All four defendants in the *Romero* case moved to dismiss for

⁸ *Panama R.R. v. Johnson*, 264 U.S. 375 (1924).

⁹ *Id.* at 391.

¹⁰ *Engel v. Davenport*, 271 U.S. 33 (1926); *Panama R.R. v. Vasquez*, 271 U.S. 557 (1926) (dictum).

¹¹ 28 U.S.C. § 1333 (1958); see *London Guar. & Acc. Co. v. Industrial Acc. Comm'n*, 279 U.S. 109 (1929); *Atlantic Transp. Co. v. Imbrovek*, 234 U.S. 52 (1914); *The Osceola*, 189 U.S. 158 (1903).

¹² See *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 88-89 (1946); *Leon v. Galceran*, 78 U.S. (11 Wall.) 185 (1870); *Rounds v. Cloverport Foundry & Mach. Co.*, 237 U.S. 303 (1915). See also *Stevens, Erie R.R. v. Tompkins and the Uniform General Maritime Law*, 64 HARV. L. REV. 246 (1950).

¹³ *Doucette v. Vincent*, 194 F.2d 834 (1st Cir. 1952); *Jansson v. Swedish Am. Line*, 185 F.2d 212, 217-18 (1st Cir. 1950) (dictum).

¹⁴ *Paduano v. Yamashita Kisen Kabushiki Kaisha*, 221 F.2d 615 (2d Cir. 1955); *Jordine v. Walling*, 185 F.2d 662 (3d Cir. 1950).

¹⁵ Compare *Lindquist v. Dilkes*, 127 F.2d 21 (3d Cir. 1942), with *Jordine v. Walling*, *supra* note 14. Compare *Mullen v. Fitz Simons & Connell Dredge & Dock Co.*, 172 F.2d 601 (7th Cir. 1948), with *Mullen v. Fitz Simons & Connell Dredge & Dock Co.*, 191 F.2d 82 (7th Cir. 1951). See also *Bartholomew v. Universe Tankships, Inc.*, 263 F.2d 437 (2d Cir. 1959); *McAfoos v. Canadian Pac. S.S., Ltd.*, 243 F.2d 270, 274 (2d Cir. 1957); *Troupe v. Chicago, D. & G. Bay Transit Co.*, 234 F.2d 253, 258 (2d Cir. 1956).

want of "jurisdiction." The district court granted their motions.¹⁶ The court of appeals affirmed the dismissals.¹⁷ The Supreme Court of the United States divided sharply over the issues presented by the case. Five members of the Court, speaking through Mr. Justice Frankfurter, held that the Jones Act claims should not have been dismissed for want of jurisdiction, although they did not state claims on which relief could be granted.¹⁸ Two members of the minority agreed with this conclusion.¹⁹ The Court also held that the non-Jones Act claims could not be maintained independently on the "law side" of the federal courts absent diversity-of-citizenship jurisdiction, but they could properly be joined there with a Jones Act claim. All four dissenters disagreed with these propositions. The Court also held that all but one of the claims against the second defendant were properly dismissed on the merits and that the claims resting on diversity jurisdiction were properly before the district court although joined with the non-diversity claim under the Jones Act. On these last rulings, the Court was unanimous.

It is not the purpose of this paper to provide a critique of the *Romero* case; that has been ably done elsewhere.²⁰ Rather, an attempt will be made to consider the relationship of the *Romero* case to two more general problems in the area of federal jurisdiction: the meaning of the phrase "laws . . . of the United States" in section 1331 of the Judicial Code,²¹ and the concept of "pendent jurisdiction." At the outset of this discussion, it is necessary to state, as will later be shown,²² that the Court in *Romero* was not faced with any real jurisdictional questions, although it and the other courts recently dealing with the problems have deemed them "jurisdictional." There can be no doubt that the District Court of the Southern District of New York had power to decide each of the

¹⁶ 142 F. Supp. 570 (S.D.N.Y. 1956).

¹⁷ 244 F.2d 409 (2d Cir. 1957).

¹⁸ Cf. *Lauritzen v. Larsen*, 345 U.S. 571, 575 (1953); *Montana-Dakota Util. Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246, 249 (1951); *Bell v. Hood*, 327 U.S. 678 (1946).

¹⁹ 358 U.S. at 414.

²⁰ See Currie, *The Silver Oar and All That*, 27 U. CHI. L. REV. 1 (1959); *The Supreme Court, 1958 Term*, 73 HARV. L. REV. 84, 138-47 (1959).

²¹ "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States," 28 U.S.C. § 1331 (1958).

²² See Section II, pp. 833-50 *infra*. See also Currie, *The Silver Oar and All That*, 27 U. CHI. L. REV. 1 (1959).

claims asserted by Romero. The real issues were whether the claims could be joined and by what procedure their trial should be governed, issues which are not jurisdictional since they do not involve any question of the competence of the district court to entertain the litigation.

I. THE MEANING OF SECTION 1331

Romero contended that he had a right to file his nonstatutory maritime claims on the "law side" of the district court by reason of section 1331 of the Judicial Code. The majority rejected this proposition. The minority would have ruled in Romero's favor on this point. But in dealing with the construction of section 1331 solely in the context of maritime causes, the Court failed to take note of the implications of the solutions to this problem which radiate far beyond the limits of this case and of the admiralty power. On the majority's thesis it did not have to consider these issues. But the minority did, and Mr. Justice Black was thus guilty of oversimplification when he said, "The real core of the jurisdictional controversy is whether a few more seamen can have their suits for damages passed on by federal juries instead of judges."²³ For more than seamen's injury cases were involved even if the problem were confined to the distribution of maritime cases between the jury and nonjury calendars of the federal courts: The minority construction of section 1331 would afford the right of jury trial to all cases now tried in admiralty with the exception of libels in rem.²⁴ And the Justice was equally in error when he implied that the rationale for sustaining section 1331 jurisdiction proffered by Mr. Justice Brennan in *Romero* was the same as that afforded by Judge Magruder in *Doucette v. Vincent*.²⁵

The alternative solutions offered to this "jurisdictional" problem may be summarized in this way: (1) Judge Magruder took the position that such nonstatutory maritime claims "arise under" the Constitution and are therefore properly cognizable under section 1331; (2) the minority of the Supreme Court held that section 1331 jurisdiction attaches because the claims properly "arise under" federal decisional law; (3) the majority of the Court rejected

²³ 358 U.S. at 388.

²⁴ In 1957, the federal courts docketed 2,786 cases in admiralty; in 1958, the number was 3,149. [1958] DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS ANN. REP. 163 (1959).

²⁵ 194 F.2d 834 (1st Cir. 1952).

the idea that these claims have a constitutional base; it avoided the question whether nonstatutory claims can arise under federal law by resorting to the history of the Judicial Code to demonstrate that maritime causes of this nature were not included within section 1331 and its predecessor sections of the Judicial Code.²⁶

A. *The Doucette Rationale*

There is an obvious advantage in choosing Judge Magruder's position rather than that of Mr. Justice Brennan, since the *Doucette* rationale would be confined to maritime claims. Despite this attraction, however, it is clear that *Doucette* rests on too weak a base. In *Doucette* the question of the "jurisdiction" of the district court to entertain nonstatutory maritime claims on the "law side" was raised sua sponte by the court of appeals.²⁷ The same court had previously, in a "carefully considered" dictum in *Jannson v. Swedish American Line*,²⁸ indicated that "jurisdiction" existed under section 1331 of "a civil action for damages . . . to enforce a claim cognizable in admiralty . . ."²⁹ Judge Magruder's reasoning had been succinctly set out in *Jannson*. *Doucette* did little more than turn the dictum into a holding and make even more explicit the reliance on the Constitution rather than "the laws . . . of the United States" as the basis for section 1331 jurisdiction.³⁰ In *Jannson*, Magruder had written:

If the "Constitution itself adopted and established, as part of the

²⁶ The opinion for the Court relied upon the interpretation of the 1875 grant of federal-question jurisdiction as the appropriate basis for finding the meaning of § 1331 for the purposes of this case. "The modifications of language to be found in the present version of this Act, 28 U.S.C. § 1331, were not intended to change in any way the meaning or content of the Act of 1875. See Reviser's Note to 28 U.S.C. § 1331." 358 U.S. at 359 n.5. The pertinent language of the 1875 grant provided the federal trial courts with jurisdiction "of all suits of a civil nature at common law or in equity . . . arising under the Constitution or laws of the United States . . ." Act of March 3, 1875, § 1, 18 Stat. 470. The minority took no exception to the proposition that the 1875 statute had been amended only by change of language and not by change of meaning.

²⁷ 194 F.2d at 836. The problem is still regarded by the First Circuit as one calling for court inquiry on its own motion. *Mitchell v. Trawler Racer, Inc.*, 265 F.2d 426, 427-28 (1st Cir. 1959).

²⁸ 185 F.2d 212, 217-18 (1st Cir. 1950). See also *Nolan v. General Seafoods Corp.*, 112 F.2d 515, 517 (1st Cir. 1940).

²⁹ 185 F.2d at 217.

³⁰ Magruder's reliance on the Constitution rather than the laws of the United States as the basis for jurisdiction in *Doucette* is constantly reiterated in the opinion. See *The Supreme Court, 1958 Term*, 73 HARV. L. REV. 84, 139 (1959). But see *Currie, The Silver Oar and All That*, 27 U. CHI. L. REV. 1, 59 n.327 (1959).

laws of the United States, approved rules of the general maritime law," and if, when a cause of action cognizable in admiralty is sued on at common law, either in a state court or on the law side of a federal district court, the court must apply the general maritime law rather than the law of the state of the forum, and if the judgment of a state court in such a case is reviewable by the United States Supreme Court because a federal question is necessarily involved, then it would plainly follow, we think, that a civil action for damages filed on the law side of a federal district court, to enforce a claim cognizable in admiralty, may be maintained in the district court pursuant to 28 U.S.C.A. § 1331 as a case arising "under the Constitution, laws or treaties of the United States" — assuming, of course, that the requisite jurisdictional amount is present³¹

It is thus obvious that, although the rationalization thus offered would be applicable to all admiralty cases governed by national law and not merely to seamen's personal-injury actions, it would be limited in its application to admiralty cases.

The fallacy of this approach lies in its erroneous major premise that "the Constitution prescribed the substantive law to be applied in such cases."³² The support for this proposition derives from the language of the Supreme Court in *Knickerbocker Ice Co. v. Stewart*,³³ which Judge Magruder quoted in both of his opinions. Taken in context, however, the language of that Supreme Court opinion says no more than that : (1) The admiralty law was received by the United States at the time of the adoption of the Constitution much as the common law of England was received by the states, often by way of constitutional provision; (2) the national government is supreme over the states with regard to the admiralty power under article III as it is supreme over the states with regard to the powers specified in article I. To say this is hardly to raise the judicial opinions and statutes formulated under the admiralty power to the level of constitutional provisions. They would be strange constitutional provisions which were subject to change both by the legislature and the judiciary. Certainly in the event of conflict between admiralty legislation or decisions and provisions of the Constitution, there could be no doubt that the latter must prevail. The common law received by the states in like manner does not have constitutional status in those jurisdictions.

³¹ 185 F.2d at 217-18. The internal quotation is from *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 160 (1920).

³² 194 F.2d at 841.

³³ 253 U.S. 149 (1920).

Mr. Justice Holmes, dissenting in the *Knickerbocker Ice* case, said: "I do not suppose that anyone would say that [the Admiralty clause] . . . by implication, enacted a whole code for master and servant at sea, that could be modified only by a constitutional amendment."³⁴ How much stranger it would have appeared to him if the majority opinion in that case had ruled that such a code, amendable by Congress and the national courts, was the equivalent of Constitutional mandate. Judge Magruder's major premise, however ingenious, will not stand analysis. And with the collapse of this foundation, the entire edifice which would allow seamen to maintain their actions for maritime-tort claims on the "law side" must fall. As Mr. Justice Frankfurter put it for the Court in *Romero*:³⁵ "Of course all cases to which 'judicial power' extends 'arise,' in a comprehensive, non-jurisdictional sense of the term, 'under this Constitution.' It is the Constitution that is the ultimate source of all 'judicial Power' — defines grants and implies limits — and so 'all Cases of admiralty and maritime Jurisdiction' arise under the Constitution in the sense that they have constitutional sanction. But they are not 'Cases . . . arising under this Constitution . . . ' "³⁶

B. The Brennan Interpretation of Section 1331

Mr. Justice Brennan's opinion in *Romero* uses a less esoteric approach but one which has greater implications for nonmaritime law. For the minority of the Supreme Court, the plain meaning of section 1331 requires acceptance of jurisdiction over nonstatutory maritime claims. In substance the argument depends upon four points: (1) Section 1331 extends the jurisdiction of the United States district courts to all civil cases in law and equity arising under the laws of the United States; (2) the word "laws" in the

³⁴ 253 U.S. at 167.

³⁵ 358 U.S. at 368.

³⁶ Magruder's third point raises an interesting problem which the Court has not adequately considered. Review of state-court judgments on certiorari is authorized "where any title, right, or privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States." 28 U.S.C. § 1257(3) (1958). (Emphasis added.) The admiralty cases coming to the Supreme Court on certiorari are often based on non-statutory claims. See, e.g., *Garrett v. Moore-McCormack Co.*, 317 U.S. 239 (1942). Nothing in § 1257(3), says Judge Magruder, would seem to authorize such review unless it be the word "Constitution" since the word "statute" — not "laws" — can hardly be defined to mean judicial decisions. It is more likely that the Court's attention was not called to this defect in its certiorari jurisdiction — or that the Court chose to ignore it — than that it was sustaining jurisdiction on the ground that the cases were constitutional ones.

statute includes laws created by federal judicial decisions as well as by congressional legislation; (3) the nonstatutory claims asserted in *Romero* were based on rights established by decisions of the national courts; (4) nondiversity maritime claims, except insofar as the remedy sought is one peculiar to admiralty, are civil cases in law and equity. All four of these propositions are essential to the minority position.

The first proposition is beyond dispute. The third could be rejected only by overruling a long line of Supreme Court decisions, beginning with *Southern Pac. Co. v. Jensen*³⁷ and "culminating" in *Pope & Talbot, Inc. v. Hawn*.³⁸ The majority of the Court rejected the fourth proposition and, therefore, did not have to consider the second with its interesting radiations beyond the maritime jurisdiction. In brief, the majority rested on the proposition that the statute which first granted general federal-question jurisdiction to the federal trial courts did not include within the term "suits of a civil nature at common law or in equity . . . arising under the . . . laws of the United States"³⁹ maritime claims not resting on a federal statute. In large measure this understanding of the meaning given to the 1875 statute by its framers was predicated on Justice Marshall's dictum in *American Ins. Co. v. Canter*⁴⁰ that cases in admiralty were a different species from cases at law or equity. Further support was garnered from the

³⁷ 244 U.S. 205 (1917).

³⁸ 346 U.S. 406 (1953).

³⁹ See note 26 *supra*.

⁴⁰ 26 U.S. (1 Pet.) 511, 545-46 (1828):

The Constitution and laws of the United States, give jurisdiction to the District Courts over all cases in admiralty; but jurisdiction over the case, does not constitute the case itself. We are therefore to inquire, whether cases in admiralty, and cases arising under the laws and Constitution of the United States, are identical.

If we have recourse to that pure fountain from which all the jurisdiction of the Federal Courts is derived, we find language employed which cannot well be misunderstood. The Constitution declares, that "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, or other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction."

The Constitution certainly contemplates these as three distinct classes of cases; and if they are distinct, the grant of jurisdiction over one of them, does not confer jurisdiction over either of the other two. The discrimination made between them, in the Constitution, is, we think, conclusive against their identity. If it were not so, if this were a point open to inquiry, it would be difficult to maintain the proposition that they are the same. A case in admiralty does not, in fact, arise under the Constitution or laws of the United States. These cases are as old as navigation itself; and the law, admiralty and maritime, as it has existed for ages, is applied by our Courts to the cases as they arise.

The conflict between the majority and the minority in *Romero* extended even to

fact that for three-quarters of a century after the enactment of the predecessor of section 1331 no court had ever held that the federal-question jurisdiction could be extended to include nonstatutory maritime causes. Moreover, Mr. Justice Clifford, in an opinion rendered in 1876, only one year after the grant of the federal-question jurisdiction to the federal courts, had said: "Parties in maritime cases are not . . . compelled to proceed in the admiralty at all, as they may resort to their common-law remedy in the State courts, or in the Circuit Court, if the party seeking redress and the other party are citizens of different States."⁴¹

Mr. Justice Brennan was unimpressed by the failure of litigants and legal writers to invoke the federal-question jurisdiction in maritime cases decided prior to *Doucette*. He read *American Ins. Co. v. Canter* only as a rejection of the Magruder position that maritime cases arise under the Constitution: "In its broadest permissible interpretation, the dictum only means that the fact that the Constitution creates admiralty *jurisdiction* does not make all admiralty cases cases arising under the Constitution."⁴² He rejected the Clifford statement on the ground that it was a dictum "in a case decided shortly after the Act's passage, where the effect of the new statute was not at all presented or discussed."⁴³ His most telling point with reference to the alleged categorical difference between maritime causes and cases in law and equity was stated this way: "In fact, the grant of diversity jurisdiction in the 1875 Act was in the very same terms as the grant of the 'arising under' jurisdiction; the same introductory phrase, 'suits of a civil nature at common law or in equity,' governed both grants. It seems to me very odd to say that this phrase, introducing two grants of jurisdiction, had the effect of excluding maritime causes of action entirely from the one but not at all from the other."⁴⁴ The fact is that the acceptance of the diversity jurisdiction over maritime claims under the saving-clause developed long before establishment of the *Jensen* line of cases, when federal courts may have been under the happy delusion that they were applying rules of general common law not derived from admiralty sources.

the appropriate citation of the Marshall language in the *Canter* case. Compare 358 U.S. at 364 with 358 U.S. at 399 n.9. On this score, the minority would seem to have the better of the argument.

⁴¹ Norton v. Switzer, 93 U.S. 355, 356 (1876), quoted in 358 U.S. at 370.

⁴² 358 U.S. at 402.

⁴³ *Id.* at 406.

⁴⁴ *Id.* at 398; see *The Supreme Court, 1958 Term*, 73 HARV. L. REV. 84, 140 (1959).

Clearly there is a doctrinal inconsistency in treating saving-clause cases brought in diversity suits as cases in law or equity, but when brought in the national courts on the basis of their federal origin as cases in admiralty and not in law or equity, when both categories are governed by substantive rules made pursuant to the admiralty power.

Assessment of the opinions suggests that the majority has effectuated the legislative purpose as it was expressed in 1875 and presumably remains unchanged. The minority has, on the other hand, proved that the language of the statute is capable of a construction which would include nonstatutory maritime causes within section 1331 and has asserted that there are factors weighing in favor of that interpretation. It is not surprising that in the twilight area between the dominion clearly assigned to the legislature and that clearly assigned to the judiciary, the champions of broad judicial power were willing to read their own desires into the statute in order to achieve a result more in keeping with their rewriting of the FELA.⁴⁵ But even if the minority had been successful in persuading the Court as to the validity of its fourth proposition — that there was no basic difference contemplated between cases in admiralty on the one hand and cases in law and equity on the other — it would still have to establish its argument that the word “laws” as used in section 1331 includes judicially created rights as well as rights created by statute. And it is the fact that four Justices of the Court were ready so to read the statute, while the others remained silent on this point, that gives the *Romero* case a really broad potential.

C. The Meaning of Section 1331 for Nonmaritime Cases

“There is no federal general common law,” said Mr. Justice Brandeis in *Erie R.R. v. Tompkins*.⁴⁶ Despite the breadth of that statement, the fact remains that there are many areas of the law in which the federal courts are called upon to formulate applicable rules of law without guidance from legislation. Mr. Justice Brandeis himself recognized this in an opinion which he delivered on the same day as *Erie*, in which he applied “federal common law” to a case involving the construction of an interstate com-

⁴⁵ The FELA is incorporated by reference in the Jones Act. See GILMORE & BLACK, ADMIRALTY §§ 6-26 to -37 (1957). For the rewriting of the FELA, see, e.g., *Ringhiser v. Chesapeake & O. Ry.*, 354 U.S. 901 (1957); *Reed v. Pennsylvania R.R.*, 351 U.S. 502 (1956).

⁴⁶ 304 U.S. 64, 78 (1938).

pact.⁴⁷ And the Court has elsewhere recognized that "federal common law" still plays an important part in the formulation of national legal doctrine. Thus in the *Lincoln Mills* case the Court said: "It is not uncommon for federal courts to fashion federal law where federal rights are concerned."⁴⁸ Nor is this power limited to situations in which Congress has purportedly given the courts a blank check, creating jurisdiction and leaving the substantive rules to be made by the national judiciary, as under section 301(a) of the Taft-Hartley Act as interpreted in *Lincoln Mills*.⁴⁹ Where the United States is a party to litigation involving liability on Government commercial paper, "in the absence of an applicable Act of Congress it is for the federal courts to fashion the governing rule of law according to their own standards."⁵⁰ In diversity litigation, when the plaintiff sought to recover damages for defamation against Government employees, the Court recently ruled "that the validity of petitioner's claim of absolute privilege must be judged by federal standards, to be formulated by the courts in the absence of legislative action by Congress."⁵¹ Federal common law is similarly fashioned in cases in which the United States is a party,⁵² in bankruptcy cases,⁵³ in patent cases,⁵⁴ in cases originating in the District of Columbia,⁵⁵ and even in some cases coming to the Supreme Court from state courts when federal interests are involved.⁵⁶ This list is not exhaustive.⁵⁷

⁴⁷ *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938).

⁴⁸ *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 457 (1957).

⁴⁹ See 61 Stat. 156 (1947), 29 U.S.C. § 185(a) (1958); Meltzer, *The Supreme Court, Congress, and State Jurisdiction over Labor Relations: II*, 59 COLUM. L. REV. 269 (1959); Bickel and Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1 (1957).

⁵⁰ *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943); see *National Metropolitan Bank v. United States*, 323 U.S. 454 (1945).

⁵¹ *Howard v. Lyons*, 360 U.S. 593, 597 (1959); see *Kaufman v. Western Union Tel. Co.*, 224 F.2d 723 (5th Cir. 1955); *O'Brien v. Western Union Tel. Co.*, 113 F.2d 539 (1st Cir. 1940); cf. *Francis v. Southern Pac. Co.*, 333 U.S. 445 (1948).

⁵² See cases cited note 50 *supra*; *United States v. Fullard-Leo*, 331 U.S. 256 (1947); *Priebe & Sons, Inc. v. United States*, 332 U.S. 407 (1947). Similar powers have been exerted where one of the parties was a national corporation. *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942).

⁵³ See *Heiser v. Woodruff*, 327 U.S. 726 (1946); *Phelan v. Middle States Oil Corp.*, 220 F.2d 593, 617 (2d Cir. 1955).

⁵⁴ See *Sola Elec. Co. v. Jefferson Elec. Co.*, 317 U.S. 173, 176 (1942).

⁵⁵ See *Barr v. Matteo*, 360 U.S. 564 (1959).

⁵⁶ See *Farmers Educ. & Co-op. Union v. WDAY, Inc.*, 360 U.S. 525 (1959); *Ivanhoe Irr. Dist. v. McCracken*, 357 U.S. 275, 289 (1958).

⁵⁷ See Note, *Exceptions to Erie v. Tompkins: The Survival of Federal Common*

Even when the Court has refused to sanction the use of federal common law, and has applied state law⁵⁸ or has refused to give sanction to a newly claimed right, it has not denied the existence of its power to create federal law. Thus, in *United States v. Standard Oil Co.*,⁵⁹ after declining to recognize a claim in favor of the United States against a corporation which had injured one of its soldiers, the Court said:

[A]lthough federal judicial power to deal with common-law problems was cut down in the realm of liability or its absence governable by state law, that power remained unimpaired for dealing independently, wherever necessary or appropriate, with essentially federal matters, even though Congress has not acted affirmatively about the specific question.

In this sense, therefore, there remains what may be termed, for want of a better label, an area of "federal common law" or perhaps more accurately "law of independent federal judicial decision," outside the constitutional realm, untouched by the *Erie* decision.⁶⁰

Certainly the decisions make it difficult to ascertain when the federal courts will resort to their power of "independent federal judicial decision."⁶¹ But this might equally be said of the difficulty of ascertaining the rationale of the existence of a federal question.⁶² Suffice it for our purposes to note that such judicially created rights exist — and not merely as defenses to claims arising under state law or national statute.⁶³ The question then is whether a claim based on such federally created rights would "arise under"

Law, 59 HARV. L. REV. 966 (1946); Note, *Clearfield: Clouded Field of Federal Common Law*, 53 COLUM. L. REV. 991 (1953); Comment, *Erie Limited: The Confines of State Law in the Federal Courts*, 40 CORNELL L.Q. 561 (1955).

⁵⁸ See *Commissioner v. Stern*, 357 U.S. 39, 45 (1958); *Bank of Am. Nat'l Trust & Sav. Ass'n v. Parnell*, 352 U.S. 29 (1956); *DeSylva v. Ballentine*, 351 U.S. 570 (1956).

⁵⁹ 332 U.S. 301 (1947).

⁶⁰ *Id.* at 307-08.

⁶¹ For an excellent analysis, see Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797 (1957).

⁶² See Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157 (1953).

⁶³ See, e.g., *Kaufman v. Western Union Tel. Co.*, 224 F.2d 723 (5th Cir. 1955). Even if the rights so created were defensive in nature, it is not yet clear whether they would be the measure of claims under the Declaratory Judgment Act. See *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667 (1950); *Developments in the Law — Declaratory Judgments — 1941-1949*, 62 HARV. L. REV. 787, 802-03 (1949);

the "laws" of the United States within the meaning of section 1331. To this question the courts have not yet provided an answer, except that four Justices of the Supreme Court, the dissenters in *Romero*, apparently would sustain such jurisdiction.

Perhaps the factor weighing most heavily against the assumption of such jurisdiction is the same dearth of authority which the majority found so persuasive in *Romero*.⁶⁴ However, some of our foremost commentators in the field of federal jurisdiction have suggested the existence of such jurisdiction. Thus, Professors Hart and Wechsler have said: "A decision that a given matter is governed by federal law . . . may or may not have the consequence of establishing a basis for federal question jurisdiction."⁶⁵ Professor Mishkin is less reserved in the expression of his opinion:

The first formulation of the requirement developed by the courts is that the plaintiff must be contending that a federally ordained rule specifically creates his cause of action. Any national source will suffice, whether Constitution, treaty, or law. Indeed, he need not maintain even that some piece of national legislation provides, in so many words, the governing rule of substance; if it is his position that his right to relief is granted by federal common law, whether in connection with a statute or otherwise, jurisdiction in the national trial courts will be supported.⁶⁶

Unfortunately, the authorities cited in support of the "or otherwise" proposition, *Bell v. Hood*⁶⁷ and *Doucette*, involved cases purportedly arising under the Constitution rather than the laws of the United States. Like the commentators, the courts have occasionally been bemused by the question outside of the admiralty

Note, *Federal Question Jurisdiction of Federal Courts and the Declaratory Judgment Act*, 4 VAND. L. REV. 827 (1951).

⁶⁴ The Fifth Circuit has found such jurisdiction to exist in a federal enclave case. *Mater v. Holley*, 200 F.2d 123 (5th Cir. 1952), cited by Mr. Justice Brennan, 358 U.S. at 393; see *Coffman v. Cleveland Wrecking Co.*, 24 F. Supp. 581 (W.D. Mo. 1938); Note, *Federal Areas: The Confusion of a Jurisdictional-Geographical Dichotomy*, 101 U. PA. L. REV. 124 (1952); Comment, *Exclusive Federal Jurisdiction Over State-Ceded Land*, 4 ST. LOUIS U.L.J. 334 (1957).

⁶⁵ HART & WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 699 (1953).

⁶⁶ Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157, 165 (1953). (Emphasis added.)

⁶⁷ 327 U.S. 678 (1946).

area, but have generally found it unnecessary to rest jurisdiction on this ground.⁶⁸

Next to the want of favorable authority as an argument against such jurisdiction is the proposition that the courts have read the word "laws" to mean "statutes" when they have referred to section 1331. There is indeed ample evidence that this has been done,⁶⁹ but never, except in admiralty cases,⁷⁰ has it been done when the court was attempting to distinguish between statutes and decisional law.

The final argument to be made against the jurisdiction of the federal courts over this kind of claim is the general one that federal jurisdiction is to be construed restrictively, with all doubts resolved against jurisdiction.⁷¹ There would, of course, be few such cases added to the business of the federal court on the basis of existing law, by reason of this application of the Code. But open acknowledgment of the existence of this jurisdiction would be likely to stimulate the effort toward "creative development by the judicial process."⁷²

The reason for sustaining this jurisdiction, however, at least in nonmaritime areas, would seem to outweigh the arguments against it. The primary contention in favor of jurisdiction is based on the rationale of the 1875 grant, which swayed the Court to deny jurisdiction in *Romero*. When the general federal-question jurisdiction was created, federal-court jurisdiction over admiralty matters already existed. But the reason for creating federal-question jurisdiction in the federal courts, "to insure the availability of a forum designed to minimize the danger of hostility toward, and specially suited to the vindication of, federally created rights,"⁷³ is as applicable to judicially created rights as to rights created by statute. And, indeed, the majority in *Romero* seemed to acknowledge that the test of federal-question jurisdiction lies in the source

⁶⁸ See, e.g., *Kaufman v. Western Union Tel. Co.*, 224 F.2d 723, 725 (5th Cir. 1955).

⁶⁹ See, e.g., *Shulthis v. McDougal*, 225 U.S. 561, 569 (1912); *Railroad Co. v. Mississippi*, 102 U.S. 135, 141 (1880); *Tennessee v. Davis*, 100 U.S. 257, 264 (1879), all cited in *Jordine v. Walling*, 185 F.2d 662, 667 (3d Cir. 1950).

⁷⁰ See, e.g., *Jordine v. Walling*, 185 F.2d 662, 667 (3d Cir. 1950).

⁷¹ See *Healy v. Ratta*, 292 U.S. 263, 270 (1934).

⁷² The phrase is from HART & WECHSLER, *op. cit. supra* note 65, at 708.

⁷³ *Paduano v. Yamashita Kisen Kabushiki Kaisha*, 221 F.2d 615, 618 (2d Cir. 1955), quoted at 358 U.S. 395. The court of appeals' opinion relied for this proposition on Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROB. 216, 223-34 (1948).

rather than the form of law: "[T]his jurisdictional decision would largely depend on whether the governing law is state or federal."⁷⁴

If it be true that the Court has not yet held that jurisdiction under section 1331 may be based on judicially created rights, it is equally true that the Court has marched right up to this point. For in cases in which the Court has been unable to find explicit warrant in congressional legislation, it has not hesitated to find that a statute implicitly creates a basis for asserting section 1331 jurisdiction. For example, in *Tunstall v. Brotherhood of Locomotive Firemen*,⁷⁵ Mr. Chief Justice Stone, whose dictum in *Healy v. Ratta*⁷⁶ on the necessity for confining the jurisdiction of federal courts is so frequently cited, said on behalf of the Court:

We also hold that the right asserted by petitioner which is derived from the duty imposed by the Railway Labor Act on the Brotherhood, as bargaining representative, is a federal right implied from the statute and the policy which it has adopted. It is the federal statute which condemns as unlawful the Brotherhood's conduct. "The extent and nature of the legal consequences of this condemnation, though left by the statute to judicial determination, are nevertheless to be derived from it and the federal policy which it has adopted." *Deitrick v. Greaney*, 309 U.S. 190, 200-201; *Board of County Commissioners v. United States*, 308 U.S. 343; *Sola Electric Co. v. Jefferson Co.*, 317 U.S. 173, 176-7; cf. *Clearfield Trust Co. v. United States*, 318 U.S. 363. The case is therefore one arising under a law regulating commerce of which the federal courts are given jurisdiction by 28 U.S.C. [§ 1337]⁷⁷

The constant emphasis on "federal policy" and the reference to the *Clearfield* case⁷⁸ suggest how close to the edge of the immediate problem the Court has come.

The technical arguments in favor of jurisdiction, in themselves hardly persuasive, are useful in demonstrating the absence of congressional policy different from that described in the quotation from *Paduano* above.⁷⁹ Mr. Justice Brennan used the *Erie* case to show that the word "laws" should be construed to mean judi-

⁷⁴ 358 U.S. at 375.

⁷⁵ 323 U.S. 210 (1944). See also *Jacobson v. New York, N.H. & H.R.R.*, 206 F.2d 153, 157 (1st Cir. 1953), *aff'd*, 347 U.S. 909 (1954); *Fielding v. Allen*, 181 F.2d 163 (2d Cir. 1950).

⁷⁶ 292 U.S. at 270.

⁷⁷ 323 U.S. at 213.

⁷⁸ See p. 828 & note 50 *supra*.

⁷⁹ See text accompanying note 73 *supra*.

cial decisions as well as statutes.⁸⁰ Commentators had previously pointed out the inaptness of that authority for that purpose.⁸¹ But if *Erie* cannot be used to prove the affirmative of this proposition, it is at least useful to show that the word "laws" need not mean only statutes. And this proposition is buttressed by the fact that Congress has, in the portion of the Judicial Code dealing with district-court jurisdiction, used the phrase "Act of Congress" where it was clearly referring only to statutory law.⁸²

It would seem, therefore, that when a claim is properly asserted as depending on federal rights created by national courts, the case may well be considered to be one arising under the laws of the United States as specified in section 1331. The *Romero* dissent has moved the Supreme Court closer to that conclusion. The majority position does not read against it. It should be carefully noted, however, that the anticipated rule would apply only when the source of the substantive rule is national authority. The mere fact that the law has been stated by a federal court is not sufficient. Chief Justice Waite established this proposition fifty years before *Erie*.⁸³ There is neither authority nor reason for departing from it.

II. PENDENT JURISDICTION

After denying that section 1331 afforded the nonstatutory claims independent entry to the "law side" of the federal courts, Mr.

⁸⁰ 358 U.S. at 393. See *Warren v. United States*, 340 U.S. 523, 526-27 (1951): "The term law in our jurisprudence usually includes the rules of court decisions as well as legislative acts. . . . No reason is apparent why a more restricted meaning should be given 'national laws or regulations.'"

⁸¹ Thus, Judge Wyzanski, in *Jenkins v. Roderick*, 156 F. Supp. 299, 301-02 n.3 (D. Mass. 1957), had this to say: "It may be contended that only acts of Congress and not mere decisions of the Supreme Court of the United States are 'laws' of the United States. A disingenuous answer is that there are in other fields rulings that the word 'laws' does include court decisions. *Erie R. Co. v. Tompkins* . . . *Warren v. United States* . . ." And a law-review note, which bears a marked similarity to the views expressed by the minority of the Court in *Romero*, recognized the weakness of the *Erie* argument. See Note, *The Expansion of Federal Question Jurisdiction to Maritime Claims: A New Jurisdictional Theory*, 66 HARV. L. REV. 315, 324 n.86 (1952).

⁸² See 28 U.S.C. §§ 1336-40, 1343(3), (4), 1345, 1346(2), 1349, 1353, 1355 (1958); cf. note 36 *supra*.

⁸³ "[A] case does not arise under the laws of the United States simply because this court, or any other Federal court, has decided in another suit the questions of law which are involved." *Leather Mfrs. Bank v. Cooper*, 120 U.S. 778, 781 (1887); cf. *Giles v. Little*, 134 U.S. 645, 648-49 (1890); *Provident Sav. Life Assur. Soc'y v. Ford*, 114 U.S. 635, 641-42 (1885).

Justice Frankfurter decided that the Court could still reach the substantive issue of the validity of these claims, since they were properly before the district court by reason of the fact that they were appended to the Jones Act claim. The lengthy treatment afforded the section 1331 problem proved unnecessary in dealing with this question of "pendent jurisdiction":

[T]he District Court may have jurisdiction of them "pendent" to its jurisdiction under the Jones Act. Of course the considerations which call for the exercise of pendent jurisdiction of a state claim related to a pending federal cause of action within the appropriate scope of the doctrine of *Hurn v. Oursler*, 289 U.S. 238 [1933], are not the same when, as here, what is involved are related claims based on the federal maritime law. We perceive no barrier to the exercise of "pendent jurisdiction" in the very limited circumstances before us. Here we merely decide that a district judge has jurisdiction to determine whether a cause of action has been stated if that jurisdiction has been invoked by a complaint at law rather than by a libel in admiralty, as long as the complaint also properly alleges a claim under the Jones Act.⁸⁴

Despite this careful language, it is unfortunate that the Supreme Court followed the lead of the lower federal courts in pinning the label "pendent jurisdiction" on the problem before it. That phrase has already come into common use to cover disparate situations, with much resulting confusion. It will not prove helpful to bring another under that umbrella-like phrase. For if in this stage of our jurisprudential development it is no longer necessary to assert that the same words may have different meanings in different contexts,⁸⁵ the fact remains that there is still a tendency on the part of the bench and the bar to ignore the obvious and to carry over the meaning given to a phrase in one situation to solve problems which are entirely distinct.

There are four separate and distinct situations which may now be hiding under the rubric of "pendent jurisdiction." The first is the so-called *Siler* doctrine,⁸⁶ that in cases presenting both constitutional questions and questions of state law the federal courts may decide the issues of state law. It is based on the need to

⁸⁴ 358 U.S. at 380-81.

⁸⁵ See, e.g., COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* ch. VI (1942); Morgan, *Rules of Evidence—Substantive or Procedural?*, 10 VAND. L. REV. 467, 470 (1957).

⁸⁶ *Siler v. Louisville & N.R.R.*, 213 U.S. 175 (1909). This doctrine is qualified by the "abstention" technique of *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941). See generally Note, 59 COLUM. L. REV. 749 (1959).

avoid the resolution of constitutional questions until they must be faced in order to reach a judgment in a lawsuit.⁸⁷ It is thought that this doctrine of avoidance justifies the incursion of the federal courts into the domain of state courts, perhaps on the theory that it is less likely to damage the principles of federalism than would a premature declaration of the invalidity of a state law. The second is the so-called doctrine of *Hurn v. Oursler*,⁸⁸ which authorizes the decision by a federal court of a state claim, over which it would have no independent ground for jurisdiction, because the identity of issues between the federal and state claims is such that the basis for deciding the former will also provide a basis for deciding the latter.⁸⁹ The argument for this extension of jurisdiction is put in terms of convenience and the avoidance of trying the same case twice. Certainly the *Hurn v. Oursler* doctrine provides a less pressing reason for federal invasion of state court jurisdiction than does *Siler*. But both the *Siler* and the *Hurn v. Oursler* situations involve the federal courts in the assumption of jurisdiction which would not ordinarily be theirs. The third and fourth categories do not really involve jurisdictional questions, for here each of the claims has independent access to the federal courts. In the third, labelled *Oklahoma* for reasons which will appear, one question is a constitutional one as in *Siler*, but the other is a question of federal, not state, law. Clearly here the second claim ought to be decided not only when to do so would avoid the constitutional question, but simply because, under ordinary circumstances, the question presented is one which independently calls for federal-court adjudication. The only countervailing factors are the ordinarily existing objections to joinder: prejudice or complexity or imposition on judicial facilities. In short, all the reasons for joinder in *Siler* are present without the shortcoming of assuming state-court jurisdiction. In the fourth category we find the *Romero* case. Here there is no constitutional claim, but both claims are properly and independently within the ken of the federal courts. Under ordinary circumstances there would be no question that both could be decided in the same lawsuit. If the *Siler* compulsion for joinder is absent, the case never-

⁸⁷ See Brandeis, J., concurring in *Ashwander v. TVA*, 297 U.S. 288, 354-56 (1936).

⁸⁸ 289 U.S. 238 (1933).

⁸⁹ See Shulman & Jaegerman, *Some Jurisdictional Limitations on Federal Procedure*, 45 YALE L.J. 393 (1936); Note, *Jurisdiction of the Federal Courts in Multiple Question Cases*, 1 U. CHI. L. REV. 480 (1934).

theless remains a far stronger one than *Hurn v. Oursler*.⁹⁰ The third and fourth categories raise questions only when the claims would ordinarily be heard by the federal court sitting in different capacities. But clearly, as will appear, these are not jurisdictional questions in the ordinary sense in which that word is used. And the "pendent jurisdiction" shibboleth should not be applied to them.

The different results required in the *Romero* case from that in *Hurn v. Oursler* are demonstrated by the action of the majority in the *Romero* case itself. There the Supreme Court authorized the resolution of the non-Jones Act claims — at least to the extent of passing on the sufficiency of the complaint — although the Jones Act claim which required trial by the federal court sitting as a court of law was dismissed without trial. Neither the *Siler* nor the *Hurn v. Oursler* rationale⁹¹ would justify the decision on the state claims by the federal court under these circumstances, for there would be no need to decide the state questions, either to avoid a constitutional issue or to avoid multiple trials of the same issues. This is not to suggest that the courts have consistently followed this distinction,⁹² but rather to point out that the ruling in *Romero* should not be read as approval of such action in the first two as distinguished from the third and fourth categories set out above. Again, the close identity of issues need not be required in the *Romero*-type case to the extent that *Hurn v. Oursler* demands, since again there need be no fear of treading on state jurisdiction. Too rigid adherence to the *Hurn v. Oursler* principle in *Romero*-type situations has already misled some federal courts into reaching results different from that apparently sanctioned by *Romero*.⁹³

⁹⁰ See *Mitchell v. Trawler Racer, Inc.*, 265 F.2d 426, 428 (1st Cir. 1959).

⁹¹ See 289 U.S. at 245-46, 247-48.

⁹² As to *Siler*, see *United Fuel Gas Co. v. Railroad Comm'n*, 278 U.S. 300 (1929); *Risty v. Chicago, R.I. & Pac. Ry.*, 270 U.S. 378 (1926); *Fitzhenry v. Erie R.R.*, 7 F. Supp. 880 (S.D.N.Y. 1934). As to *Hurn v. Oursler*, see *Telechron, Inc. v. Parissi*, 197 F.2d 757, 762 (2d Cir. 1952); *Georgia v. Wenger*, 187 F.2d 285, 287-88 (7th Cir.), cert. denied, 342 U.S. 822 (1951); *Kleinman v. Betty Dain Creations, Inc.*, 189 F.2d 546, 548 (2d Cir. 1951); *Massachusetts Universalist Convention v. Hildreth & Rogers Co.*, 183 F.2d 497, 501 (1st Cir. 1950); *Strachman v. Palmer*, 177 F.2d 427, 433 (1st Cir. 1949) (concurring opinion). See also Schlesinger & Strasburger, *Divestment of Federal Jurisdiction: A Trapdoor Section in the Judicial Code*, 39 COLUM. L. REV. 595 (1939).

⁹³ See *Bartholomew v. Universe Tankships, Inc.*, 263 F.2d 437 (2d Cir. 1959), excluding consideration of the maintenance-and-cure claims for lack of identity of

In *Romero* the real problem was not one of "pendent jurisdiction" but rather of the propriety and effect of joining two or more federal claims which would ordinarily be triable before the federal court sitting in different capacities and, perhaps, by different methods of trial. The Supreme Court in *Romero* provided a rationale for the joinder of the maritime claims with the Jones Act claim on the "law side" of the district court. Presumably it limited that right of joinder to claims involving the same parties,⁹⁴ since it sustained the jurisdiction over the claims against the other parties on the basis of diversity jurisdiction.⁹⁵ And it clearly refused to state what the appropriate procedure for the trial of the non-Jones Act claims should be, either when the Jones Act claim is tried or when it is dismissed before trial: "We are not called upon to decide whether the District Court may submit to the jury the 'pendent' claims under the general maritime law in the event that a cause of action be found to exist."⁹⁶

Professor Currie has examined the cases involving joinder of Jones Act claims with the claims of a nonstatutory maritime nature.⁹⁷ He has reached the conclusions (1) that joinder of the claims involving the same parties is proper and (2) that the joinder implies that the right to a jury trial which is afforded to Jones Act claimants must also be available with regard to the other maritime claims, at least when the former goes to trial. He has shown, too, that until Judge Wyzanski aroused sleeping dogs in 1947,⁹⁸ the lower federal courts generally followed the procedure of joinder with jury trial for all claims.⁹⁹

It is proposed here to examine two situations analogous to *Romero* outside the admiralty field to see (1) whether the courts treat the problem as a jurisdictional question, (2) whether joinder of claims ordinarily required to be filed before the court sitting in

issues with the Jones Act claim; *Mullen v. Fitz Simons & Connell Dredge & Dock Co.*, 191 F.2d 82 (7th Cir.), *cert. denied*, 342 U.S. 888 (1951); *Jordine v. Walling*, 185 F.2d 662 (3d Cir. 1950).

⁹⁴ This accords with the conclusion reached by the courts of appeals under *Hurn v. Oursler*. See *Benbow v. Wolf*, 217 F.2d 203 (9th Cir. 1954); *Gladden v. Stockard S.S. Co.*, 184 F.2d 510 (3d Cir. 1950); *New Orleans Pub. Belt R.R. v. Wallace*, 173 F.2d 145 (5th Cir. 1949); *Pearce v. Pennsylvania R.R.*, 162 F.2d 524 (3d Cir.), *cert. denied*, 332 U.S. 765 (1947).

⁹⁵ 358 U.S. at 381.

⁹⁶ *Ibid.*

⁹⁷ Currie, *The Silver Oar and All That*, 27 U. CHI. L. REV. 1, 41-58 (1959).

⁹⁸ See *McDonald v. Cape Cod Trawling Corp.*, 71 F. Supp. 888 (D. Mass. 1947).

⁹⁹ Currie, *The Silver Oar and All That*, 27 U. CHI. L. REV. 1, 58 (1959).

different capacities is permitted, and (3) whether, if the joinder is permitted, the trial procedure should be the same for all claims.

A. Three-Judge-Court Analogies

Certain federal claims are required by Congress to be tried before specially constituted district courts of three judges.¹⁰⁰ Basically they fall into two categories: those involving suits to enjoin the enforcement of federal or state statutes on the ground of unconstitutionality, and those involving the administration of peculiarly important federal legislation. Ordinarily, review of the judgments of such courts is by direct appeal to the Supreme Court rather than to the court of appeals for the appropriate circuit.¹⁰¹ The policies behind the requirement of three-judge courts, based as they are on the desire to eliminate abuses common to decisions of individual judges¹⁰² and on the importance of the kinds of cases involved,¹⁰³ are sufficiently strong and clear to prohibit the adjudication of such claims by a single judge,¹⁰⁴ whether joined with another claim or not.¹⁰⁵ Thus, if precedent is sought for *Romero* in the availability for the combined claims of the court sitting as a court of general jurisdiction rather than as a specialized court, the three-judge-court cases would clearly lead to the conclusion that

¹⁰⁰ See 28 U.S.C. §§ 2281-84 (1958); 32 Stat. 823 (1903), as amended, 15 U.S.C. § 28 (1958).

¹⁰¹ There have been exceptions. The three-judge court once authorized by the Bankruptcy Act was subject to review by the Supreme Court on certiorari. Act of Oct. 16, 1942, ch. 610, 56 Stat. 790, 795. A judgment of a three-judge court authorized to hear condemnation proceedings under the Tennessee Valley Authority Act is reviewable by appeal to the appropriate court of appeals. 48 Stat. 70 (1933), 16 U.S.C. § 831x (1958).

¹⁰² See Hutcheson, *A Case for Three Judges*, 47 HARV. L. REV. 795 (1934); Frankfurter & Fisher, *The Business of the Supreme Court at the October Terms, 1935 and 1936*, 51 HARV. L. REV. 577, 610-19 (1938); Note, *The Judiciary Act of 1937*, 51 HARV. L. REV. 148, 151-54 (1937). But see Frankfurter, J., referring to the three-judge-court requirement "not as a measure of broad social policy to be construed with great liberality, but as an enactment technical in the strict sense of the term and to be applied as such." *Phillips v. United States*, 312 U.S. 246, 251 (1941).

¹⁰³ See *United States v. Griffin*, 303 U.S. 226, 232 (1938); FRANKFURTER & LANDIS, *THE BUSINESS OF THE SUPREME COURT* 263 (1928).

¹⁰⁴ See *Ex parte Metropolitan Water Co.*, 220 U.S. 539 (1911). See also *Ex parte Bransford*, 310 U.S. 354 (1940); *Ex parte Poresky*, 290 U.S. 30 (1933); *Ex parte Hobbs*, 280 U.S. 168 (1929); *Ex parte Public Nat'l Bank*, 278 U.S. 101 (1928); *Ex parte Collins*, 277 U.S. 565 (1928).

¹⁰⁵ Cf. *New York State Guernsey Breeders Co-op., Inc. v. Wallace*, 28 F. Supp. 590 (N.D.N.Y. 1939), *aff'd on other grounds sub nom.* *New York State Guernsey Breeders Co-op., Inc. v. Wickard*, 141 F.2d 805 (2d Cir. 1944), discussed at p. 844 *infra*.

the claims cannot be tried together by the court sitting in its general capacity. Unlike the Jones Act situation, however, the very nature of the claim cognizable by a three-judge court precludes it, almost by definition, from being treated as anything but the dominant claim. In the *Romero* situation, the bases for recovery to be found in the Jones Act, the claim of unseaworthiness, and the claim for maritime tort are of equal stature so far as the courts and the legislature are concerned. It is feasible, therefore, to allow the plaintiff to characterize that claim as dominant which reasons peculiar to him make the dominant claim.¹⁰⁶ This, in effect, is what the Supreme Court did in *Romero* when it accepted the plaintiff's labelling of the non-Jones Act claims as "pendent." The analogy to the three-judge-court cases may be more fruitfully pursued, therefore, in terms of dominant and subordinate claims than in terms of the specialized or general capacity of the federal court.

On this second approach, the question becomes whether the principal claim before a federal court sitting with capacity to entertain it can carry with it the subordinate claims. The answer is clear in the first category, the *Siler*-type case. When the principal claim involves the question of constitutionality and the secondary claim has no independent right to be heard in the federal courts, the Supreme Court has clearly approved the consideration of the junior claim by the federal three-judge court and has itself entertained such a claim on direct appeal.¹⁰⁷ Thus the Court has not only sanctioned the joinder of the claims but has provided the same process for resolution of the secondary as of the primary claim — trial by a three-judge court and direct appeal to the Supreme Court. When the principal claim presents a constitutional issue and the subordinate claim has a right of entry to the federal courts on its own — the third of the four categories suggested at the outset of this section — the Court has apparently reached the same conclusion. Thus Mr. Justice Stone, speaking for a unanimous Court in *Oklahoma Gas & Elec. Co. v. Oklahoma Packing Co.*, said: "Hence the cause of action alleged against Wilson & Company, although within the jurisdiction of the district court, is

¹⁰⁶ Cf. *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257 (1916); *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22 (1913).

¹⁰⁷ See *Railroad Comm'n v. Pacific Gas & Elec. Co.*, 302 U.S. 388, 391 (1938); *Sterling v. Constantin*, 287 U.S. 378, 393-94 (1932); *Davis v. Wallace*, 257 U.S. 478, 482 (1922); *Van Dyke v. Geary*, 244 U.S. 39, 42 (1917); *Louisville & N.R.R. v. Garrett*, 231 U.S. 298, 303-04 (1913).

subject to this extraordinary procedure, and appealable directly to this Court, if at all only because it is incidental to the relief prayed against the state officers.”¹⁰⁸ The meaning of “if at all” has never been specifically clarified by the Court. It might well refer to the fact that the secondary claim in the case was asserted against a party different from those defending the principal cause of action. But the Court has acted as though that phrase added no qualification when the claims involved the same parties, even in the absence of identity of issues between the senior and junior claims.¹⁰⁹

Both of these categories of cases provide evidence that the problem is not a jurisdictional one. For when the basis for invoking the three-judge court has proved groundless, the Supreme Court has not ordered the dismissal of the claims for want of jurisdiction. It has instead consistently made provision for the case to be heard in the proper court of appeals.¹¹⁰ This action can only be explained on the theory that the defect is “one going to the jurisdiction of the appellate and not of the trial court.”¹¹¹ This is equally true when the three-judge court is erroneously tried to a one-judge court. Correction of the error does not require dismissal for want of jurisdiction, but rather retention of the claim to be

¹⁰⁸ 292 U.S. 386, 390 (1934).

¹⁰⁹ In *United Air Lines v. Public Util. Comm'n*, 109 F. Supp. 13, 15 (N.D. Cal. 1952), the three-judge court had declined to decide the constitutional question. “But there are other adequate bases of federal jurisdiction. 28 U.S.C. §§ 1331, 1337, 2201. Such being the case, this Court, having properly acquired jurisdiction, has power to consider and dispose of all questions involved in the suit.” The Supreme Court on direct appeal did not dismiss for want of jurisdiction; it reversed in a *per curiam* opinion, presumably because the secondary questions were not ripe for adjudication under the Declaratory Judgment Act. *Public Util. Comm'n v. United Air Lines*, 346 U.S. 402 (1953). Again, in *Grand Cent. Aircraft Co. v. Allen*, 114 F. Supp. 389 (N.D. Cal. 1953), the three-judge court passed over the constitutional issues in order to pass on one of statutory construction. The Supreme Court took jurisdiction on a direct appeal and reversed the three-judge-court judgment on the merits. *Allen v. Grand Cent. Aircraft Co.*, 347 U.S. 535 (1954). See also *Jonco Aircraft Corp. v. Franklin*, 114 F. Supp. 392 (N.D. Tex.), *rev'd per curiam*, 346 U.S. 868 (1953).

¹¹⁰ See *Phillips v. United States*, 312 U.S. 246, 252 (1941); *Rorick v. Board of Comm'rs*, 307 U.S. 208, 213 (1939); *William Jameson & Co. v. Morgenthau*, 307 U.S. 171, 174 (1939); *International Ladies' Garment Workers v. Donnelly Garment Co.*, 304 U.S. 243, 251-52 (1938); *Oklahoma Gas & Elec. Co. v. Oklahoma Packing Co.*, 292 U.S. 386, 392 (1934); *Gully v. Interstate Natural Gas Co.*, 292 U.S. 16, 18-19 (1934).

¹¹¹ ROBERTSON & KIRKHAM, *JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES* § 203 n.10 (Wolfson & Kurland ed. 1951).

entertained by a properly constituted tribunal.¹¹² In short, trial before a district court wearing the wrong hat does not raise jurisdictional questions in the fundamental sense of the term — that is, with reference to the power of the trial court to entertain the litigation.

When the three-judge court is invoked for reasons other than the presence of a constitutional issue, the *Siler* and *Oklahoma* support for joinder is gone; present instead is the convenience doctrine which underlies both the *Hurn v. Oursler* and *Romero* situations. In sole support of the joinder sanctioned by *Hurn v. Oursler* is the preference for avoidance of two trials of what is in effect the same lawsuit. With *Romero* there is no question of infringement on state jurisdiction or of husbanding the resources of the federal judiciary. But these factors seem to have appeared inadequate to compel the Supreme Court to sanction joinder here of a three-judge claim with another federal question. Without distinguishing the cases just discussed, the Court has simply reached an opposite conclusion, denying joinder.

The negative reply, however, was not the first answer which the Court gave. In *The Chicago Junction Case*,¹¹³ the Court in an opinion by Mr. Justice Brandeis sustained the joinder of a “suit to set aside the order” of the Interstate Commerce Commission, a three-judge-court action, with “a suit to restore the status quo.” Not only was joinder sustained, but the procedure applicable to the principal claim was also applied to the subordinate one. Moreover, this was done in a case which may well have been of the *Hurn v. Oursler* kind rather than the *Romero* type, *i.e.*, one in which there was no independent federal jurisdiction over the second claim.¹¹⁴

Shortly thereafter, however, Mr. Justice Brandeis seems to have had second thoughts on the subject. In *Pittsburgh & W. Va. Ry.*

¹¹² See cases cited note 104 *supra*.

¹¹³ 264 U.S. 258, 269 (1924).

¹¹⁴ The only independent jurisdictional base would have been diversity of citizenship. One of the plaintiff corporations was incorporated in Illinois, among other places, and some of the defendants were citizens of Illinois. One of the defendant corporations was incorporated in Illinois, Indiana, Pennsylvania, and Michigan, among others, all of which were the domiciles of one or more plaintiffs. The suit was brought in the federal court in Illinois. Transcript of Record, pp. 1-3, *The Chicago Junction Case*, 264 U.S. 258 (1924). It is clear that today the Court would hold that the requisite diversity of citizenship was not present. *Jacobson v. New York, N.H. & H.R.R.*, 347 U.S. 909 (1954), *affirming per curiam* 206 F.2d 153 (1st Cir. 1953).

v. United States,¹¹⁵ again writing for the Court, he held that the joinder was improper between the claim giving rise to the three-judge court, which involved an injunction against the effectuation of the ICC order authorizing the abandonment of a terminal, and a diversity claim¹¹⁶ which sought an injunction against the abandonment on grounds of breach of Ohio law of trusts. The Justice drew a rather tenuous distinction between the two cases:

It is neither ancillary to nor dependent upon the judgment as to the order. Relief of that character may be had only in a suit invoking the plenary equity jurisdiction of the district court. Such a suit would be heard in ordinary course by a single judge; and it would be appealable only to the Circuit Court of Appeals. The case at bar is wholly unlike *The Chicago Junction Case* . . . where a prayer to set aside the illegal purchase of stock and the lease already made was held proper as ancillary to setting aside the order of the Commission authorizing the same. There, the joinder was permitted in order to carry out the purpose of Congress to make the judicial review effective. Here such joinder is unnecessary for that purpose. Moreover, grounds for general equitable relief, obviously, cannot give the Pittsburgh a standing in this Court on direct appeal under the Urgent Deficiencies Act, when it had no right to bring suit under that Act.¹¹⁷

However sound the distinction, it proved to be the kind of distinction which kills.¹¹⁸ Although *The Chicago Junction Case* has remained an important one in administrative law, it has never again been cited in support of the propriety of joinder of claims in a three-judge-court action. Whenever the question has come before the Court since the *Pittsburgh* case, the Court has rejected the propriety of the joinder. Thus, in *New York Cent. Sec. Corp. v. United States*,¹¹⁹ the three-judge court was invoked to hear an action to enjoin the enforcement of an ICC order approving a railroad lease. Joined with this claim was one for breach of fiduciary duty in making the lease. The Court held that the issues involved in the second claim "are not properly raised in this suit under the Urgent Deficiencies Act . . . and hence are not open

¹¹⁵ 281 U.S. 479 (1930).

¹¹⁶ Diversity jurisdiction was clearly present. See Transcript of Record, p. 3, *Pittsburgh & W. Va. Ry. v. United States*, 281 U.S. 479 (1930).

¹¹⁷ 281 U.S. at 488.

¹¹⁸ This is not an extraordinary weapon in the judicial arsenal. See, e.g., the treatment of *Grovey v. Townsend*, 295 U.S. 45 (1935); in *United States v. Classic*, 313 U.S. 299 (1941), and the ultimate death of the first case in *Smith v. Allwright*, 321 U.S. 649, 661-66 (1944).

¹¹⁹ 287 U.S. 12 (1932).

to review on this appeal.”¹²⁰ Here, as in *Pittsburgh*, the Court might have been saying that the defect was in the Supreme Court’s jurisdiction and not that of the trial court. But this reading would be inconsistent with the apparent conclusion reached in these cases and with the language in the later case of *Powell v. United States*.¹²¹ In the *Powell* case, an intervenor sought to assert, in a three-judge-court action, a counterclaim also arising under the Interstate Commerce Act. The Court very bluntly ordered its dismissal:

The counterclaim was not properly before the court and could not be entertained as an incident to or part of the suit to set aside the commission’s order respecting the tariff.

The Seaboard’s [plaintiff’s] bill merely assails the commission’s order. The issue between the original parties is confined to its validity. The suit is a statutory one triable only in a specially constituted court. The counterclaim is based on a violation of § 1(18); the facts alleged are not sufficient to constitute a cause of action within the jurisdiction of that court. . . . The counterclaim, not being within the jurisdiction of the specially constituted court, should have been dismissed for want of jurisdiction.¹²²

This entire line of cases, however, is distinguishable from the series of three-judge cases heretofore considered and from *Romero* in that the parties to the secondary claim necessarily differed from those involved in the primary claim — since the primary claim alone involved the ICC.¹²³ But this distinction requires rejection of the broad language which the Court has used. On the other hand, accepting the “jurisdictional” language at its face value certainly brings these cases into conflict with the three-judge-court constitutional cases. They seem to be reconcilable on only one proposition: The propriety of the joinder governs the question of the form of trial to be accorded the secondary claim.

Professor Moore, the most influential writer on the subject of procedure in the federal courts, ignoring all the Supreme Court cases except the *Pittsburgh* case, which he brushes off in a footnote, advises that the joinder of a three-judge-court nonconstitutional claim with a claim independently cognizable by the district court as ordinarily constituted should be sustained.¹²⁴ He would

¹²⁰ *Id.* at 28–29.

¹²¹ 300 U.S. 276 (1937).

¹²² *Id.* at 289–90.

¹²³ See text accompanying note 94 *supra*.

¹²⁴ 3 MOORE, FEDERAL PRACTICE ¶ 18.07[2] (2d ed. 1948).

go so far as to allow the three-judge claim to be appended to that calling for a trial in a district court as regularly constituted. He, therefore, rejects Judge Patterson's ruling in *New York State Guernsey Breeders Co-op., Inc. v. Wallace*.¹²⁵ The judge may there have been in error in assuming the impossibility of joinder of claims, since the three-judge claim was a demand for injunction based on the unconstitutionality of a federal statute, bringing it within the *Oklahoma* category heretofore discussed. But since the venue was improper for the three-judge claim, and no transfer for improper venue was then authorized,¹²⁶ Judge Patterson was clearly right in dismissing the attempt to append the three-judge claim to the secondary claim.

Professor Moore's general proposition is supported by Judge Fee's decision in *Atlantic Lumber Corp. v. Southern Pac. Co.*¹²⁷ There Judge Fee said he would permit the joinder of an action to enjoin the enforcement of an ICC order denying plaintiff damages for discriminatory charges with a suit against the railroad for damages for the same discriminatory charges. The judge ordered the convening of the three-judge court and ordered the ICC claim set for hearing before it. He also ruled that if the three-judge court declined to entertain the subsidiary claim, "hearing will immediately proceed before a single District Judge. The application of the decision in *Pittsburgh & West Virginia Railway Company v. United States* . . . may then be considered."¹²⁸ Judge Fee thus separated the propriety of joinder from the question of the form of trial, just as the majority did in the *Romero* case. In so doing, in this context, however, he in effect rejected all the Supreme Court cases in the *Pittsburgh* line which assumed implicitly that the propriety of joinder and the form of trial were not separable questions.

Moore also suggests that, if the defect is really one in the jurisdiction of the Supreme Court to hear on direct appeal the judgment in the secondary claim, then trial by the three-judge court of both claims could be followed by the entry of separate judgments under Rule 54(b),¹²⁹ with the appeal from one to the Supreme Court and from the other to the appropriate court of ap-

¹²⁵ 28 F. Supp. 590 (N.D.N.Y. 1939), *aff'd on other grounds*, 141 F.2d 805 (2d Cir. 1944).

¹²⁶ See 28 U.S.C. § 1406(a) (1958), enacted in 1948.

¹²⁷ 2 F.R.D. 313 (D. Ore. 1941).

¹²⁸ *Id.* at 314.

¹²⁹ FED. R. CIV. P. 54(b).

peals. This avenue had not been opened to the Supreme Court at the time it decided the cases discussed in the text above. The *Romero* case might help toward the result of permitting the joinder in the *Pittsburgh* situation, either with separate trials as suggested by Judge Fee, or with separate appeals from the same trial, as suggested by Professor Moore. For in *Romero* the Court, by sanctioning the joinder but refusing to pass on the method of trial of the secondary claims, has pointed up the fact that the two questions may properly be separately treated in the nonconstitutional situation.

B. The Law-Equity Analogy

The second analogy to the *Romero* problem of the propriety of entertaining claims which separately would require the district court to act in different capacities is that of the joinder of claims in law and equity. In one sense it may be suggested that the answer to this problem was long ago supplied by the courts at Westminster: When the principal claim was for equitable remedies, a court of equity had jurisdiction to dispose of the entire case. But this seems to be applicable to questions of law arising in an equity action involving but a single claim, or at least to situations in which the ancillary nature of the legal claim is such that the one cannot well be tried without the other. With regard to claims of a more separate or separable nature, as in *Romero*, there is a different history.

Long ago the Supreme Court recognized that a case brought before a federal trial court sitting in one capacity when it should have been sitting in the other did not involve a problem of the jurisdiction of the trial court.¹³⁰ Mr. Chief Justice Fuller put it succinctly in *Blythe v. Hinckley*: "The Circuit Court held that the remedy was at law and not in equity. That conclusion was not a decision that the Circuit Court had no jurisdiction as a court of the United States."¹³¹ Mr. Chief Justice Taft gave the rule broader overtones; a jurisdictional problem is involved, he said, "only when the District Court's power to hear and determine the cause as defined and limited by the Constitution or statutes of the United States is in controversy, and, where a District Court is vested with jurisdiction of a cause, as where diversity of citizenship exists, and the matter in controversy is of the requisite value,

¹³⁰ See, e.g., *Smith v. McKay*, 161 U.S. 355 (1896).

¹³¹ 173 U.S. 501, 507 (1899).

the question whether it has the power to afford the plaintiff a particular remedy does not present a jurisdictional issue.”¹³²

The fact that the problem was not a jurisdictional one, however, did not answer the question of how to treat a claim brought on the wrong “side” of the court or what to do about the joinder of several claims properly cognizable on different “sides” of the court. At the very same time that the Court was acknowledging the absence of a jurisdictional question, it was sanctioning the dismissal of actions brought before the court sitting in the wrong capacity.¹³³ Thus, Mr. Justice Shiras, who wrote the opinion in *Smith v. McKay*¹³⁴ rejecting the notion of a jurisdictional defect, expressed the view of the Court in *Lindsay v. First Nat’l Bank*:

The case is thus brought within the rule, which this court has so often had occasion to lay down, that the remedies in the courts of the United States are, at common law or in equity, not according to the practice of state courts, but according to the principles of common law and equity, as distinguished and defined in that country from which we derive our knowledge of these principles, and that although the forms of proceedings and practice in the state courts shall have been adopted in the Circuit Courts of the United States, yet the adoption of the state practice must not be understood as confounding the principles of law and equity, nor as authorizing legal and equitable claims to be blended together in one suit. *Bennett v. Butterworth*, 11 How. 669, 674; *Thompson v. Railroad Companies*, 6 Wall. 134; *Broderick will case*, 21 Wall. 503, 520.

It is true that the cases in which such strictures have been expressed have been usually those in which resort has been had to equitable forms of relief instead of legal remedies, and when defendants have thus been deprived of the constitutional right of trial by jury; but, so long as we attach importance to regular forms of procedure, we cannot sustain so plain an attempt as is here presented to substitute the machinery of a court of law, in which the

¹³² *Timken Roller Bearing Co. v. Pennsylvania R.R.*, 274 U.S. 181, 185 (1927).

¹³³ See *Curriden v. Middleton*, 232 U.S. 633 (1914); *Northern Pac. R.R. v. Paine*, 119 U.S. 561 (1887); *Foster v. Mora*, 98 U.S. 425 (1878). The Court did treat the defect as waivable, in accordance with its nonjurisdictional nature. See *Reynes v. Dumont*, 130 U.S. 354 (1889); *Kilbourn v. Sunderland*, 130 U.S. 505 (1889); *Wylie v. Cox*, 56 U.S. (15 How.) 415 (1853). But also, somewhat inconsistently, it indicated that the court could raise the issue on its own motion. *Lewis v. Cocks*, 90 U.S. (23 Wall.) 466 (1874); *Hipp v. Babin*, 60 U.S. (19 How.) 271 (1856).

¹³⁴ 161 U.S. 355 (1896).

facts are found by the jury and the law prescribed by the judge for the usual and legitimate practice of a court of chancery. . . .

It is, therefore, clear that the court below should have sustained the defendants' demurrer or exception, and dismissed the suit.¹³⁵

This problem was partially solved in 1912 by the promulgation of Equity Rule 22 by the Supreme Court. This rule provided: "If at any time it appear that a suit commenced in equity should have been brought as an action on the law side of the court, it shall be forthwith transferred to the law side and be there proceeded with, with only such alteration in the pleadings as shall be essential."¹³⁶ This was followed by the 1915 amendment to the Judicial Code which authorized the transfer from either side of the trial court to the other.¹³⁷ (In the *Romero* Term, the Supreme Court adopted the same principle in the admiralty area by ordering the transfer of a maritime cause erroneously brought on the law side of the court.¹³⁸) But neither the equity rule nor the statute solved the joinder problem.¹³⁹ That remained until the promulgation of the Federal Rules of Civil Procedure in 1938. Rule 18(a) now provides: "The plaintiff in his complaint or in a reply setting forth a counterclaim and the defendant in an answer setting forth a counterclaim may join either as independent or as alternate claims as many claims either legal or equitable or both as he may have against the opposing party." The rule has been appropriately described as the culmination of "the trend of more recent American reform measures . . . [toward] a completely free joinder of causes of action with identity of parties, provision being made for the severance or separate trial if the interests of justice require."¹⁴⁰ It should be noted that the solution of the joinder problem still left unanswered the question of the appropriate form of trial when joinder is permitted. It has certainly not followed here, as has been assumed by many courts in the admiralty and three-judge-court cases, that the authorization of joinder is the equivalent of sanctioning a single form of trial for all the claims.

There are some situations, derived from the old equity proce-

¹³⁵ 156 U.S. 485, 493-94 (1895).

¹³⁶ 226 U.S. 654 (1912).

¹³⁷ Act of March 3, 1915, ch. 90, 38 Stat. 956; see *Liberty Oil Co. v. Condon Nat'l Bank*, 260 U.S. 235 (1922).

¹³⁸ *Aho v. Jacobsen*, 359 U.S. 25 (1959).

¹³⁹ See Equity R. 26, 226 U.S. 655-56 (1912).

¹⁴⁰ MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 114 (1952).

dure, in which all the claims will be tried according to the nature of the principal claim.¹⁴¹ But the pattern in the law-equity conglomeration generally has been for the judge to try the equity causes and the jury the legal ones.¹⁴² For the most part, however, the controversy has not been about the divided form of trial but rather about which issues should be tried first, in light of the fact that the first adjudication will be *res judicata*.¹⁴³ The demand of the Supreme Court that the jury questions be tried first was clearly established during the *Romero* Term, albeit by a sharply divided court, in *Beacon Theatres, Inc. v. Westover*.¹⁴⁴ There the plaintiff had sought a declaratory judgment that it was not violating the antitrust laws and an injunction against suits based on those laws. The defendant entered a compulsory counterclaim¹⁴⁵ under the antitrust laws seeking treble damages and asked for a jury. The trial court, "under the purported authority of Rules 42(b) and 57,"¹⁴⁶ ordered the issues raised by the complaint to be tried to the bench first, leaving the counterclaim for subsequent jury trial. Since most, if not all, of the issues raised by the declaratory-judgment-injunction action would dispose of the issues raised by the counterclaim, in effect this meant that the case would be tried to the bench, as the courts recognized.¹⁴⁷ Mr. Justice Black, writing for a five-man majority, held that that the demand for declaratory relief did not make the issues equitable for purposes of jury trial. Nor did the demand for injunctive relief require that the plaintiff's claim be tried first. He said that the court of appeals' reliance¹⁴⁸ on *American Life Ins. Co. v. Stewart*¹⁴⁹ was misplaced, since that case was "decided before the enactment of the

¹⁴¹ See, e.g., *Camp v. Boyd*, 229 U.S. 530, 552 (1913); *Chappell & Co. v. Palermo Cafe, Inc.*, 146 F. Supp. 867 (D. Mass. 1956), *appeal dismissed*, 249 F.2d 77 (1st Cir. 1957). These cases seem to have been severely restricted by the rationale underlying the *Beacon Theatres* case, discussed below.

¹⁴² See, e.g., *Chappell & Co. v. Palermo Cafe Co.*, 249 F.2d 77, 81 (1st Cir. 1957) (dictum); *Leimer v. Woods*, 196 F.2d 828, 832 (8th Cir. 1952); *Tanimura v. United States*, 195 F.2d 329 (9th Cir. 1952); *Orenstein v. United States*, 191 F.2d 184 (1st Cir. 1951).

¹⁴³ Compare *Leimer v. Woods*, 196 F.2d 828 (8th Cir. 1952), and *Bruckman v. Hollzer*, 152 F.2d 730 (9th Cir. 1946), with *Orenstein v. United States*, 191 F.2d 184 (1st Cir. 1951), and *Tanimura v. United States*, 195 F.2d 329 (9th Cir. 1952).

¹⁴⁴ 359 U.S. 500 (1959).

¹⁴⁵ See FED. R. CIV. P. 13(a).

¹⁴⁶ 359 U.S. at 503.

¹⁴⁷ *Id.* at 503-04.

¹⁴⁸ 252 F.2d 864, 873 (9th Cir. 1958).

¹⁴⁹ 300 U.S. 203 (1937).

Federal Rules of Civil Procedure”¹⁵⁰ which, by authorizing the joinder of the equitable and legal claims generally provided an adequate legal remedy making the resort to equity unnecessary.

If there should be cases where the availability of declaratory judgment or joinder in one suit of legal and equitable causes would not in all respects protect the plaintiff seeking equitable relief from irreparable harm while affording a jury trial in the legal cause, the trial court will necessarily have to use its discretion in deciding whether the legal or equitable cause should be tried first. Since the right to jury trial is a constitutional one, however, while no similar requirement protects trials by the court,¹⁵¹ that discretion is very narrowly limited and must, wherever possible, be exercised to preserve jury trial. . . . [O]nly under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims.¹⁵²

Mr. Justice Stewart, speaking for Justices Harlan and Whittaker as well,¹⁵³ dissented, asserting that although it was “of no great moment in what order the issues between the parties in the present litigation are tried,” the Court had arrived at its decision by a “disregard [of] the historic relationship between equity and law.”¹⁵⁴ For the minority the Federal Rules made no change in the principles enunciated by Mr. Justice Cardozo in the *American Life Insurance* case: “[T]hey expressly affirm the power of a trial judge to determine the order in which claims shall be heard.”¹⁵⁵

The implications of the law-equity cases for the *Romero* problem are obvious. The courts have here utilized the approach suggested by Professor Moore and Judge Fee with regard to the three-judge-court cases: permitting joinder but requiring different forms of trial for the separate claims. This is a possible but not the most desirable solution of the *Romero* problem.

It would seem from these two analogues, that the Court in

¹⁵⁰ 359 U.S. at 505.

¹⁵¹ It is not irrelevant to the consideration of the *Romero* doctrine to note that one of the cases cited by the Court at this point was *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443, 459-60 (1851).

¹⁵² 359 U.S. at 510-11.

¹⁵³ Mr. Justice Frankfurter did not participate.

¹⁵⁴ 359 U.S. at 514.

¹⁵⁵ *Id.* at 519.

Romero reached the right conclusions but used the wrong concepts in doing so. For if the analogues are relevant, the questions presented by *Romero* clearly were not jurisdictional ones, nor even ones of pendent jurisdiction. Instead the issues were the propriety of joinder of the claims and the appropriate method of trial for the different claims. While there is some evidence that the Court has treated these as inseparable, the law-equity cases show that they are indeed distinct issues. And the majority in *Romero* so treated them by answering the joinder question without passing on the proper method of trying the non-Jones Act issues. Nonetheless, since the mode of trial should be resolved in the way "most conducive to the just, speedy and inexpensive disposition of the business of the courts,"¹⁵⁶ no jurisdictional problem being present, when the question is ultimately resolved it should be in favor of a single jury trial for all the claims, for the reasons given by Professor Currie¹⁵⁷ and because the alternative presents the unreasonable and unnecessary difficulties catalogued by Judge Wyzanski in *McDonald v. Cape Cod Trawling Corp.*¹⁵⁸

Romero is a many-faceted case; only a few of those facets have been examined here. It is a case which is likely to call forth a great deal of comment, most of which is likely to be as inconsistent as were the differing opinions expressed by the Justices themselves. Like all landmark decisions,¹⁵⁹ its meaning will only unfold in the course of judicial application and may, like *Erie*, require decades of refinement. The dragon's teeth have been sown; it remains to see what the harvest will bring.

¹⁵⁶ *Bartholomew v. Universe Tankships, Inc.*, 263 F.2d 437, 446 (2d Cir. 1959).

¹⁵⁷ Currie, *The Silver Oar and All That*, 27 U. CHI. L. REV. 1 (1959); see *Mitchell v. Trawler Racer, Inc.*, 265 F.2d 426, 429 (1st Cir. 1959).

¹⁵⁸ 71 F. Supp. 888 (D. Mass. 1947).

¹⁵⁹ See generally LEVI, AN INTRODUCTION TO LEGAL REASONING (1949).