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The Defendant's Right to Jury Trial in Jones Act Claims: Washington State's *Endicott* Opinion Invites Much Needed Supreme Court Review

O. Shane Balloun[*]

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Abstract

The Jones Act seaman has de facto power over whether a jury will hear his claim through his ability, under *Panama Railroad v. Johnson*, to elect that his claim proceed at law or in admiralty. A significant conflict of laws exists between the federal circuits and several state courts regarding whether this election power means the seaman may divest the defendant of the right to a jury trial by later amending his complaint from law to admiralty. The Fifth Circuit has held that a plaintiff whose at-law Jones Act claim rests on non-diversity jurisdiction may amend his complaint to elect admiralty jurisdiction, even if the defendant previously demanded a jury trial. Several federal circuits that have opined on the issue, including the Seventh and Ninth Circuits, have adopted similar views.

Nevertheless, and although a state high court's opinion on how cases proceed in federal court is purely dicta, Illinois has rejected the Fifth Circuit's view, placing it squarely in conflict with the Seventh Circuit. Moreover, the Washington Supreme Court, in *Endicott v. Icicle Seafoods, Inc.*, adopted Illinois's view as its own, placing it in conflict, at least nominally, with the Ninth Circuit. This article evaluates *Endicott* in light of the confusion created by the jurisdictional split and argues that the State of Washington's entry into the fray is more likely to invite review by the Supreme Court of the United States, which should grant *certiorari* to resolve the conflicts of law.

I. INTRODUCTION

The Jones Act (alternatively "the Act") creates a statutory negligence cause of action allowing a seaman (or his personal representative in case of death) to sue his employer for injuries suffered during the course of employment.[1] The Act specifies that "the seaman may *elect* to bring a civil action at law, with the right of trial by jury."[2]

To spare the Act from challenge on the grounds that Congress had unconstitutionally diminished the federal courts' admiralty jurisdiction in favor of their common law jurisdiction, the Supreme Court ruled, in *Panama Railroad Co. v. Johnson*, that a seaman has the choice to sue at law or in admiralty.[3] The *Johnson* Court also upheld the Jones Act plaintiff's right to make this election between law and admiralty against a substantive due process challenge that the statutory grant of the election to the plaintiff, but not the defendant-employer, was "unreasonably discriminatory and purely arbitrary."[4] The Court aptly reasoned, "There are many instances in the law where a person entitled to sue may choose between alternative measures of redress and modes of enforcement . . . . [I]t has never been held . . . that to permit such a choice . . . is a violation of due process of law."[5]

According to a recent case from the Washington Supreme Court, *Endicott v. Icicle Seafoods, Inc.*, the *Johnson* Court left open the question whether the plaintiff's election power is a right to determine the mode of trial (jury or nonjury) or merely the right to select the Jones Act claim's jurisdictional basis (law or admiralty).[6] If the former view is correct, then the plaintiff's election power actually would be tantamount to a right to control whether a jury can hear the claim, regardless of the defendant's preference.[7] If the latter view is correct, then the plaintiff would have the initial right to determine the jurisdiction, and the right to a jury would be merely incident, potentially leaving the defendant a vested right to try the case before a jury if the plaintiff first elects jurisdiction at law.[8] By ruling in favor of the latter, the Washington

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[1] Jones Act, 46 U.S.C. § 30104 (2006).

[2] *Id.* (emphasis added). Hereinafter, this statutory right is referred to as the *plaintiff's election power*.

[3] 264 U.S. 375, 391 (1924); *see* David W. Robertson & Michael F. Sturley, *Understanding* Panama Railroad Co. v. Johnson*: The Supreme Court's Interpretation of the Seaman's Elections Under the Jones Act*, 14 U.S.F. MAR. L.J. 229, 237 (2001); *see also* U.S. CONST. art. III, § 2 (granting the Supreme Court power over "all Cases of admiralty and maritime Jurisdiction").

[4] *Johnson*, 264 U.S. at 392.

[5] *Id*. at 392–93.

[6] Endicott v. Icicle Seafoods, Inc., 224 P.3d 761, 765 (Wash. 2010).

[7] *See id.* at 763, 765.

[8] *Id.* at 765.

Supreme Court's opinion in *Endicott* entered it into what it considered a jurisprudential split between those two views.[9]

This paper examines the case history leading up to *Endicott* and asserts that there are actually three, not two, jurisprudential views of the plaintiff's election power.[10] Although Washington conflates the Fifth Circuit's view with the Illinois Supreme Court's view, the two positions are actually distinguishable.[11] This paper contends that the Fifth Circuit's cases on point were wrongly decided because they read the plaintiff's election power too broadly.[12] Moreover, this paper argues that California's view, addressed *infra*, is a misreading of the Fifth Circuit's view and is wrong.[13] Thus, this issue is ripe for Supreme Court certiorari.[14] Illinois's view, on which *Endicott* leans, is the most jurisprudentially coherent.[15] Ideally, the Supreme Court should overrule the Fifth Circuit's view of the plaintiff's election power and adopt Illinois's interpretation regarding the manner in which federal cases designated at law should proceed.[16] At the very least, the Supreme Court should uphold the authority of the States to configure the rights to jury trials in state Jones Act cases as they see fit.[17]

II. BACKGROUND

A. *The Fifth Circuit's View of the Plaintiff's Election Power in* Rachal

In *Rachal v. Ingram Corp.*, the Fifth Circuit Court of Appeals' leading decision addressing the Jones Act plaintiff's election power, the court examined whether the defendant, Ingram, retained a vested right to trial by jury in a Jones Act claim after the seaman-plaintiff, Rachal, had initially demanded a jury.[18] Although the plaintiff's complaint had demanded a jury trial, the plaintiff had filed a contradictory cover sheet

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[9] *Id.* at 765, 767. *Endicott* defines the split of authority as "among federal and state courts as to which interpretation of *Johnson* is correct, with the Ninth Circuit and California on one side and the Fifth Circuit, Seventh Circuit, Louisiana, and Illinois on the other." *Id.* at 765. The Washington Supreme Court followed the Illinois view. *Id.* at 767.

[10] *See infra* Parts II, IV(A).

[11] *See supra* note 9 and accompanying text; *infra* Part IV(A)(1)–(2).

[12] *See infra* Part IV(B).

[13] *See infra* Part IV(C).

[14] *See infra* notes 255–62 and accompanying text; *infra* Part V.

[15] *See infra* Part IV(D).

[16] *See infra* Part V.

[17] *See infra* Part V.

[18] 795 F.2d 1210, 1212 (5th Cir. 1986).

designating the claim in admiralty under Federal Rule of Civil Procedure 9(h).[19] The plaintiff amended his complaint a year later to clarify that the claim was , in fact, an action in admiralty.[20] The defendant asserted a right to a jury trial, which the plaintiff moved to strike.[21] The district court granted the motion to strike, holding that the plaintiff did not need the defendant's consent under Rule 39(a).[22]

The district court determined that the only two bases for jurisdiction were the general maritime law and the Jones Act.[23] It reasoned that the rule otherwise requiring a defendant's consent to amend a complaint's demand for a jury trial was inapplicable because "no *right* to a jury trial existed for" defendant Ingram.[24] As the Seventh Amendment does not protect the right to jury trial in admiralty cases, the district court impliedly reasoned that only the Jones Act plaintiff has the right to demand a jury trial in the first place. Thus, the plaintiff retained the power to convert his claim at law back to an admiralty nonjury claim.[25]

On appeal, the defendant contended that once a jury trial had been elected under Rule 9(h), the Seventh Amendment preserved it as a matter of right.[26] The seaman-plaintiff, on the other hand, argued that his initial right to elect admiralty jurisdiction meant that he had the authority to later revoke the demand for a jury trial by electing under Rule 9(h).[27]

Addressing the defendant's argument, the Fifth Circuit acknowledged that the Supreme Court has extended the Seventh Amendment right to jury trials to areas uncontemplated at the time of the framing of the Constitution—even to certain modern legal claims mimicking equity.[28] The Fifth Circuit explained, however, that the right

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[19] *Id.*; *see* Jones Act, 46 U.S.C. § 30104 (2006) ("A seaman . . . may elect to bring a civil action at law, with the right of trial by jury, against the employer."). The applicable rule of civil procedure states, in pertinent part:

If a claim for relief is within the admiralty or maritime jurisdiction and also within the court's subject-matter jurisdiction on some other ground, the pleading may designate the claim as an admiralty or maritime claim for purposes of Rules 14(c), 38(e), and 82 and the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions.

FED. R. CIV. P. 9(h)(1) (2012) [hereinafter Rule 9(h)].

[20] *Rachal*, 795 F.2d at 1212.

[21] *Id.*

[22] *Id.*

[23] Rachal v. Ingram Corp., 600 F. Supp. 406, 407 (W.D. La. 1984).

[24] *Id.*

[25] *See Rachal*, 600 F. Supp. at 407; *see also* Fitzgerald v. U.S. Lines. Co., 374 U.S. 16, 21 (1963).

[26] *Rachal*, 795 F.2d at 1212 (citations omitted).

[27] *Id.* at 1212–13.

[28] *Id.* at 1213 (citing Ross v. Bernhard, 396 U.S. 531, 539–40 (1970) (upholding the right to jury trial in shareholder derivative suits once shareholders were given standing at law to proceed for their recalcitrant corporations); Dairy Queen, Inc. v. Wood, 369 U.S. 469, 478 (1962) (holding trademark infringement claims to be actions at law and

to jury trial in a nondiversity case such as *Rachal* could arise only out of the Jones Act's statutory grant, because admiralty would not otherwise recognize the right.[29] The right is held by "the seaman, on proper request."[30] By contrast, *Rachal* held that where a Jones Act plaintiff pursues his claim in diversity under the federal admiralty jurisdiction statute's *saving to suitors* clause, both parties have an independent right to jury trial.[31]

The *Rachal* court appeared to rely implicitly on its holding in *Harrison v. Flota Mercante Grancolombiana, S.A.*, in which a fourth-party defendant argued that simultaneous admiralty jurisdiction and diversity jurisdiction over a products liability and negligence case necessitated that it could demand a jury in diversity.[32] The *Harrison* court held that, even in a claim with multiple bases for jurisdiction, the plaintiff "may preclude the defendant from invoking the right to trial by jury which may otherwise exist" simply "by electing to proceed under 9(h) rather than by invoking diversity jurisdiction."[33] Implicitly relying on *Harrison*, the *Rachal* court observed that, without a separate jurisdictional basis such as diversity, the only thing giving rise to a jury trial was the plaintiff's election to proceed at law.[34] Thus, *Rachal* reasoned that the defendant's ability to preserve a jury trial existed only to the extent the rules of civil procedure might have prevented the plaintiff "from withdrawing his jury demand."[35]

In sum, because the Jones Act plaintiff was proceeding at law under Jones Act-federal question jurisdiction, the *Rachal* court determined that the text of the Jones Act gave the plaintiff—and the plaintiff alone—the

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upholding the right to a jury trial even where the claim was pled as an "accounting" between partners); Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 509 (1959) (mandating that the trial of legal claims necessitating a jury precede the trial of equitable nonjury claims)).

[29] *Id.* (citing *Fitzgerald*, 374 U.S. at 19–21) (noting that joindered claims in admiralty are tried together with Jones Act claims before a jury only as a matter of judicial economy).

[30] *Id.*; *see* 46 U.S.C. § 30104 (2006) ("A seaman . . . may elect to bring a civil action at law, with the right of trial by jury, against the employer.").

[31] *Rachal*, 795 F.2d at 1213; *see* 28 U.S.C. § 1333(1) (2006) (giving federal district courts exclusive jurisdiction over "[a]ny civil case of admiralty or maritime jurisdiction, *saving to suitors in all cases all other remedies to which they are otherwise entitled*") (emphasis added).

[32] 577 F.2d 968, 986 (5th Cir. 1978); *see Rachal*, 795 F.2d at 1213 (*citing id.*).

[33] *Harrison*, 577 F.2d at 986; *see* Rule 9(h). By implication, the defendant would have been able to demand a jury trial had the plaintiff not elected admiralty under Rule 9(h). *See Harrison*, 577 F.2d at 986.

[34] *Rachal*, 795 F.2d at 1214.

[35] *Id.*

right to a jury trial.[36] By contrast, "[w]hen there is diversity jurisdiction . . . both parties have an independent basis for a jury trial *if* the plaintiff has chosen to pursue his Jones Act claim through the 'saving to suitors' clause in a civil action."[37]

B. The Fifth Circuit Reinforces Rachal *with* Linton

In *Linton v. Great Lakes Dredge & Dock Co.*, the Fifth Circuit considered whether a Jones Act plaintiff's election to proceed in state court *without* a jury was proper.[38] At the time, Louisiana Code of Civil Procedure article 1732(6) afforded a maritime plaintiff suing in state court under the *saving to suitors* clause of 28 U.S.C. § 1333 the option of forcing a nonjury trial.[39] The defendant removed the case to federal court, asserting that, by allowing a plaintiff to designate his state claim as "admiralty or general maritime" and proceed without a jury, article 1732(6) was a constructive invocation of exclusive federal admiralty jurisdiction.[40] The district court, agreeing with the defendant, denied the plaintiff's motions to remand and reconsider under 28 U.S.C. § 1447(c), based on improvident removal and lack of subject matter jurisdiction.[41] The plaintiff appealed.[42]

With respect to the plaintiff's Jones Act claim, the Fifth Circuit opined that the "antecedent right implicit in" the Jones Act lies in admiralty by virtue of the fact that plaintiffs may elect to proceed for damages at law.[43] Accordingly, the court summarized the defendant's argument about the plaintiff's election power as asserting a distinction between (1) the exclusive admiralty jurisdiction of the federal court and

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[36] *See id.* at 1217 (ruling that "when the initial complaint was filed" under federal question—not diversity— jurisdiction in federal court "and the plaintiff chose a civil action" only the plaintiff retained the right to trial by jury); *see also* 28 U.S.C. § 1331 (2006) (outlining federal question subject matter jurisdiction).

[37] *Rachal*, 795 F.2d at 1213.

[38] 964 F.2d 1480, 1482–84 (5th Cir. 1992).

[39] LA. CODE CIV. PROC. ANN. art. 1732(6) (1990) ("A trial by jury shall not be available in . . . [a] suit on an admiralty or general maritime claim under federal law that is brought in state court under a federal 'saving to suitors' clause, if the plaintiff has designated that suit as an admiralty or general maritime claim."). Louisiana has since repealed this provision. LA. CODE CIV. PROC. ANN. art 1732(6) (2012) ("A trial by jury shall not be available in . . . [a]ll cases where a jury trial is specifically denied by law.").

[40] *Linton*, 964 F.2d at 1483.

[41] *Id.*

[42] *Id.*

[43] *Id.* at 1489; *see* Jones Act, 46 U.S.C. § 30104 (2006) (stating "the seaman may elect to bring a civil action at law, with the right of trial by jury"); Panama R.R. Co. v. Johnson, 264 U.S. 375, 391 (1924) (highlighting the choice between suing in admiralty or suing at law with a "right of trial by jury").

(2) an action at law, available in state or federal court, which "*must* be tried to a jury."[44]

Calling upon *Rachal*, the *Linton* court stated that the Jones Act's "right to an 'action for damages at law' protects the *seaman's* 'right of trial by jury.'"[45] *Linton* also recapitulated *Rachal*''s distinction between Jones Act nondiversity actions at law and Jones Act diversity actions at law, granting the plaintiff the unilateral right to choose a jury or nonjury trial in the former, while recognizing the right to a jury trial vested in both parties in the latter.[46] The Fifth Circuit observed that the Constitution does not *mandate*, but merely permits, the invocation of the right to a jury trial in an action at law.[47] In light of *Rachal*''s recognition that defendants' rights to a jury trial in federal court differ depending on the underlying subject matter jurisdiction, *Linton* reasoned, by analogy, that there must not be a constitutional bar to a right to a nonjury trial "if state procedure allows it."[48]

The *Linton* court also held that the *saving to suitors* clause permits a nonjury trial at the state level if allowed by state procedure.[49] The court pointed out that the *saving to suitors* clause gives state courts concurrent jurisdiction over all *in personam* claims seeking common law remedies.[50] So long as the state court is not "provid[ing] a remedy *in rem* for a maritime cause of action," or attempting to change federal substantive admiralty law, permissible common law remedies include equitable and statutory remedies as well as damages "enforceable in a court of law."[51] Accordingly, the *Linton* court reasoned that:

[A] non-jury trial in state court is not, in and of itself, offensive to the general maritime law. Furthermore, a statutory provision for a non-jury trial, in and of itself (absent any pretense at *in rem* proceedings), does not constitute an attempt to create "an admiralty side of state court which can have no constitutional foundation."[52]

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[44] *Linton*, 964 F.2d at 1489–90. Note, here, the *Linton* court finds the defendant's assertion that a proceeding in state court through an at-law claim required a jury (versus merely allowing one) to be incorrect. *Id.*

[45] *Id.* at 1490 (quoting Rachal v. Ingram Corp., 795 F.2d 1210, 1213, 1215 (5th Cir. 1986)).

[46] *Linton*, 964 F.2d at 1490; *see Rachal*, 795 F.2d at 1213–15, 1217.

[47] *See Linton*, 964 F.2d at 1490.

[48] *Id*.

[49] *Id.*

[50] *See id.* at 1486–87 (citing Madruga v. Superior Court, 346 U.S. 556, 562, 564 (1954); Red Cross Line v. Atlantic Fruit Co., 264 U.S. 109, 124 (1924)); *see also* The Hine v. Trevor, 4 U.S. (Wall.) 555.

[51] *Id*. at 1486 (quoting *Madruga*, 346 U.S. at 561; *Red Cross Line*, 264 U.S. at 124) (internal quotation marks omitted).

[52] *Id.* at 1487.

In other words, the *saving to suitors* clause does not require a jury trial for a remedy to fall within its purview.[53]

Linton also noted that just because the Louisiana statue referred to the state court claims as "admiralty and maritime" did not mean such words had converted what were actually civil *in personam* claims under the purview of *saving to suitors* into bona fide federal admiralty claims.[54] *Linton*, therefore, first reinforced the *Rachal* rule that nondiversity Jones Act defendants do not have the right to a jury trial.[55] It then provided that a state may fashion its Jones Act remedies as it chooses so long as it does not attempt to afford a true admiralty *in rem* remedy or contravene federal substantive general maritime law.[56]

C. *The Ninth Circuit's View in* Craig

The Ninth Circuit weighed in on the meaning of the Jones Act plaintiff's election power in *Craig v. Atlantic Richfield Co*.[57] In a Jones Act wrongful death claim brought by William Craig's estate, defendant ARCO demanded a jury trial, which the plaintiff did not oppose.[58] The district court ruled that ARCO did not have the right to a trial by jury and, after a bench trial, found for the defendant.[59] Craig's estate appealed on the basis that ARCO had the right as the defendant to demand a jury trial; that it was prejudicial error for the court to deny a jury trial; and that, in the alternative, Craig was entitled to rely on the demand anyway.[60]

Relying on the Fifth Circuit's rulings in *Rachal* and *Linton*, the Ninth Circuit held that, whereas the defendant has the right to demand a jury when a separate basis for jurisdiction—such as diversity—exists, only the plaintiff has a right to demand a jury trial when the sole basis for jurisdiction is the Jones Act itself.[61] Since there was no diversity jurisdiction, ARCO, as the defendant, had no right to demand a jury trial

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[53] *Linton*, 964 F.2d at 1487.

[54] *Id.* That is, the question of whether state law preserved the right to a jury trial or right to a nonjury trial did not modify the subject matter jurisdiction of the claim. *Id.* at 1489.

[55] *See supra* notes 36, 45–48 and accompanying text.

[56] *See supra* notes 49–53 and accompanying text.

[57] 19 F.3d 472, 475–77 (9th Cir. 1994).

[58] *Id.* at 474–75.

[59] *Id.* at 475.

[60] *Id.*

[61] *Id.* at 475–76 (citing Linton v. Great Lakes Dredge & Dock Co., 964 F.2d 1480, 1489 n.16 (5th Cir. 1992); Rachal v. Ingram Corp., 795 F.2d 1210 (5th Cir. 1986)).

under the Jones Act.[62] Thus, the Ninth Circuit held that the plaintiff could rely on the defendant's demand only if the defendant's right to a trial by jury had existed in the first place.[63]

D. Other Federal Courts Following the Fifth and Ninth Circuits

In *Wingerter v. Chester Quarry Co.*, the Seventh Circuit impliedly followed the Fifth Circuit's view concerning the Jones Act plaintiff's election power by acknowledging that the plaintiff's election of jurisdiction in a Jones Act claim yields procedural results incident to jurisdiction.[64] The Seventh Circuit impliedly rejected the notion that a Jones Act defendant has a substantive right to a jury trial.[65] Likewise, the Second Circuit, following the Ninth Circuit, broadly stated that the Jones Act "provides seamen plaintiffs with powerful procedural rights, such as the *unilateral* right to elect between jury and non-jury trial."[66] Federal district courts in various circuits have followed the same reasoning, though not all agree.[67]

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[62] *Id.* at 476 ("The plain language of the Jones Act gives a *plaintiff* the option of maintaining an action at law with the accompanying right to a jury trial. The Act makes no mention of a defendant.").

[63] *Craig*, 19 F.3d at 476–77

[64] 185 F.3d 657, 665–68 & n.5 (7th Cir. 1998).

[65] *Id.* at 671. The court's implication that the Jones Act defendant has no substantive jury trial right is subtle. In a footnote of the opinion, the court asserted that it was not addressing the merits of the defendant's claim because it did not retain jurisdiction. *See id.* at 671 n.9. Nevertheless, the court expressly stated, "Although it is true that the consequence of allowing the Third Amended Complaint to be filed was that the case was designated as one in admiralty and that it would therefore proceed to a bench trial rather than a jury trial, that consequence is irrelevant for our purposes." *Id.* at 671. The court also stated, "Orders which do not determine parties' substantive rights or liabilities, however, are not appealable . . . even if those orders have important procedural consequences." *Id.* (quoting Ingram Towing Co. v. ADNAC, Inc., 59 F.3d 513, 517 (5th Cir. 1995)). Thus, in order to hold that it did not have jurisdiction to decide the appeal or the merits of the case, the *Wingerter* court necessarily implied that the defendant's loss of the jury trial was a procedural issue, not a substantive one. *See id.*

[66] Harrington v. Atlantic Sounding Co., Inc., 602 F.3d 113, 133 & n.7 (2d Cir. 2010).

[67] *Compare* Quinn Constr., Inc. v. Skanska USA Bldg., Inc., No. CIV.A. 07-406, 2010 WL 4909587 (E.D. Pa. Nov. 30, 2010), Adams v. James Transp., LLC, No. 5:09-CV-00036-R, 2010 WL 4789290, at *2 (W.D. Ky. Nov. 16, 2010) ("Only a plaintiff may assert the right to a jury trial under the Jones Act."), *and* Ferdinand v. Cnty. of Nassau, No. CV 02-4024, 2004 U.S. Dist. LEXIS 18272, at *1 (E.D.N.Y. June 16, 2004) ("Under the Jones Act, the plaintiff, but not the defendant, had a right to demand a jury trial . . . ."), *with* Abbott v. Bragdon, 893 F. Supp. 99, 101 (D. Me. 1995) (misreading *Rachal* as support for the notion that a defendant in a Jones Act case has a constitutional right to jury trial once the plaintiff has elected to proceed at law), *and* In re Armatur, S.A., 710 F. Supp. 404, 406 (D.P.R. 1989) ("[O]nce a plaintiff has demanded a jury . . . he cannot subsequently withdraw the jury demand and designate his claim as one in admiralty, without abiding by Fed.R.Civ.P. 39(a), which requires all parties to stipulate to the withdrawal of a jury demand.").

E. Louisiana's View

Relying upon *Rachal*'s assessment of Jones Act claims pled under statutory jurisdiction rather than diversity, Louisiana followed the Fifth Circuit in its own opinion about the plaintiff's election power, holding that "plaintiffs alone have control over whether the case is to be tried to a judge or a jury."[68] According to the Louisiana Supreme Court, "[P]laintiffs may choose to have the entire case tried to a jury, or may *withdraw* the jury demand."[69] By implication, the plaintiff retains the power to determine whether or not a jury hears the case.[70]

The court in *Parker v. Rowan Companies, Inc.* also explained that state courts have the power to hear Jones Act claims both through the statute's own jurisdictional grant as civil actions at law and as claims in admiralty.[71] Like *in personam* claims in admiralty, Jones Act claims are cognizable in state court actions under the *saving to suitors* clause under *Parker*.[72] *Parker* thus independently reached the same conclusion as *Linton*, namely that "it is within the province of the states to establish their own rules for the availability of jury trials" and a "denial of a jury trial in a state court" Jones Act claim by state court procedure is valid.[73]

F. California's View

It is technically incorrect to say that California has ruled on this subject, as its leading case with respect to the plaintiff's election power is an unpublished opinion.[74] Still, *Peters v. City and County of San Francisco* is instructive because it outlines the state court's understanding of federal jurisprudence on the matter.[75] (There was also published support for the same view in Illinois state courts before the Illinois Supreme Court overruled it, so the interpretation is one that can and has percolated elsewhere.[76]) Plaintiff Peters sued the City of San

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[68] Parker v. Rowan Cos., Inc., 599 So. 2d 296, 299 (La. 1992).

[69] *Id.* at 298 (emphasis added).

[70] *See id*. at 299.

[71] *Id.* at 299–301 (citing Panama R.R. Co. v. Johnson, 264 U.S. 375, 388–89 (1924)).

[72] *Id.* at 300–01 (citing Panama R.R. Co. v. Vasquez, 271 U.S. 557, 559–60 (1926)).

[73] *Id.* at 301; *accord* Linton v. Great Lakes Dredge & Dock Co., 964 F.2d 1480, 1486–87 (5th Cir. 1992); *see supra* part II(B).

[74] Peters v. City & Cnty. of San Francisco, 1995 AMC 788 (Cal. Ct. App. Mar. 14, 1994).

[75] *See id*. at 792; Roy Dripps, *The Seaman's "Election" Under the Jones Act: A Reply to Professors Robertson and Sturley*, 14 U.S.F. MAR. L.J. 127, 134 (2001) (acknowledging *Peters*'s importance as demonstrative of this particular strain of interpretation).

[76] Allen v. Norman Bros., Inc., 678 N.E.2d 317, 321 (Ill. App. Ct. 1997) (calling Jones Act jury rights a matter of substantive federal law and reversing a trial court's refusal to strike the defendant's jury demand), *overruled by* Bowman v. Am. River

Francisco under the Jones Act after injuring his arm while lashing two barges together in preparation for a fireworks display commemorating the fiftieth anniversary of the Golden Gate Bridge.[77] Peters originally demanded a jury but later waived his right.[78] The city then demanded a trial by jury, which the lower court denied.[79]

On appeal, the *Peters* court acknowledged the Jones Act plaintiff's election power under federal law, namely, that a seaman may sue in "an action for damages at law, with the right of trial by jury."[80] The city argued that Peters's election of a remedy at law in state court required a jury trial.[81] The court responded by asserting that *Linton* "rejected the specific contention that if a Jones Act or maritime case is to be tried in state court, it must be tried to a jury."[82]

The city also argued that it retained an independent right to a jury trial.[83] The court, however, pointed out that the Jones Act incorporates the Federal Employer's Liability Act (FELA) by reference and that FELA cases guide Jones Act jurisprudence.[84] The *Peters* court also noted that federal maritime law governs the parties' substantive rights while state law governs procedure.[85] Because both the Supreme Court of the United States and the California Supreme Court previously had ruled that the right to trial by jury is a substantive right under FELA, the *Peters* court reasoned the same must be true under the Jones Act.[86] Accordingly, the *Peters* court determined that the right to a jury trial under the Jones Act was a substantive right and held that federal law should control.[87]

Peters adopted—as substantive law applicable to *every* Jones Act case in any forum—*Rachal*'s holding that federal law provides only the plaintiff, not the defendant, with the right to trial by jury.[88] *Peters* considered the Jones Act plaintiff's unilateral right to elect a jury so

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Transp. Co., 838 N.E.2d 949, 962 (Ill. 2005) (upholding the defendant's Jones Act jury trial right); *see infra* notes 84–90 and accompanying text; *infra* Part II(G).

[77] *Peters*, 1995 AMC at 788–89.

[78] *Id.* at 790.

[79] *Id.* at 789–90.

[80] *Id.* at 790.

[81] *Id.* at 791.

[82] *Id.* (citing Linton v. Great Lakes Dredge & Dock Co., 964 F.2d 1480, 1485, 1488–90 (5th Cir. 1992)).

[83] *Peters*, 1995 AMC at 791.

[84] *Id.*

[85] *Id.* (citing Monessen Sw. Ry. Co. v. Morgan, 486 U.S. 330, 335 (1988); Jehl v. Southern Pac. Co., 66 Cal. 2d 821, 833 (1967)).

[86] *Id.* at 791–92 (citing *Monessen*, 486 U.S. at 336; Dice v. Akron, Canton & Youngstown R. Co., 342 U.S. 359, 363 (1952); *Jehl*, 66 Cal. 2d at 833).

[87] *Id.* at 792.

[88] *Id.* (citing Rachal v. Ingram Corp., 795 F.2d 1210, 1212, 1215–16 (5th Cir. 1986)).

significant that it held the plaintiff had the right to a nonjury trial notwithstanding the California Constitution's guarantee of a jury right in all trials.[89] Thus, *Peters* relied upon *Linton* for the proposition that federal law guarantees only the Jones Act plaintiff the choice between a jury or nonjury trial in an action at law in state court, and upon *Rachal* and FELA jurisprudence for the notion that this right is substantive.[90]

G. Illinois's Rejection of Rachal *and* Craig

Until the Illinois Supreme Court opined on the matter in *Bowman v. American River Transport Co.*, Illinois appellate courts were split over the issue of the plaintiff's election power.[91] In *Bowman*, the plaintiff filed a Jones Act negligence claim against his employer, and the defendants demanded a jury trial.[92] Upon motion by the plaintiff, the court struck the jury demand.[93] After judgment in favor of the plaintiff, the defendants appealed in part, asserting a right to a jury trial in Jones Act cases.[94]

The *Bowman* court began by noting that the *saving to suitors* clause of 28 U.S.C. § 1333 confers concurrent jurisdiction of admiralty and maritime claims on state courts and preserves state remedies.[95] The court also derived five distinct propositions from the Supreme Court's decision in *Panama Railroad Co. v. Johnson*: (1) the injured seaman's negligence action may lie in admiralty; (2) alternatively, the action may lie on the basis of general federal question and statutory jurisdiction; (3) it is the *saving to suitors* clause that allows general federal and statutory jurisdiction to lie in lieu of admiralty; (4) the *saving to suitors* clause

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[89] *Peters*, 1995 AMC at 792 ("The state constitutional right to jury trial does not apply, because the right to a jury trial is an issue of substantive law that turns on federal law alone."). *Contra* CAL. CONST. art. I, § 16.

[90] *See supra* Part II(B); *supra* notes 74–89 and accompanying text.

[91] *See* 838 N.E.2d 949, 962 (Ill. 2005) (upholding the defendant's Jones Act jury trial right). *Compare* Hendricks v. Riverway Harbor St. Louis, Inc., 732 N.E.2d 757, 765 (Ill. App. Ct. 2000) (following *Allen*), Hearn v. Am. River Transp., 707 N.E.2d 1283, 1289 (Ill. App. Ct. 1999) (upholding the court's previous *Allen* jurisprudence), Hanks v. Luhr Bros., Inc., 707 N.E.2d 1266, 1268 (Ill. App. Ct. 1999) (following *Allen* and denying the Jones Act defendant the right to trial by jury), Gibbs v. Lewis & Clark Marine, Inc., 700 N.E.2d 227, 229 (Ill. App. Ct. 1998) (upholding the rule that only the plaintiff has the right to jury trial in Jones Act claims), *and Allen*, 678 N.E.2d at 318–21 (reasoning that federal law mandates that Jones Act defendants have no right to a jury trial and applying the same rule to Illinois), *with* Hutton v. Consol. Grain & Barge Co., 795 N.E.2d 303, 307 (Ill. App. Ct. 2003) (disagreeing with *Allen* and giving the right to the Jones Act defendant to a jury trial).

[92] *Bowman*, 838 N.E.2d at 951.

[93] *Id.*

[94] *Id.*

[95] *Id.* at 952 (citing Lewis v. Lewis & Clark Marine, Inc., 531 U.S. 438, 445 (2001)).

provides *ipso facto* that Jones Act suits may proceed under federal diversity jurisdiction or even in state court; and (5) Jones Act cases lie in admiralty when the plaintiff characterizes them as such in federal court.[96] The Illinois Supreme Court further cited *Johnson* for the crucial proposition that "[w]hen Jones Act Cases are brought on any other jurisdictional basis [than admiralty], whether in state court or on the law side of federal court, they, like other saving-clause cases, are deemed to be cases at common law."[97]

The *Bowman* court then analyzed the statutory construction of the language of the Jones Act.[98] The court quoted a previous version of the Act, which stated: "Any seaman who shall suffer personal injury in the course of his employment *may, at his election, maintain an action for damages at law, with the right of trial by jury*."[99] The court then stated:

> We believe that anyone well versed in statutory construction, or even English grammar, would find the plain language of that sentence clearly states that the "election" to be made by the seaman pertains to his choice to maintain an action "at law," and not his election of a "right of trial by jury." Under the principle of statutory construction known as the last antecedent doctrine, relative or qualifying words or phrases in a statute serve only to modify words or phrases which are immediately preceding and do not modify those which are more remote.[100]

The court noted that the Jones Act did not specifically grant the plaintiff unilateral control over the right to trial by jury *per se*.[101] Rather, the court concluded, "[T]he rules of statutory construction clearly establish that the 'election' referred to in the Jones Act is *not* the seaman's election of a trial by jury, but his election to proceed 'at law' rather than in admiralty," i.e., the plaintiff's choice pertains to jurisdiction, not the mode of trial.[102]

The *Bowman* court cited the Supreme Court's decision in *Panama Railroad Co. v. Vasquez* for the proposition that there exists a distinction between the substantive rights of the Jones Act plaintiff, namely, the

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[96] *Id.* at 953 (citing Panama R.R. Co. v. Johnson, 264 U.S. 375, 382–85 (1924)).

[97] *Id.* (citing *Johnson*, 264 U.S. at 382, 388, 391).

[98] *Bowman*, 838 N.E.2d at 953.

[99] *Id.* (quoting 46 U.S.C. app § 688(a) (2000) (emphasis added)). The operative phrase in the updated language is virtually identical. *Compare* 46 U.S.C. App. § 688(a) (2000), *with* 46 U.S.C. § 30104 (2006) ("A seaman injured in the course of employment . . . *may elect to bring a civil action at law, with the right of trial by jury*, against the employer.") (emphasis added).

[100] *Bowman*, 838 N.E.2d at 953.

[101] *Id.* at 954.

[102] *Id.*

right to sue in negligence to seek damages, and the procedural guarantees incident to whichever form of jurisdiction the plaintiff might invoke.[103] The plaintiff's election power, according to *Bowman*, is a choice between a suit "at law, with the *attendant* right to a trial by jury" and a suit "in admiralty, where there is no right to trial by jury."[104]

Accordingly, *Bowman* ascertained that the "varying measures of redress" and "different forms of action" described in *Johnson* reflect a choice between law and admiralty, not a direct choice between jury and nonjury trials.[105] The *Bowman* court reasoned that, because *Johnson*'s purpose was to determine the constitutionality of the Jones Act, its focus was on whether a new maritime cause of action could arise out of or in addition to the substantive rights already inherent in the general maritime law, without depriving the Supreme Court of its constitutional admiralty jurisdiction.[106] To wit:

> *Johnson* in its entirety shows that the "forms of action" choice . . . refers to admiralty actions versus at-law negligence actions. We can find nothing . . . which suggests that the term "forms of action" could have been intended to refer to a choice between jury and nonjury trials in common law actions. Indeed, the jury trial is explicitly referred to "as an incident" of the choice "to proceed on the common law side of the court."[107]

The *Bowman* court rejected the notion that the plaintiff's election power gives a seaman the unilateral right to elect a jury or nonjury trial in an action at law.[108]

The court also rejected the idea that a jury trial is a substantive right inherent in the Jones Act.[109] The plaintiff argued that federal substantive law, not state procedural law, should govern the demand for jury trials, because the Jones Act incorporates FELA by reference and *Dice v. Akron, Canton and Youngstown Railroad Co.*, a United States Supreme Court decision, held that a jury trial in FELA cases is a substantive right.[110] The *Bowman* court rejected this argument, pointing out that even if the jury trial right in Jones Act cases is guaranteed through *Dice*,

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[103] *See id.* at 955 (citing 271 U.S. 557, 560 (1926)).
[104] *Id.* (emphasis added).
[105] *Id.* at 955–56 (quoting Panama R.R. Co. v. Johnson, 264 U.S. 375, 392 (1924)).
[106] *Bowman*, 838 N.E.2d at 956.
[107] *Id.* (quoting *Johnson*, 264 U.S. at 391).
[108] *Id.*
[109] *Id.* at 958. *But cf.* Dice v. Akron, Canton & Youngstown R. Co., 342 U.S. 359, 363 (1952) (holding the right to a jury trial in FELA cases to be a substantive right).
[110] *Bowman*, 838 N.E.2d at 958. *But cf.* Peters v. City & Cnty. of San Francisco, 1995 AMC 788, 791 (Cal. Ct. App. Mar. 14, 1994); *see supra* notes 83–90 and accompanying text.

it does not necessarily follow that there exists a plaintiff's right to a *nonjury* trial.[111]

Ultimately, the *Bowman* court concluded that "the availability of a jury trial in Jones Act cases is a question that is properly controlled by the normal laws of the forum."[112] Determining that jury trials in state court are a matter of state law, the Illinois Supreme Court analyzed its own state constitution and held that it guarantees the right to a jury trial in Jones Act claims to both parties.[113] The court expressly rejected *Rachal*'s interpretation that only the plaintiff has the right to demand or strike the demand for a jury in federal court once the plaintiff designates the claim's subject matter jurisdiction to be at law.[114] Notably, this placed Illinois in conflict with the circuit in which it sits, the Seventh Circuit, which impliedly followed the Fifth Circuit and rejected the notion that a Jones Act defendant could demand a jury trial.[115]

III. ENDICOTT V. ICICLE SEAFOODS, INC.

As in all Jones Act claims, the seaman in *Endicott* suffered an injury while working for his employer.[116] After a fish cart crushed Justin Endicott's arm, he sued Icicle Seafoods in Washington State Superior Court under the Jones Act and a general maritime law claim of unseaworthiness.[117] Endicott moved to strike Icicle Seafood's demand for a jury trial, and the trial court granted Endicott's motion.[118] After a bench trial, the court awarded Endicott damages, and Icicle Seafoods appealed on several issues, including an assertion to the right to a jury trial.[119]

The Washington Supreme Court first noted that the *saving to suitors* clause gives maritime plaintiffs the right to sue in state court provided the causes of action are *in personam* and not *in rem*.[120] Reading

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[111] *Bowman*, 838 N.E.2d at 959.

[112] *Id.*

[113] *Id.* at 959–62.

[114] *Id.* at 957. At least two federal district courts agree. Abbott v. Bragdon, 893 F. Supp. 99, 101 (D. Me. 1995) (misreading *Rachal* as support for the notion that a defendant in a Jones Act case has a constitutional right to jury trial once the plaintiff has elected to proceed at law); In re Armatur, S.A., 710 F. Supp. 404, 406 (D.P.R. 1989) ("[O]nce a plaintiff has demanded a jury . . . he cannot subsequently withdraw the jury demand and designate his claim as one in admiralty, while abiding by Fed.R.Civ.P. 39(a), which requires all parties to stipulate to the withdrawal of a jury demand.").

[115] Wingerter v. Chester Quarry Co., 185 F.3d 657, 665–68 & n.5, 671 (7th Cir. 1998); *see supra* note 64 and accompanying text.

[116] Endicott v. Icicle Seafoods, Inc., 224 P.3d 761, 763 (Wash. 2010).

[117] *Id.*

[118] *Id.*

[119] *Id.* at 763–64.

[120] *Id.* at 764.

the text of the original Jones Act closely and impliedly interpreting the word "elect" as redundant, the Washington Supreme Court stated, "By its terms, the Jones Act allows seamen to sue at law, but not in admiralty, to recover for their employers' negligence."[121] *Endicott* noted that the Supreme Court's opinion in *Panama Railroad Co. v. Johnson* was a thinly veiled way of saving the Act from unconstitutionality.[122] Because the Act otherwise carved out a negligence action from the Court's admiralty purview, the *Johnson* court had read into the Act the plaintiff's choice to sue at law or in admiralty.[123] The *Endicott* court stated that *Johnson* left ambiguous whether the plaintiff's power to "elect between . . . different forms of action" is a statutory right to elect the mode of trial (jury vs. nonjury) or whether it is the right to select the jurisdictional basis of trial (at law vs. in admiralty). If the latter, the jury trial right flows procedurally from the choice of jurisdiction."[124]

The court further recognized a "split among federal and state courts as to which interpretation of *Johnson* is correct" but mischaracterized the divide as "the Ninth Circuit and California on one side and the Fifth Circuit, Seventh Circuit, Louisiana, and Illinois on the other."[125]

Because the Ninth Circuit in *Craig* specifically had stated that "[t]he [Jones] Act makes no mention of a defendant," *Endicott* summarized *Craig* as using "exclusio alterius reasoning to conclude that the defendant in a nondiversity Jones Act suit filed in federal court has no right to demand a jury trial."[126] The *Endicott* court then stated that the California appellate court's unpublished *Peters* decision "adopts reasoning *like Craig's* in the state court-context, denying the defendant a jury trial right in a Jones Act and general maritime suit filed in state court under the saving to suitors clause."[127]

Next, the Washington Supreme Court, assenting to the Defendant's characterization of the Fifth and Seventh Circuits' opinions as "'jurisdictional' position[s]," noted that a "Jones Act election is limited to choosing the jurisdictional basis of trial (in admiralty vs. at law) and that jury rights flow from this election as procedural incidents."[128]

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[121] *See id.* (focusing on the holistic meaning of the Jones Act clause "may . . . bring a civil action at law, with the right of trial by jury").

[122] Endicott, 224 P.3d at 764–65.

[123] *Id.* at 765 (citing Panama R.R. Co. v. Johnson, 264 U.S. 375 (1924)).

[124] *Id.*

[125] *See id.* at 765; *supra* Part II.

[126] *Id.* at 765 (quoting Craig v. Atlantic Richfield Co., 19 F.3d 472, 476 (9th Cir. 1994)); *see supra* Part II(C).

[127] *Endicott*, 224 P.3d at 765 (emphasis added); *see supra* Part II(F).

[128] *Endicott*, 224 P.3d at 765 (quoting *Johnson*, 264 U.S. at 391 ("[T]he injured seaman is permitted, but not required, to proceed on the common law side of the court *with a trial by jury as an incident*.")(emphasis added)); *id.* ("Federal case law interpreting

Endicott believed the Ninth Circuit had misread *Rachal* and *Linton* and, therefore, sided with the Fifth Circuit view upholding the "jurisdictional" position.[129]

Endicott continued its analysis with *Panama Railroad Co. v. Vasquez*, noting that the Supreme Court there had decided the *saving to suitors* clause allows Jones Act plaintiffs to bring their *in personam* maritime claims at law with the right to jury trial or in admiralty without trial by jury.[130] *Endicott* viewed *Vasquez* as upholding the jurisdictional interpretation of the Jones Act, because the Supreme Court had distinguished between suits at law and suits in admiralty with "the jury trial right as an incident following from this distinction."[131] The Washington Supreme Court saw the "progression of federal cases" as "reinforc[ing] this interpretation."[132]

The *Endicott* court then observed that both Louisiana and Illinois (through *Bowman*) had adhered to the jurisdictional analysis of the plaintiff's election power and that state procedural law should determine whether a plaintiff or defendant has the right to demand a trial by jury (or vice versa) in state court.[133] The court stated definitively:

> We find the analysis in *Bowman* persuasive. The Jones Act affords the plaintiff the right to elect only the jurisdictional basis for his suit. Once the plaintiff makes his choice of jurisdiction, procedural rights flow as normal incidents of the suit. This means that there is no substantive federal right to elect the mode of trial directly. Rather, state procedural law determines whether the parties have a right to a jury trial.[134]

Finally, *Endicott* queried whether the Washington Constitution guarantees the right to trial by jury in Jones Act claims.[135] The court recognized that the Washington Constitution guarantees the right to a

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the Jones Act convinces us that the jurisdictional interpretation is correct."); *see supra* Part II(A), (B), (D).

[129] *See Endicott*, 224 P.3d at 765–66.

[130] *Id.* at 766 (quoting Panama R.R. Co. v. Vasquez, 271 U.S. 557, 560 (1926) ("[T]he new substantive rights may be asserted and enforced either in actions *in personam* against the employers in courts administering common-law remedies, with a right of trial by jury, or in suits in admiralty in courts administering remedies in admiralty, without trial by jury . . . .")).

[131] *Id.*

[132] *Id.* (citing Wingerter v. Chester Quarry Co., 185 F.3d 657, 665–68 & n.5 (7th Cir. 1998); Tex. Menhaden Co. v. Palermo, 329 F.2d 579, 580 (5th Cir. 1964); McAfoos v. Canadian Pac. S.S., Ltd., 243 F.2d 270, 272, 274 (2d Cir. 1957); Williams v. Tide Water Associated Oil Co., 227 F.2d 791, 793–94 (9th Cir. 1955); McCarthy v. Am. E. Corp. 175 F2.d 724, 726 (3d Cir. 1949)).

[133] *Id.* at 766–67.

[134] *Id.* at 767.

[135] *Endicott*, 224 P.3d at 767.

jury trial in any cause of action at law that existed, or is analogous to one that existed, at the time of statehood.[136] According to the court, the Jones Act cause of action is rooted in negligence and, therefore, is analogous to the common law claims recognized in Washington as of 1889.[137] Accordingly, the *Endicott* court ruled that the Washington Constitution confers the right to a jury trial to both Jones Act parties.[138] The court subsequently vacated the judgment and remanded for jury trial.[139]

IV. ANALYSIS

A. A Summary of the Three Views of the Jones Act Jury Trial Right

Federal court jurisprudence, as well as that of Louisiana, California, and Illinois, suggests there are actually three distinct judicial views regarding the right to a jury trial under the Jones Act.[140] For clarity, the operative text of the Jones Act is restated here: "A seaman injured in the course of employment or, if the seaman dies from the injury, the personal representative of the seaman *may elect to bring a civil action at law, with the right of trial by jury*, against the employer."[141]

1. Rachal-Linton

The first view, which one might call the *Rachal-Linton* view, interprets the Jones Act plaintiff's power to "elect to bring a civil action at law, with the right of trial by jury," to be a jurisdictional choice between a suit in admiralty and a suit at law.[142] Yet, whether or not a trial proceeds before a jury or judge is incident to this first jurisdictional choice.[143] If the plaintiff chooses to proceed in admiralty in federal court, there naturally is no jury trial.[144] If, however, the plaintiff chooses to proceed at law, he may face a second choice: he may file either in federal court under a non-admiralty grant of subject matter jurisdiction or in state court under the *saving to suitors* clause.[145] If the claim proceeds

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[136] *Id.*
[137] *Id.*
[138] *Id.*
[139] *Id.*
[140] *See supra* Part II; *infra* Part IV(A)(1)–(3).
[141] 46 U.S.C. § 30104 (2006) (emphasis added).
[142] Rachal v. Ingram Corp., 795 F.2d 1210, 1215 (5th Cir. 1986); *see supra* notes 29–34 and accompanying text.
[143] *Rachal*, 795 F.2d at 1214, 1217; *see supra* notes 35–37 and accompanying text.
[144] FED. R. CIV. P. 9(h), 38(e); *see Rachal*, 795 F.2d at 1214; *see also* Fitzgerald v. U.S. Lines, 374 U.S. 16, 20 (1963); Waring v. Clarke, 5 U.S. (How.) 441, 460 (1847).
[145] Linton v. Great Lakes Dredge & Dock Co., 964 F.2d 1480, 1483 (5th Cir. 1992); *see supra* note 43 and accompanying text.

in state court, state procedural law governs whether and for whom the right to trial by jury exists and how a party secures it.[146]

If, on the other hand, the claim at law proceeds in federal court, there is yet a third bifurcation: claims that proceed at law in diversity give both parties the simultaneous right to demand and retain a jury.[147] Claims that proceed at law solely under general federal question jurisdiction and the Jones Act's statutory language allow only the plaintiff to elect whether to proceed with a jury.[148] As a trial by jury can only arise conditionally out of the plaintiff's unilateral power to choose federal question jurisdiction, the *Rachal-Linton* view recognizes the right to trial by jury as something the plaintiff can opt out of later because the plaintiff had the power to opt into it at the outset.[149] Thus, when the claim is not in diversity, the *Rachal-Linton* view collapses jurisdiction and mode of trial into one question.[150] The nondiversity federal defendant can neither demand a jury trial nor retain a jury trial if the plaintiff moves to strike his own or the defendant's previous jury demand.[151]

2. *Bowman*

The second view, espoused by the Illinois Supreme Court in *Bowman*, agrees with the *Rachal-Linton* view regarding the nature of the plaintiff's election power: it is a choice between jurisdictional bases, admiralty or law, for Jones Act claims.[152] At law, the plaintiff may sue in state or federal court.[153] If he sues in state court, state procedure governs the right to a jury trial.[154] According to *Bowman*, however, the Fifth Circuit's distinction between diversity and nondiversity Jones Act cases is incorrect.[155] In all federal Jones Act cases proceeding at law, the

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[146] *Linton*, 964 F.2d at 1487, 1490; *see supra* note 49 and accompanying text.

[147] *Linton*, 964 F.2d at 1489 n.16; *Rachal*, 795 F.2d at 1213; *see supra* notes 50–54, 56 and accompanying text.

[148] *Linton*, 964 F.2d at 1490; *Rachal*, 795 F.2d at 1213–15, 1217; *see supra* notes 45–47 and accompanying text.

[149] *Rachal*, 795 F.2d at 1217; *see supra* notes 36, 46–47, 55, 142 and accompanying text.

[150] *See* sources cited *supra* note 149.

[151] *Rachal*, 795 F.2d at 1213–15, 1217; *see Linton*, 964 F.2d at 1490; *supra* notes 45–47 and accompanying text.

[152] Bowman v. Am. River Transp. Co., 838 N.E.2d 949, 953 (Ill. 2005); *see supra* notes 96–97 and accompanying text.

[153] *Bowman*, 838 N.E.2d at 952–53; *see supra* notes 95–97 and accompanying text.

[154] *Bowman*, 838 N.E.2d at 959–62; *see supra* notes 112–15 and accompanying text.

[155] *Bowman*, 838 N.E.2d at 953–59; *see supra* notes 98–111 and accompanying text.

Bowman doctrine holds that either the plaintiff or the defendant has the right to demand and preserve trial by jury.[156]

3. *Peters*

Under the third view, espoused in California's unpublished *Peters* opinion, instead of reading "with the right of trial by jury" as an indicator of a Jones Act claim's jurisdiction at law, the court conflates the right of trial by jury with the plaintiff's election power.[157] Thus, when cases are tried at law—in state or in federal court—only the plaintiff may decide whether or not a jury may hear his claims, even if this choice overrides otherwise valid state procedural guarantees to jury trials.[158]

B. Evaluation of Rachal-Linton*: The Plaintiff Gave and the Plaintiff Hath Taken Away*[159]

The conflicts between these views of the right to jury trial in Jones Act cases really are not about whether the plaintiff has the right to control the mode of trial.[160] The plaintiff unquestionably has the right to determine at the outset whether he and the defendant will try their case to the bench or to a jury, especially considering the Jones Act gives him the right to designate his claim in admiralty or at law.[161] To the extent the law allows the plaintiff to make the choice between state and federal court—or, in federal court, between admiralty and a claim at law—the plaintiff is the master of his complaint.[162] He controls the subject matter jurisdiction and the forum.[163]

The split of authority, rather, is about whether the Jones Act gives the plaintiff so much control of the case that he could unilaterally re-designate his case from law (with an attendant right to trial by jury) to

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[156] *Bowman*, 838 N.E.2d at 957; *see supra* note 112 and accompanying text.

[157] Peters v. City & Cnty. of San Francisco, 1995 AMC 788, 792 (Cal. Ct. App. Mar. 14, 1994); *see supra* note 88 and accompanying text.

[158] *Peters*, 1995 A.M.C. at 791–92; *see supra* note 89 and accompanying text. *Contra* CAL. CONST. art. I, § 16.

[159] *Cf. Job* 1:21.

[160] *See* David W. Robertson & Michael F. Sturley, *The Right to a Jury Trial in Jones Act Cases: Choosing the Forum Versus Choosing the Procedure*, 30 J. MAR. L. & COM. 649, 650 (1999).

[161] *See* Rule 9(h) (giving procedural life to the plaintiff's election power); Panama R.R. Co. v. Johnson, 264 U.S. 375, 391 (1924) (creating the plaintiff's election power); Robertson & Sturley, *supra* note 160, at 669–70 (acknowledging the plaintiff's power is *de facto*).

[162] *See* Rule 9(h); *Johnson*, 264 U.S. at 391; Caterpillar Inc. v. Williams, 482 U.S. 386, 392 (1987) (acknowledging that the plaintiff has the power to confer federal jurisdiction *vel non* with a well-pleaded complaint and is the "master of [his] claim").

[163] *See* sources cited *supra* note 162.

admiralty without the consent of the defendant.[164] Cynically speaking, does the plaintiff have the right to designate a claim at law so as to garner the right to trial by jury, but also to later convert his claim to admiralty when he discovers the identity of the assigned judge and believes the bench in admiralty might be more favorable to his claim?[165]

The generic plaintiff already exercises significant control when it comes to finding a forum favorable to his claim.[166] The Constitution notwithstanding, it would not be entirely surprising had Congress intended for the Jones Act plaintiff—a seafarer and ward of the courts of admiralty—to be able to control trial to such an extent that he could convert a jury trial into a nonjury trial.[167] But the crux of the issue, really, is whether such a view comports with the Seventh Amendment guarantee of the right to jury trials at law.[168] It does not.[169]

1. Constitutional and Textual Problems in *Rachal*

The Seventh Amendment has never protected the right to trial by jury in admiralty, but it has always protected the right to jury trial in claims at law.[170] Furthermore, "the right to trial by jury" is a term of art that contemplates the rights of both the plaintiff and the defendant to demand or retain a jury.[171] Federal Rules of Civil Procedure 38 and 39

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[164] *See* Robertson & Sturley, *supra* note 160, at 650.

[165] *See id.* (laying out Jones Act plaintiffs' filing strategies to ensure the most favorable forum for adjudication of their claims).

[166] *See Caterpillar*, 482 U.S. at 392 (cognizing the plaintiff's ability to determine jurisdiction and forum on the face of the complaint).

[167] *See* Calmar S.S. Corp. v. Taylor, 303 U.S. 525, 529 (1938) (explaining the "liberality with which admiralty courts have traditionally interpreted rule devised for the benefit and protection of seamen who are its wards"); Robertson v. Baldwin, 165 U.S. 275, 287 (1897) (explicating the admiralty courts' view that seaman are presumed to be deficient in their abilities to look after themselves and that the admiralty courts are their guardians). The Court saw admiralty courts "'*quemadmodum pater in filios, magister in discipulos, dominus in servos vel familiares*.'" *Robertson*, 165 at 287. This translates to "as a father to a child, a master to a disciple, [or] the lord of the household servants." *See* GOOGLE TRANSLATE, http://translate.google.com/ (select "Latin" from the left dropdown box, enter the phrase in the first textbox, select "English" from the right dropdown box, and read Google's translation in the right textbox) (last visited November 18, 2012).

[168] *See infra* Part IV(B)(1).

[169] *See infra* Part IV(B)(1).

[170] Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 41–42 (1989); Curtis v. Loether, 415 U.S. 189, 193–94 (1974); Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 446–47 (1830).

[171] *Curtis*, 415 U.S. at 192 ("[T]he Seventh Amendment entitles *either party* to demand a jury trial in an action for damages in the federal courts . . . ." (emphasis added)); Parklane Hosiery Co. v. Shore, 439 U.S. 322, 345 (1979) (Rehnquist, J., dissenting) ("If a jury would have been empaneled in a particular kind of case in 1791, then the Seventh Amendment requires a jury trial today, if *either party* so desires." (emphasis added)).

acknowledge and implement this right.[172] Once a jury is demanded, neither party, generally speaking, can unilaterally revoke or strike the demand.[173] Constitutionally speaking, why would and how could the Jones Act be any different?[174]

The Jones Act was Congress's second attempt at enacting a negligence cause of action for seamen in light of the Supreme Court's holdings in *The Osceola*.[175] *The Osceola* had articulated, along with two other principles, the following two bars to negligence claims under the general maritime law:

> 3. . . . [A]ll the members of the crew, *except*, *perhaps*, *the master*, are, as between themselves, fellow servants, and hence seamen cannot recover for injuries sustained through the negligence of another member of the crew beyond the expense of his maintenance and cure . . . .
>
> 4. . . . [T]he seaman is not allowed to recover an indemnity for the negligence of the master, or any member of the crew, but is entitled to maintenance and cure, whether the injuries were received by negligence or accident.[176]

Congress responded by passing "[a]n Act [t]o promote the welfare of American seamen in the merchant marine of the United States," which included a section stating "[t]hat in any suit to recover damages for any injury sustained on board [a] vessel or in its service *seamen having command* shall not be held to be fellow-servants with those under their authority."[177] It appears Congress latched onto *The Osceola*'s prevarication in the third principle regarding whether seamen were "fellow servants" of their master by purporting to allow a seaman to sue for negligence caused by the "seam[a]n having command."[178]

The Supreme Court struck down Congress's response in *Chelentis v. Luckenbach S.S. Co.*, holding (a) that even if the case were pursued outside of admiralty under the *saving to suitors* clause, maritime law, and

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[172] FED. R. CIV. P. 38, 39 (2012) [hereinafter Rule 38 and Rule 39].

[173] *Id.* at Rule 38(a), (b), (d); *id.* at Rule 39(a) (allowing the parties to stipulate together to waive the jury once demanded or requiring a party to seek leave of the court upon motion).

[174] *See infra* notes 176–215 and accompanying text; *see also* Robertson & Sturley, *supra* note 160, at 666–69 (arguing for why there is no difference).

[175] GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY § 6-20, at 325–27 (2d ed. 1975); Robertson & Sturley, *supra* note 3, at 233–34.

[176] 189 U.S. 158, 175 (1903) (emphases added).

[177] Act to Promote the Welfare of American Seamen in the Merchant Marine of the United States, Pub. L. No. 63-302, § 20, 38 Stat. 1164, 1185 (1915) (emphasis added); GILMORE & BLACK, *supra* note 173, § 6-20, at 325; Robertson & Sturley, *supra* note 3, at 234. *Compare* § 20, 38 Stat. 1164, 1185, *with The Osceola*, 189 U.S. at 175.

[178] GILMORE & BLACK, *supra* note 175, § 6-20, at 325.

not the common law, applied; and (b) that maritime law does not consider negligence when providing a remedy.[179] *Chelentis* called Congress's act "irrelevant," because whether or not a "seam[a]n having command" acted negligently, the fourth principle—namely, that the "seaman is not allowed to recover . . . for the negligence of the master"—controlled.[180] Furthermore, in the midst of its discussion about whether maritime law or the common law applied, *Chelentis* emphasized the differences between rights and remedies, noting that the *saving to suitors* clause for general maritime law claims employs common law remedies to enforce maritime rights.[181] That is, in a *saving to suitors* case, jury trials and common law standards for liability govern the maritime cause of action.[182]

Thus, Congress redoubled by passing the Jones Act.[183] The original language of the Act elucidates Congress's intent:

Any seaman who shall suffer personal injury in the course of his employment may, at his election, *maintain an action for damages at law*, *with the right of trial by jury*, and in such action all statutes of the United States modifying or extending the *common-law right or remedy* in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an *action for damages at law with the right of trial by jury*, and in such action all statutes of the United States conferring or regulating the *right of action for death* in the case of railway employees shall be applicable. Jurisdiction in such

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[179] 247 U.S. 372, 383–85 (1918); GILMORE & BLACK, *supra* note 173, § 6-20, at 326.

[180] GILMORE & BLACK, *supra* note 175, § 6-20, at 326; *see Chelentis*, 247 U.S. at 384; *see also The Osceola*, 189 U.S. at 175 (espousing the fellow servant doctrine, except perhaps as to the master of the vessel, yet rejecting a seaman's cause of action for the negligence of any crew member, including the master). Gilmore and Black seemed to posit that no one ever figured out why Congress declined to directly address *The Osceola*'s fourth point:

By those few lines the Congress apparently intended to change the maritime law as stated in The Osceola under which an injured seaman . . . could not recover damages for negligence of master or crew in the navigation or management of the ship. At least, if that was not the intention, no one has ever been able to suggest what the intention was.

See GILMORE & BLACK, *supra* note 175, § 6-20, at 325.

[181] *Chelentis*, 247 U.S. at 383–84 ("The distinction between rights and remedies is fundamental . . . . [W]e think, under the saving clause a right sanctioned by the maritime law may be enforced through any appropriate remedy recognized at common law.").

[182] *Id.* at 379, 382–83.

[183] GRANT & GILMORE, *supra* note 175, § 6-20, at 326 (noting, whimsically, that the Court "goaded Congress into doing it the hard way"); Robertson & Sturley, *supra* note 3, at 234.

actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.[184]

By expressly extending FELA's "common-law right or remedy" to this new cause of action, in conjunction with a slew of terms of art that signaled an action at common law, Congress made clear it was creating a common law negligence action enforceable in common law courts as opposed to a maritime remedy.[185]

In context, Congress placed *the right to trial by jury* in the text as a descriptor of the sailor's election to "maintain an action for damages at law" (currently: "bring a civil action at law") so that it would be evident to the Supreme Court that the Jones Act was not infringing on the Court's constitutionally-provided, original admiralty jurisdiction over the general maritime law.[186] Congress was not modifying the general maritime law's prohibition of negligence causes of action *per se*.[187] Consequently, it is very unlikely that Congress envisioned the plaintiff controlling the right to trial by jury *vel non* in a legal cause of action analogous to negligence on land, subject—like any other action at law—to the Seventh Amendment.[188] In any similar action at law, either the plaintiff or the defendant could demand a jury.[189]

Upon review, the Supreme Court asserted a potential conflict anyway: the *Johnson* Court entertained the strawman that Congress was attempting to "carve out" a cause of action from the general maritime law.[190] Yet, to avoid declaring unconstitutional Congress's negligence-for-seamen cause of action after previously having done exactly that, the Court deftly held that Congress intended for Jones Act plaintiffs to be able to choose between suits at law and admiralty.[191]

Thus, it was the Supreme Court that created the plaintiff's election power, a jurisdictional choice between law and admiralty for Jones Act plaintiffs—the one reflected in Rule 9(h) today.[192] The text of *Johnson* illustrates this character of the election by noting that further rights, such as the right to a jury trial, are "incident" to the jurisdictional basis of a

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[184] The Jones Act, § 33, 41 Stat. 988, 1007 (1920) (emphasis added).

[185] *Compare id.* ("common-law right or remedy"), *with Chelentis*, 247 U.S. at 383 ("It is not a remedy in the common-law courts which is saved, but a common-law remedy."), *and* The Moses Taylor, 71 U.S. (4 Wall.) 411, 431 (1866) (saying the same).

[186] *See* sources cited *supra* note 185.

[187] *See* sources cited *supra* note 185.

[188] *See* Curtis v. Loether, 415 U.S. 189, 192 (1974) (recognizing the right for either party in an action at law to demand a jury trial).

[189] *See id.*

[190] *See* Panama Railroad Co. v. Johnson, 264 U.S. 375, 387–90 (1924).

[191] *Id.* at 388–89.

[192] *Id.*; *accord* Rule 9(h).

Jones Act plaintiff's claim.[193] On this point, the Fifth Circuit, Ninth Circuit, Seventh Circuit, Illinois Supreme Court and Washington Supreme Court all agree that the right to trial by jury is incident to the jurisdictional election of the plaintiff.[194] Only California disagrees (or may disagree given that *Peters* was an unpublished intermediate appellate level case).[195]

The Court may have interpreted the Jones Act in a way that preserved admiralty jurisdiction, but nothing in *Johnson* indicates the Court was taking the extraordinary step of modifying the bilateral meaning of *right to trial by jury* once a Jones Act plaintiff has made his election at law, either in diversity or under federal question jurisdiction.[196] Before *Rachal*, the Fifth Circuit in *Johnson v. Penrod Drilling* recognized precisely that there was no such distinction.[197]

The *Penrod* court held that the trial court had deprived the defendant of his right to trial by jury by allowing the plaintiffs to re-designate their claim as one in admiralty under Rule 9(h) after the defendant already had designated the claim at law and demanded a jury.[198] The court articulated the issue as whether "the plaintiffs, through the device of amending their complaints to state admiralty and maritime claims under Rule 9(h), effectively withdr[e]w their demands for jury trials without compliance with the specific procedures set forth in Rule 39(a) . . . ."[199] *Penrod* answered in the negative, citing the Seventh Amendment.[200]

Rachal, therefore, diametrically departed from the Fifth Circuit's previous jurisprudence.[201] Why *Rachal* did this is speculative, but the illuminating question is: how?[202] *Rachal* distinguished *Penrod* by noting that the Jones Act claim in *Penrod* rested on diversity jurisdiction while plaintiff Rachal's at law claim was one of federal question jurisdiction.[203] Following *Penrod* to the letter of its facts, *Rachal* held that Jones Act

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[193] *Johnson*, 264 U.S. at 390–91; *see* Robertson & Sturley, *supra* note 160, at 670.
[194] *See supra* Parts II(C), (D), III, IV(A)(1), (2).
[195] *See supra* Part IV(A)(3).
[196] *See* Robertson & Sturley, *supra* note 160, at 663 (calling the distinction between one type of at-law jurisdiction over the other with respect to jury trial rights "unprecedented").
[197] 469 F.2d 897, 902–03 (5th Cir. 1972).
[198] *Id.* at 903.
[199] *Id.* at 902.
[200] *Id.* at 899.
[201] *Compare id.* at 899–903, *with supra* Parts II(A), (B), IV(A)(1), (2).
[202] *See infra* notes 204–11 and accompanying text.
[203] Rachal v. Ingram Corp., 795 F.2d 1210, 1216 (5th Cir. 1986).

claims in diversity vest a right to jury trial to both the plaintiff and defendant because diversity is an "independent basis" for jurisdiction.[204]

Recognizing that the jury trial right arises from the text of the Jones Act, the *Rachal* court also asserted by *fiat* that Jones Act claims heard as federal questions do not confer the right to jury trial to the defendant, because the right is one granted by statute.[205] *Rachal* noted that in a nondiversity action, the Jones Act right to a jury trial derives solely from statute.[206] Therein lies *Rachal*'s conceit: the right to a jury trial at law is not statutory as *Rachal* holds, but constitutional.[207] Yet, the *Rachal* court strangely buried an express admission to the contrary in a footnote, stating that the true basis for the jury trial was the Seventh Amendment and that diversity was merely a basis for jurisdiction.[208] If so, then why would all the normative rights to common law jurisdiction, including the defendant's right to preserve a jury trial demand, not attend?[209] In short, *Rachal* both fabricated the distinction between federal question and diversity jurisdiction for purposes of the vested right to a jury in a Jones Act claim and also contradicted its own argument.[210]

The distinction between federal question and diversity jurisdiction *vis-à-vis* jury trials is bizarre considering that diversity claims are tantamount to state general jurisdiction claims heard in a federal forum simply to avoid parochial local bias.[211] *If* the Seventh Amendment were inapplicable under one form of jurisdiction but not the other, it should be inapplicable in *diversity* jurisdiction since the Seventh Amendment is not incorporated to the states.[212] In fact, it was an open question whether the Seventh Amendment applied in diversity until the Supreme Court decided so in *Simler v. Conner*.[213] Federal question civil cases have always required a jury.[214]

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[204] *Id.* at 1213.

[205] *See* Robertson & Sturley, *supra* note 160, at 662–63 (stating that *Rachal* "seized upon" this distinction in order to control the outcome).

[206] *Rachal*, 795 F.2d at 1213.

[207] Curtis v. Loether, 415 U.S. 189, 192 (1974).

[208] *Rachal*, 795 F.2d at 1216 n.8; Robertson & Sturley, *supra* note 160, at 663 n.90.

[209] *See Curtis*, 415 U.S. at 192; Panama R.R Co. v. Johnson, 264 U.S. 375, 391 (1924) (noting that jury trial rights are incident to common law jurisdiction).

[210] *See supra* notes 201–209 and accompanying text.

[211] Chick Kam Choo v. Exxon Corp., 764 F.2d 1148, 1153 (5th Cir. 1985).

[212] *See Curtis*, 415 U.S. at 192 n.6 (expressly refusing to incorporate the Seventh Amendment to the states).

[213] Robertson & Sturley, *supra* note 160, at 667 n.121; *see* Simler v. Conner, 372 U.S. 221, 222 (1963) (considering the question whether, and deciding affirmatively that, the Seventh Amendment applies to diversity actions in federal court).

[214] *See Simler*, 372 U.S. at 222 (considering whether diversity actions, as a matter of course, would be subject to the Seventh Amendment, as "other actions,"—which can only mean federal question and statutory jurisdictional claims—already were).

2. *Linton*'s Problematic Dicta

On the questions actually presented, *Linton* was well-reasoned.[215] By distinguishing, at the very least, between a claim at law in federal court and a common law/*saving to suitors* claim in state court, *Linton* correctly applied jurisprudence that reaffirmed the states' sovereignty over procedure in their own forums and recognized that the Seventh Amendment is not applicable to state civil trials.[216] The *Linton* court held that state procedure would follow the plaintiff's election.[217] Again, almost all courts agree on the point that Jones Act cases in state court follow state procedure, whatever that may be.[218]

Linton went further than it needed to, however, by making explicit what *Rachal* had implied: it stated that defendants have no vested right to a jury trial in Jones Act cases pled as federal questions.[219] This was classic *obiter dictum* because it was wholly unnecessary to determining whether Jones Act defendants have a right to a jury trial in state court.[220] *Linton* could have ignored *Rachal*, but it chose to reinforce a dubious interpretation of the Jones Act.[221] As to the jury trial right in state court, *Linton* is correct; as to the federal at-law forum, it is superfluous and suffers the same constitutional defects as *Rachal*.[222]

C. *Evaluation of the* Peters *View: "O, that way madness lies; let me shun that."*[223]

The thrust of California's *Peters* view is that the plaintiff's election power is a substantive right not only over jurisdiction but over the mode of fact-finding at trial.[224] *Peters* effectively read this right as allowing the plaintiff to choose whether it wanted a jury *or nonjury* trial in Jones Act cases, irrespective of the rights California guarantees to its

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[215] Robertson & Sturley, *supra* note 160, at 663–64 (calling *Linton*'s explication of a state's right to control the jury right in a Jones Act trial "sensible").

[216] *Id.* at 664; *see* Linton v. Great Lakes Dredge & Dock Co., 964 F.2d 1480, 1486–90 (5th Cir. 1992).

[217] *Linton*, 964 F.2d at 1490.

[218] *See supra* Part II(A)–(E), (G).

[219] Robertson & Sturley, *supra* note 160, at 664; *see supra* note 55 and accompanying text.

[220] *See* Kastigar v. United States, 406 U.S. 441, 454–55 (1972) (finding *dictum* relied upon by petitioners "unnecessary to the Court's decision" and not "binding authority"); *see also* U.S. v. Title Ins. & Trust Co., 265 U.S. 472 (1924) (cognizing *dictum* as something not binding).

[221] *See supra* note 55 and accompanying text; *supra* part IV(B)(1).

[222] *See supra* Part IV(A)(1), (B)(1).

[223] WILLIAM SHAKESPEARE, KING LEAR act 3, sc. 4.

[224] *See supra* Parts II(F), IV(A)(3).

citizens.[225] Because the *Peters* court cites *Rachal* and jurisprudence examining FELA for this proposition, it misreads both. Significantly, every federal court that has reviewed whether state procedure should control one's jury rights in a Jones Act case has demurred from holding the right to a jury trial is substantive.[226] *Peters* simply misreads *Rachal*.[227]

It also misapplies FELA's mandatory right to jury trials.[228] *Dice v. Akron, Canton & Youngstown Railroad Co.* emphatically stated that "the right to trial by jury is too substantial a part of the rights accorded by [FELA] to permit it to be classified as a mere 'local rule of procedure' for denial in the manner that Ohio has here used."[229] In fairness to *Peters*, it is evident from the Supreme Court's holding in *Dice* that jury trials are substantively guaranteed in FELA causes of action.[230]

Nevertheless, there are five problems with *Peters*'s application of FELA's jury right guarantee to Jones Act cases. First, while the Supreme Court has recognized that FELA jurisprudence is substantially persuasive for resolving Jones Act claims, it necessarily cannot *always* be binding because of the jurisdictional and substantial factual differences between railroad casualty claims and claims involving casualties on navigable waters.[231] Second, FELA's universal guarantee of a right to a jury trial cannot be fully analogized to Jones Act claims since the plaintiff *does* have the right to plead his Jones Act claim in admiralty where no jury will hear it.[232]

Third, even if *Dice* applied to the Jones Act, it would protect the parties' rights to a jury in state court, regardless of state court procedure, and not the right to a *nonjury* trial.[233] There is absolutely no mention of a railroad employee's right to a bench trial in *Dice*.[234] *Peters* set forth the proposition that jury trial rights are substantive and guaranteed to the plaintiff no matter the forum, but then fallaciously extended the proposition to guarantee the plaintiff the right to a bench trial.[235]

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[225] *See supra* Part IV(A)(3).
[226] *See supra* Part II(A)–(E), (G).
[227] *See supra* Part IV(A)(1), (3).
[228] *See infra* notes 231–38 and accompanying text.
[229] 342 U.S. 359, 363 (1952).
[230] *Id.* at 362–63 (prohibiting a bench trial on issues associated with a FELA claim).
[231] *See* Kernan v. Am. Dredging Co., 355 U.S. 426, 439 (1958).
[232] Robertson & Sturley, *supra* note 3, at 263; *see* Panama R.R. Co. v. Johnson, 264 U.S. 375, 388–89, 391 (1924).
[233] Robertson & Sturley, *supra* note 3, at 263; *cf. Dice*, 342 U.S. at 363.
[234] *See generally id.*
[235] Peters v. City & Cnty. of San Francisco, 1995 AMC 788, 792 (Cal. Ct. App. Mar. 14, 1994).

Fourth, the application of FELA as a guarantee of a nonjury trial is hard to indulge because it would be unnecessary for a seaman who can already sue without a jury in admiralty.[236]

Fifth, and finally, no state or federal court has ever agreed with *Peters*'s broad reading that the Jones Act's jury right substantively overrides state procedure.[237] *Peters* also conflicts with the opinion of the Ninth Circuit, i.e., *Craig*, further highlighting the split of authority on this issue of the right to trial by jury in Jones Act cases. It also ignores *Panama Railroad v. Johnson*'s clear distinction between the jurisdiction of a Jones Act case and the procedural incidents that arise out of that jurisdiction, which include the right to trial by jury.[238]

D. *Evaluation of the* Bowman *View: Here Come the "Ineddicated, Vulgar, Groveling Wretches"*[239]

In light of the interplay between the original language of the Jones Act and the analysis provided in *Panama Railroad Co. v. Johnson*, *Bowman*'s narrow textual analysis regarding the placement of the phrase *right to trial by jury* is even more compelling.[240] Whether it is true that Congress intended to establish a negligence cause of action solely at law without any reference to admiralty jurisdiction whatsoever, or create the jurisdictional election as *Johnson* opined, both point to the conclusion that the phrase *right of trial by jury* was a modifier of some antecedent.[241] Had the *Johnson* Court read the Jones Act at face value, the phrase *right of trial by jury* would have served as one of several linguistic markers denoting a common law cause of action.[242] Even pursuant to *Johnson*, however, *right to trial by jury* is still best interpreted as a linguistic modifier of the antecedent jurisdictional election.[243]

Rachal and *Linton* have attempted to breathe independent life into *right to trial by jury* as part of the plaintiff's election power, an approach Illinois has soundly rejected.[244] Strictly speaking, though, *Bowman* suffers from the same problem *Linton* does, which is that Illinois engaged in *obiter dicta* by specifically rejecting *Rachal* and its line of

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[236] *See* Rule 9(h); *see also* Romero v. Int'l Terminal Operating Co., 358 U.S. 354, 363 (1959) (acknowledging no right to a jury trial in admiralty).

[237] *See supra* Part II(A)–(E), (G).

[238] 264 U.S. 375, 390–91.

[239] *See* CHARLES DICKENS, OLIVER TWIST 28 (Arthur Pober ed., Sterling Publ'g Co. 2008) (1838) (speaking of juries).

[240] *See supra* notes 100, 176–91 and accompanying text.

[241] *See* notes 100, 176–91 and accompanying text.

[242] *See supra* notes 176–91 and accompanying text.

[243] *See supra* note 100 and accompanying text.

[244] *See supra* Part IV(A)(1), (2).

cases.[245] *Bowman* was actually overruling a lower court's use of *Rachal* as support for the proposition that the plaintiff's election power includes control over the right to a jury trial, but the fact that the *Bowman* court took the time to expressly reject *Rachal* technically means it was engaging in *dicta*.[246] Still, Illinois has both acknowledged the problem with *Rachal* and *Linton* and helped to create a split of authority leading to *Endicott*—not just with the Fifth's Circuit's view, but also by extension with the Seventh Circuit's view.[247]

E. Endicott's *Confusion and Clarity*

The Washington Supreme Court quite boldly states what *Panama Railroad Co. v. Johnson* skirted around: the Jones Act by its own terms established only an action at law.[248] The *Endicott* court recognized that *Johnson* was a "fictitious reading of the [Jones Act]" meant to sidestep constitutional defects.[249] The court, however, incorrectly opined that the "ambiguity" left by *Johnson*'s creation of the plaintiff's election power pitted the Fifth Circuit, Seventh Circuit, Louisiana and Illinois against the Ninth Circuit and California.[250] The court clearly missed the nuanced tripartite view between the various courts and inaccurately conflated the Ninth Circuit's view with California's.

In fairness to Washington, what concerned *Endicott*, that is, the issue of whether the right to a jury trial in a *saving to suitors* case is procedural or substantive, can elicit only two responses: yes or no. By the time Washington entered the fray, every court other than the California *Peters* court agreed that the *saving to suitors* clause gave the states the procedural power to fashion their own common law remedies.[251] It appears Washington conflated *Craig* and *Peters* because both used "exclusio alterius reasoning" to hold that the Jones Act's failure to mention the defendant necessarily meant the Act was giving a unilateral right to the plaintiff to select a jury.[252] Fundamentally, though, *Craig* does not hold that states must always prohibit defendants from

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[245] *See* Kastigar v. United States, 406 U.S. 441, 454–55 (1972); *supra* note 217 and accompanying text; *see also* U.S. v. Title Ins. & Trust Co., 265 U.S. 472 (1924) (cognizing *dictum* as something not binding).

[246] *See* sources cited *supra* note 245.

[247] David W. Robertson & Michael F. Sturley, *Recent Developments: Developments in Admiralty and Maritime Law at the National Level and in the Fifth and Eleventh Circuits*, 35 TUL. MAR. L.J. 493, 522 (2011).

[248] Endicott v. Icicle Seafoods, Inc., 224 P.3d 761, 764–65 (Wash. 2010); *see supra* notes 186–89 and accompanying text.

[249] *Endicott*, 224 P.3d at 765; *see supra* notes 191–92 and accompanying text.

[250] *See supra* Part IV(A) (summarizing the split).

[251] *See supra* Part II.

[252] *See* Endicott v. Icicle Seafoods, Inc., 224 P.3d 761, 765 (Wash. 2010).

electing jury trials in Jones Act cases.[253] Only *Peters* currently holds this, which means that Washington is actually not in conflict with the Ninth Circuit.[254] But, because Washington *asserts* that it conflicts with the federal circuit in which it lies, this may help draw the Supreme Court's attention to the matter.

Also, by "find[ing] the analysis in *Bowman* persuasive," Washington expressly joined Illinois, which explicitly rejected *Rachal* and is itself in conflict with its own federal circuit, the Seventh Circuit.[255] By expressly following *Bowman*, Washington added to the confusion because it effectively asserted the view that the plaintiff's election power is the same in both Illinois and the Fifth Circuit.[256] Yet, because *Endicott* was focused on whether the plaintiff's election power involved a matter of jurisdiction, it did not need to address the Fifth Circuit's considerations of *federal* procedural rights in a federal forum. In other words, on the point that mattered to Washington (jury rights in state forums) the court was in agreement with the Fifth Circuit *and* Illinois, and there really were only two views.[257] The Washington Supreme Court did not need to address the crux of the matter in at-law cases in federal court; thus, it was unnecessary to formally recognize a doctrinal split between Illinois and the Fifth Circuit.

Strangely, however, *Endicott* did informally acknowledge the Fifth Circuit's contradictory view toward diversity and nondiversity jurisdiction in a footnote.[258] The Washington Supreme Court characterized the Ninth Circuit's view as "uncritically adopt[ing]" the Fifth Circuit's view toward diversity- and nondiversity-driven jury rights.[259] The court lent credence to the Fifth Circuit's distinction by noting that both cases were "consistent with the jurisdictional interpretation of the Jones Act."[260] Thus, *Endicott* implicitly agreed with *Rachal* about the distinction between the defendant's right to a jury trial *vis-à-vis* diversity or federal question jurisdiction while expressly adopting *Bowman*'s reasoning.[261] Nevertheless, *Bowman* expressly rejects the jurisdictional distinction *Rachal* and *Linton* make.[262]

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[253] *See* Craig v. Atl. Richfield Co., 19 F.3d 472, 475–76 (9th Cir. 1994).

[254] *See* Peters v. City & Cnty. of San Francisco, 1995 AMC 788, 792 (Cal. Ct. App. Mar. 14, 1994). *Compare Endicott*, 224 P.3d at 765, *with Craig*, 19 F.2d at 475–76.

[255] *See Endicott*, 224 P.3d at 767; *supra* parts II(D), IV(A)(2).

[256] *See Endicott*, 224 P.3d at 765, 767.

[257] *See id.*; *supra* Part IV(A)(1)–(2).

[258] *See Endicott*, 224 P.3d at 766 n.1.

[259] *Id.*

[260] *Id.*

[261] *Compare id.*, *with id.* at 767.

[262] Bowman v. Am. River Transp., 838 N.E.2d 949, 957 (Ill. 2005).

V. CONCLUSION

Endicott expressly agrees with the reasoning of both *Bowman* and the *Rachal-Linton* dyad even though Illinois's and the Fifth Circuit's views are irreconcilable. *Endicott* expressly rejects *Craig* even though *Craig* adopts the reasoning of *Rachal* and *Linton* wholesale, leading *Endicott* nominally to reject controlling federal law in the Ninth Circuit where Washington sits. *Peters* is in conflict with every other case, including *Craig*, even though the *Peters* court purports to have found support in *Rachal* and *Linton*. *Rachal* contrived a way to ignore *Penrod*, previous jurisprudence on point in its circuit, while *Linton* quite unnecessarily reinforced *Rachal*'s mistake. *Bowman*'s express rejection of *Rachal* impliedly puts it in direct conflict with *Wingerter*, controlling federal law in the Seventh Circuit where Illinois sits. And Louisiana's *Parker* holding, which comports with *Bowman*'s (and *Endicott*'s) views about state jurisdictional authority over jury trials, relied on the Fifth Circuit for its reasoning. Finally, *Endicott* mislabels which jurisprudence is on which side. This confusion begs for Supreme Court intervention.

Post-*Endicott*, whenever the next Jones Act case contemplating the right to jury trial is ripe for review, the Supreme Court should grant *certiorari* to absolve the courts of their patent confusion. Under *Panama Railroad Co. v. Johnson*, as understood by every published decision on point, states may determine their own common law remedies, including whether and how to grant jury trials, for all Jones Act cases they hear, and the Supreme Court should affirm this.

Moreover, there is strong, almost unwavering, support in the federal courts for the notion that the Jones Act defendant acquires his right to a jury trial only in a diversity claim at law, and not in a federal question Jones Act claim. The Supreme Court, however, should not hesitate to overrule this view. Instead, the Supreme Court should reaffirm the election power that it bestowed upon plaintiffs in *Johnson* and that it administers through Rule 9(h)—the right to determine the jurisdictional basis and forum for proceeding in Jones Act cases. But once the plaintiff has selected a common law jurisdictional basis in federal court, the Supreme Court should vest the right to trial by jury to both the plaintiff and the defendant. It is only fair, and to do otherwise would be unseemly. While the Supreme Court gave the Jones Act seaman, the canonical ward of the admiralty courts in need of greater protections, the initial unassailable choice to sue for negligence in admiralty or at law, the Court should also honor the strictures and protections of the Seventh Amendment, which grants all parties the right to demand a jury once a claim is filed at law. Such a holding would remedy the current jurisprudential affray, reinforce procedural fairness once the pleadings

have been filed, comport with the Court's own previous jurisprudence, and, chiefly, honor the Constitution.