The (Un)Constitutionality of Section 632 of the Edge Act: An Analysis Under Article III and Theories of Protective Jurisdiction

*Elizabeth R. Sheyn**

I. INTRODUCTION

Is a statute that establishes federal question jurisdiction over cases with non-diverse parties and involving purely state law claims constitutional? "The absence of diversity (and any other apparent [A]rticle III[1] ground for jurisdiction) looks like an embarrassment to the principle that Congress may not augment the jurisdictional scope of [A]rticle III."[2] Despite this fact, federal courts have tacitly approved Congress's authority to place all civil suits arising out of "transactions involving international or foreign banking . . . or out of other international or foreign financial operations"[3] in the federal courts.[4]

The Edge Act of 1919 established original federal district court jurisdiction over the two types of suits mentioned above; any defendant named in such a suit may remove the suit from state court to federal

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1. This constitutional provision places within the "judicial power" of the federal courts "all Cases, in Law and Equity, arising under th[e] Constitution, the Laws of the United States, and Treaties made . . . under their Authority . . . ." U.S. CONST. art. III, § 2, cl. 1. Although this grant of federal jurisdiction is in Article III, section 2, clause 1, this article will generally use the shorthand term "Article III" in referring to this provision.

2. Scott A. Rosenberg, Note, *The Theory of Protective Jurisdiction*, 57 N.Y.U. L. REV. 933, 935 (1982).

3. 12 U.S.C. § 632 (2006). Until relatively recently, courts generally did not rely on the "out of other international or foreign financial operations" clause of section 632 to establish federal jurisdiction. *See infra* Part III.C.1 (addressing the federal courts' increasing reliance on this provision). Thus, unless otherwise specified, when discussing the Edge Act, this article is referring to the "arising out of transactions involving international or foreign banking" provision of section 632.

4. *See infra* Parts III.B.1, III.B.2 (discussing the courts' "broad" and "narrow" interpretations of the section 632 jurisdictional grant, respectively).

district court.[5] Depending on how broadly a federal court interprets the provisions of the Edge Act, it may provide a federal jurisdictional basis for suits that ordinarily have none, such as suits involving purely state law claims without any diversity of citizenship.[6] This result has been borne out in several recent court decisions involving the extension of federal question jurisdiction under the Edge Act to claims of state law fraud, breach of contract, and wrongful termination in violation of state public policy.[7]

Even more important than the proper statutory interpretation of the Edge Act is the broader constitutional analysis of the Act.[8] Courts have recently been neglecting Article III's limitations with respect to the Edge Act (and potentially with respect to similar statutes).[9] Particularly

5. 12 U.S.C. § 632 (2006). The other provision of the Edge Act pertains to lawsuits to which any Federal Reserve bank is a party. Such suits are also "deemed to arise under the laws of the United States, and the district courts of the United States shall have original jurisdiction of all such suits." *Id.* Moreover, "any Federal Reserve bank which is a defendant in any such suit may, at any time before the trial thereof, remove such suit from a [s]tate court into the district court of the United States for the proper district by following the procedure for the removal of causes otherwise provided by law." *Id.*

6. *See* Elizabeth R. Sheyn, *The "Technicalities" of Edge Act Jurisdiction: Advocating for the Federal Courts' Adoption of and Adherence to a Uniform and Narrow Interpretation of 12 U.S.C. § 632*, 41 U. TOL. L. REV. (forthcoming 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1461823 (proposing a uniform and narrow standard for interpreting the Edge Act of 1919); Michael C. Lasky & Sean P. Cameron, *The Cutting Edge: A Non-Traditional Basis for Federal Jurisdiction Under the Edge Act*, METROPOLITAN CORP. COUNS., Apr. 2009, at 50, *available at* http://www.metrocorpcounsel.com/pdf/2009/April/50.pdf.

> [C]ourts interpret section 632 broadly and routinely grant jurisdiction pursuant to it even in cases based on state law causes of action and where the international or foreign banking activity is not central to the case. Thus, any element of international finance—however remote or marginal—will satisfy the statute.

Id.; *see also* Steven M. Davidoff, *Section 632: An Expanded Basis of Federal Jurisdiction for National Banks*, 123 BANKING L.J. 687, 688 (2006).

> [T]he scope of national banks' ability to access federal courts by invoking [s]ection 632 is clearer, and perhaps more broader [sic], than ever. National banks should acquaint themselves and make use of this open doorway to fulfil[l] [sic] [s]ection 632's potential for the more effective resolution of international or foreign banking and financial disputes.

7. *See, e.g.*, Burgos v. Citibank, N.A., 432 F.3d 46, 50 (1st Cir. 2005) (finding that a contractual agreement between the consumer and the bank arose out of "traditional banking activity"); Sollitt v. KeyCorp, No. 1:09-CV-43, 2009 WL 367494, at *4 (N.D. Ohio Feb. 11, 2009) (finding the state law wrongful discharge claim "integrally tied to banking activity" to merit federal question jurisdiction); Warter v. Boston Sec., S.A., No. 03-81026, 2004 WL 691787, at *8 (S.D. Fla. Mar. 22, 2004) (finding that wire transfers and investment advice constitute "international banking activities," thus conferring jurisdiction on the federal district court under the Edge Act).

8. *See* Sheyn, *supr*a note 6 (offering a proposed interpretation of section 632 of the Edge Act).

9. *See, e.g.*, Unicover Corp. v. U.S. Postal Serv., 859 F. Supp. 1437, 1442 (D. Wyo. 1994) (recognizing that "[t]he district courts shall have original jurisdiction of any civil action arising

during periods of financial uncertainty and bank failures, when issues concerning the federal jurisdiction of lawsuits against or implicating banks and other financial institutions come to the fore, courts must evaluate and resolve the question of the constitutionality of the Edge Act.

This article argues that section 632 of the Edge Act is likely unconstitutional because it does not fit within Article III's traditional bounds of federal question jurisdiction. For example, the Supreme Court has declared that a jurisdictional statute that is nearly identical to the Edge Act exceeds the limits of Article III.[10] Additionally, none of the three recognized theories of "protective jurisdiction"[11] fully apply to the Edge Act—and even if one did, the Court has not yet legitimized protective jurisdiction and is unlikely to do so in the near future.[12]

Part II of this article describes Article III federal question jurisdiction and the three theories of protective jurisdiction. Part III introduces the Edge Act, with Part III.A describing its historical context, Part III.B discussing the modern interpretations (broad and narrow) of the Act,

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under any Act of Congress relating to the postal service" (citing 28 U.S.C. § 1339 (2006)); FDIC v. Huntington Towers, Ltd., 443 F. Supp. 316, 319 (E.D.N.Y. 1977) (finding that the enactment of 12 U.S.C. § 1819, which provides that "all suits of a civil nature at common law or in equity to which the [Federal Deposit Insurance Corporation (FDIC)] is a party *shall be deemed* to arise under the laws of the United States," 12 U.S.C. § 1819(b)(2)(A) (2006) (emphasis added), was within Congress's authority under the Commerce Clause of the Constitution).

10. *See infra* notes 203–209 and accompanying text (discussing the Court's decision in *Mesa v. California*).

11. Stated very simply, protective jurisdiction is "jurisdiction over cases (1) in federal court (2) between non-diverse parties (3) governed by nonfederal rules of decision . . . ." Rosenberg, *supra* note 2, at 936. Put another way:

> [T]he theory of protective jurisdiction begins by identifying a field of regulatory interest over which Congress may exercise broad legislative power. The theory suggests that Congress may have authority to protect an area of federal interest from potentially hostile state court adjudication by shifting the litigation into the presumptively more friendly confines of a federal court, perhaps even where it fails to regulate the field through the passage of rules of federal substantive law to govern the disputes.

James E. Pfander, *The* Tidewater *Problem: Article III and Constitutional Change*, 79 NOTRE DAME L. REV. 1925, 1927 (2004). The theory of protective jurisdiction was originally introduced by Professors Paul J. Mishkin and Herbert Wechsler. *See* Paul J. Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157, 184–96 (1953) (postulating that "the purpose of such jurisdiction would be the protection of some congressionally favored interest by exploiting the institutional differences between the federal and state courts"); Herbert Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROBS. 216, 224–25 (1948) (stating that the power of Congress to confer federal judicial power "should extend . . . to all cases in which Congress has authority to make the rule to govern disposition of the controversy" but is content to allow the states to provide the rule).

12. *See infra* notes 57, 78–81 and accompanying text (describing how "protective jurisdiction" is indeed just a theory, as it has not been utilized in the court system).

and Part III.C summarizing the recent case law that has further broadened the reach of Edge Act jurisdiction. Section III.D outlines a statutory-level approach to interpreting and applying the Edge Act that addresses the many problems associated with the federal courts' currently maligned understanding and application of the provisions of section 632. Finally, Part IV evaluates the constitutionality of the Edge Act under Article III and theories of protective jurisdiction, concluding that section 632 is likely unconstitutional or, at the very least, that its current interpretation raises grave constitutional questions.

II. ARTICLE III JURISDICTION AND PROTECTIVE JURISDICTION

An introduction to Article III (federal question) jurisdiction and the three theories of protective jurisdiction is a necessary prerequisite to the analysis of the constitutionality of the Edge Act. The following Parts discuss these concepts, in turn.

A. Article III (Federal Question) Jurisdiction

Article III, section 2, clause 1 of the United States Constitution places within the "judicial power" of the federal courts "all Cases, in Law and Equity, arising under th[e] Constitution, the Laws of the United States, and Treaties made . . . under their Authority."[13] The limited historical evidence that exists regarding the meaning of the phrase "arising under," as it was developed and used during the constitutional convention debates, suggests "that Article III was intended to allow for federal jurisdiction over all cases involving the 'national peace [and] harmony.'"[14] In other words, "matters internal to one state would be beyond the reach of the federal judicial power (other than diversity cases), but 'where the Union is in some measure concerned,' federal jurisdiction would be appropriate."[15] Some scholars argue that there "is no limitation in Article III on what kind of law [arises under the Constitution] or whether it has to be based on substantive rather than procedural concerns. . . . There is no constitutional language, inside or outside Article III, indicating [what] jurisdictional grant[s] [would be]

13. U.S. CONST. art. III, § 2, cl. 1.

14. Eric J. Segall, *Article III as a Grant of Power: Protective Jurisdiction, Federalism and the Federal Courts*, 54 FLA. L. REV. 361, 367 (2002) (quoting Carole E. Goldberg-Ambrose, *The Protective Jurisdiction of the Federal Courts*, 30 UCLA L. REV. 542, 587 (1983)).

15. *Id.* at 368 (quoting 4 THE FOUNDERS' CONSTITUTION 233 (Phillip Kurland & Ralph Lerner eds., 1987)). *But see* Anthony J. Bellia, Jr., *The Origins of Article III "Arising Under" Jurisdiction*, 57 DUKE L.J. 263, 270–73 (2007) (utilizing English law, evidence from the debates surrounding the framing and ratification of Article III, and the Marshall Court's treatment of Article III to argue that Article III "arising under" jurisdiction is limited "to cases implicating the supremacy of actual federal laws").

improper."[16]

The primary statutory means of granting Article III power to the federal courts is 28 U.S.C. § 1331.[17] This statute uses language that is nearly identical to that included in Article III, and its primary effect is to permit federal courts to resolve federal questions.[18] Commentators argue that federal question jurisdiction has three purposes: to preserve "uniformity in federal law, [provide] a forum hospitable to federal law, and . . . [provide] a judge likely to have experience in federal law."[19]

Despite the parallel language of Article III's "arising under" clause and 28 U.S.C. § 1331, constitutional federal question jurisdiction is broader than the statutory federal question jurisdiction.[20] For example, the so-called "well-pleaded complaint rule generally limits jurisdiction

16. Segall, *supra* note 14, at 368. There is a reasonable structural argument, however, against an interpretation of Article III that allows Congress to pass pure jurisdictional statutes that further its Article I powers. If the "arising under" language reaches that far, the other categories of jurisdiction listed in Article III would be unnecessary and redundant because all of those classes of cases also implicate the national interest and Congress's Article I powers. . . . Thus, . . . a reading of the "arising under" clause that permits jurisdiction over any case implicating national concerns renders the remainder of Article III superfluous and therefore cannot be correct.

Id. at 369.

17. "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331 (2006).

18. John F. Preis, *Reassessing the Purposes of Federal Question Jurisdiction*, 42 WAKE FOREST L. REV. 247, 250 (2007).

19. *Id.*; *see also* Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg. Co., 545 U.S. 308, 312 (2005) (noting that a federal forum provides "experience, solicitude, and hope of uniformity" on federal issues); AM. LAW INST., STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 164–65 (1969) ("The federal courts have acquired a considerable expertness in the interpretation and application of federal law which would be lost if federal question cases were given to the state courts.").

20. Linda S. Mullenix, *Complex Litigation Reform and Article III Jurisdiction*, 59 FORDHAM L. REV. 169, 198 (1990); *see also* Verlinden B.V. v. Cent. Bank of Nig., 461 U.S. 480, 494 (1983) ("Although the language of § 1331 parallels that of the '[a]rising [u]nder' [c]lause of Art. III, this Court never has held that statutory 'arising under' jurisdiction is identical to Art. III 'arising under' jurisdiction. Quite the contrary is true."); Romero v. Int'l Terminal Operating Co., 358 U.S. 354, 378–79 (1959) (interpreting § 1331's "arising under" language more restrictively than the parallel constitutional language due to the "demands of reason and coherence, and the dictates of sound judicial policy which have emerged from [the statute's] function as a provision in the mosaic of federal judiciary legislation. It is a statute, not a Constitution, we are expounding."); James E. Pfander, *Protective Jurisdiction, Aggregate Litigation, and the Limits of Article III*, 95 CAL. L. REV. 1423, 1423 n.2 (2007) [hereinafter Pfander, *Protective Jurisdiction*] (stating that scholars "conventionally note that the grant of power in Article III extends more broadly than the general grant of federal question jurisdiction in § 1331" and pointing out that the satisfaction of § 1331 requires "the existence of a substantial federal question on the face of the well-pleaded complaint"); Kenneth C. Randall, *Federal Questions and the Human Rights Paradigm*, 73 MINN. L. REV. 349, 367–68 (1988) (noting that "despite the dictates of legislative history and literalism, 'Art. III arising under jurisdiction is broader than federal question jurisdiction under § 1331'" (quoting *Verlinden*, 461 U.S. at 495)).

under 28 U.S.C. § 1331 to federal questions raised in the complaint (i.e., federal defenses do not give rise to federal jurisdiction under § 1331)."[21]

The past two hundred years of constitutional analysis have produced two related theories of Article III federal question jurisdiction: the "original ingredient" theory and the protective jurisdiction theory.[22] The Supreme Court advanced the "original ingredient" theory—"the broadest possible construction of arising under jurisdiction"[23]—in *Osborn v. Bank of the United States*.[24] At issue in *Osborn* was whether the "arising under" clause of Article III granted Congress authority to "enact a statute giving the lower federal courts jurisdiction over any claim brought by or against the Bank of the United States."[25] Chief Justice Marshall's landmark ruling stated "that if a federal question 'forms an ingredient of the original cause,' then jurisdiction over the case is properly vested in federal courts."[26] In applying the holding in *Osborn* the same day it was issued, the Court extended federal jurisdiction to a state law contract claim brought by the Bank.[27] It reasoned that because Congress created the Bank and allowed it to sue and to be sued, Article III's "arising under" requirement was satisfied.[28] Such a minimal amount of federal law included in the complaint satisfied the demands of the Constitution because, according to the

21. Lumen N. Mulligan, *Why* Bivens *Won't Die: The Legacy of* Peoples v. CCA Detention Centers, 83 DENV. U. L. REV. 685, 708 (2006) [hereinafter Mulligan, *Why* Bivens *Won't Die*]; *see also* Merrell Dow Pharm., Inc. v. Thompson, 478 U.S. 804, 808 (1986) (stating that the well-pleaded complaint rule is an interpretation of § 1331, not of Article III); Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149, 152 (1908) (establishing the well-pleaded complaint rule).

> Doctrinal orthodoxy states that the [Supreme] Court has established two independent and irreconcilable tests for determining when a complaint raises a well-pleaded federal question. . . . Under [a test advocated for by Justice Holmes], § 1331 jurisdiction arises if, and only if, the cause of action is created by federal law. Under [a test articulated in *Smith v. Kansas City Title & Trust Co*., 255 U.S. 180, 199–202 (1921)], a state cause of action may arise under § 1331 if an element of the claim necessarily requires the construction of federal law.

Lumen N. Mulligan, *A Unified Theory of 28 U.S.C. § 1331 Jurisdiction*, 61 VAND. L. REV. 1667, 1676–77 (2008) [hereinafter Mulligan, *Unified Theory*].

22. Mullenix, *supra* note 20, at 198.

23. *Id.* at 199.

24. 22 U.S. (9 Wheat.) 738 (1824), *superseded in part by statute*, Act of June 25, 1948, ch. 85, 62 Stat. 934 (codified as amended at 28 U.S.C. § 1349 (2006)).

25. Goldberg-Ambrose, *supra* note 14, at 547; *see also Osborn*, 22 U.S. at 825 (discussing whether "arising under" jurisdiction gives the federal district courts jurisdiction over suits brought against the Bank of the United States).

26. Mullenix, *supra* note 20, at 198 (quoting *Osborn*, 22 U.S. at 823).

27. Goldberg-Ambrose, *supra* note 14, at 547 (citing Bank of U.S. v. Planters' Bank, 22 U.S. (9 Wheat.) 904 (1824)).

28. *Planters' Bank*, 22 U.S. at 907.

Court, the defendant could challenge the Bank's right to sue.[29] Furthermore, "[e]ven if the defendant did not actually challenge this federal element, the potential for such a contest coupled with the need to determine federal jurisdiction from the face of the complaint justified treating the claim as one arising under federal law."[30]

While it has not expressly overruled *Osbor*n, the Court has narrowed its interpretation of Article III's "arising under" jurisdiction.[31] For example, in *Verlinden B.V. v. Central Bank of Nigeria*,[32] the Court considered whether actions against foreign states brought pursuant to the Foreign Sovereign Immunities Act (FSIA)[33] were cases "arising under" federal law for purposes of Article III.[34] Instead of deciding "the precise boundaries of Article III jurisdiction," the Court held that such actions arise under federal law because a court must resolve in each case the federal question of whether the foreign state has immunity.[35]

Subsequently, in *Mesa v. California*, the Court had to decide whether claims brought against federal officers acting in their official capacities arose under Article III, thereby permitting federal courts to have

29. Goldberg-Ambrose, *supra* note 14, at 547 (citing *Osborn*, 22 U.S. at 821–23).

30. *Id.*

31. Laura S. Fitzgerald, *Is Jurisdiction Jurisdictional?*, 95 NW. U. L. REV. 1207, 1244 n.152 (2001) (collecting authorities); *see also* Mesa v. California, 489 U.S. 121, 136–37 (1989) (arguing that "grave constitutional problems" would result from grants of "arising-under" jurisdiction in cases where no "substantive" federal-law question was actually presented and stating that the Court had not, in the past, "found the need to adopt a theory of 'protective jurisdiction' to support Art. III 'arising under' jurisdiction"); Verlinden B.V. v. Cent. Bank of Nig., 461 U.S. 480, 492–93 (1983) (noting that the "breadth" of *Osborn*'s Article III definition "has been questioned"); Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 471–82 (1957) (Frankfurter, J., dissenting) (contending that *Osborn*'s understanding of Article III rested on "premises that . . . are subject to criticism" and generally dismissing various theories of "protective" federal question jurisdiction stemming from *Osborn*); Rosenberg, *supra* note 2, at 965–74 (1982) (critiquing *Osborn* as the "notorious" "grandfather of the theory of protective jurisdiction"). *But see* Am. Nat'l Red Cross v. S.G., 505 U.S. 247 (1992) (citing *Osborn* with approval in ruling that Congress may confer "arising under" jurisdiction over nonfederal claims involving federally chartered corporations).

32. 461 U.S. 480 (1983).

33. 28 U.S.C. § 1330 (2006). This statute "regulates the manner in which individuals may pursue claims against foreign sovereigns." Pfander, *Protective Jurisdiction*, *supra* note 20, at 1433.

34. *Verlinden*, 461 U.S. at 491; *see also* Pfander, *Protective Jurisdiction*, *supra* note 20, at 1433 (reasoning that for American citizens, there are no jurisdictional problems under the FSIA; "Article III extends federal jurisdiction on the basis of party alignment to controversies between a foreign nation and citizens of one of the (United) States. In *Verlinden* [, however] . . . party-alignment jurisdiction was unavailable; the plaintiff was a Dutch corporation and the defendant was a foreign nation.").

35. *Verlinden*, 461 U.S. at 493.

removal jurisdiction over such claims.[36] There, the Court acknowledged the "grave constitutional problems" surrounding the meaning of Article III "arising under" jurisdiction and held that the "statute . . . authorize[d] removal only when a defendant federal officer raises an actual federal defense."[37] Thus, the Court again avoided precisely defining the limits of Article III "arising under" jurisdiction.[38]

B. Protective Jurisdiction

Protective jurisdiction—an offshoot of the "original ingredient" theory—extends Article III federal question jurisdiction to cases or controversies that do not implicate the construction or interpretation of a particular federal law.[39] Protective jurisdiction is just a concept—not a means of obtaining federal jurisdiction; according to Professor Redish, "[i]t is merely a method of determining the constitutionality under Article III of congressional attempts to vest jurisdiction in the federal courts over purely state law matters."[40]

Scholars generally recognize three theories of protective jurisdiction.[41] The first, advanced by Professor Wechsler, states that "Congress should be seen as having the power to provide for federal

36. Bellia, *supra* note 15, at 267 (citing *Mesa*, 489 U.S. at 137). In *Mesa*, two United States Postal Service mail truck drivers were cited for traffic violations under California state law. *Mesa*, 489 U.S. at 123. The cases were subsequently removed to federal court under the federal officer removal statute, *id.* at 123–24, which states in part:

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

28 U.S.C. § 1442(a)(1) (2006). The government argued that § 1442(a)(1) should be read to permit removal without the assertion of a federal defense "based on the plain language of the removal statute and on the substantial federal interests that would be protected by permitting universal removal of all civil actions and criminal prosecutions brought against any federal official 'for the manner in which he has performed his federal duties.'" *Mesa*, 489 U.S. at 134 (citation omitted). The Court disagreed with the government, however, holding that 28 U.S.C. § 1442 could not "independently support" federal jurisdiction. *Id.* at 136.

37. Bellia, *supra* note 15, at 267 (citing *Mesa*, 489 U.S. at 137).

38. *See Mesa*, 489 U.S. at 137 (finding no need to "adopt a theory of 'protective jurisdiction' to support [Article] III 'arising under' jurisdiction").

39. Mullenix, *supra* note 20, at 199 (noting that "protective jurisdiction's crucial feature is its grant of federal jurisdiction over a case predicated upon state, not federal, substantive law").

40. MARTIN H. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 90 (2d ed. 1990).

41. Pfander, *Protective Jurisdiction*, *supra* note 20, at 1428.

jurisdiction over *any state law claim* for which Congress could, in the exercise of its enumerated powers, legislate the rule of decision."[42] Consequently, if Congress could regulate contracts of a certain kind through the commerce power, it would "be 'free to take the lesser step of drawing suits upon such contracts to the district courts without' displacing substantive state law."[43] As Professors Bickel and Wellington suggest, it provides "a forum for the enforcement of state law in a field which Congress could occupy [as] a way of seeking a degree of uniformity while leaving the maximum room for the exercise of initiative by the states."[44] Thus, pursuant to Wechsler's theory, "state law claims would arise under a federal statute that simply conferred jurisdiction on the federal courts."[45]

The second recognized theory of protective jurisdiction, articulated by Professor Mishkin, would permit Congress to grant federal jurisdiction over any area that Congress *could* regulate. Unlike Wechsler, Mishkin would require that Congress *had actually regulated* in that area.[46] Mishkin criticizes the notion that "Congress could simply confer jurisdiction on federal courts to hear claims involving particular parties who might otherwise face state court bias; he view[s] the heads of party-alignment jurisdiction in Article III (including diversity matters) as exhaustively specifying Congress's authority to address such bias."[47] Indeed, Mishkin's theory of protective jurisdiction attempts to remedy state courts' "uninformed or hostile attitude" toward congressional legislative programs (or federal programs).[48] Thus, according to Mishkin, where Congress has set out a federal policy regulating a particular field, Article III's "arising under" clause allows federal courts to have jurisdiction over all of the cases in the field,

42. *Id.* (quoting Wechsler, *supra* note 11, at 224–25) (emphasis added).

43. *Id.* (quoting Wechsler, *supra* note 11, at 225).

44. Alexander M. Bickel & Harry H. Wellington, *Legislative Purpose and the Judicial Process: The* Lincoln Mills *Case*, 71 HARV. L. REV. 1, 20 (1957).

45. Pfander, *Protective Jurisdiction*, *supra* note 20, at 1428.

46. *Id.*; *see also* Mullenix, *supra* note 20, at 199–200.

> Professor Wechsler states the broader theory of protective jurisdiction and Professor Mishkin the narrower. Under either view, [A]rticle III federal question jurisdiction is analytically tied to [A]rticle I legislative power. The broader view posits that protective jurisdiction is supportable inferentially where Congress could have legislated some substantive interest under [A]rticle I, but has not done so. The narrower theory posits that, for protective jurisdiction to be applicable, Congress must have manifested a federal interest actively through legislation. (citations omitted).

Id.

47. Pfander, *Protective Jurisdiction*, *supra* note 20, at 1428–29 (citing Mishkin, *supra* note 11, at 192).

48. Mishkin, *supra* note 11, at 195.

including cases that would be controlled by state law.[49]

Professor Goldberg-Ambrose offers a third theory of protective jurisdiction.[50] To begin, Goldberg-Ambrose views *Osborn* not as an example of protective jurisdiction but "as an instance of conventional federal ingredient jurisdiction."[51] She also criticizes Wechsler's so-called "greater power" theory[52] and Mishkin's "partial occupation" theory.[53] In doing so, Goldberg-Ambrose argues that "Congress does not always have the greater power to regulate the particulars of a field of commerce; moreover, there may be too much state-to-state variation and too little agreement in Congress to set forth a detailed federal code."[54] Rather, she suggests that in such circumstances, "incorporation of state law may provide the only practical means by which Congress can regulate," and that "protective jurisdiction might reflect a congressional desire to secure procedural harmonization or simplification through a shift of litigation to the federal system."[55] Goldberg-Ambrose's theory of protective jurisdiction would thus temper the broad federal power to extend protective jurisdiction with the understanding that state sovereignty may outweigh federal concerns.[56]

The legitimacy of protective jurisdiction—both generally and as a basis for the expansion of Article III federal question jurisdiction—is

49. *Id.* at 192. Mishkin also notably distinguishes his approach from Wechsler's by arguing that even under the current expansive conception of the commerce power, though "it seems fairly clear that Congress might legislate as to most legal relations of an entity created and organized as the Bank [in *Osborn*] was, it is far from certain . . . that federal law could be made substantively to govern every one of the Bank's lawsuits." *Id.* at 189.

50. Goldberg-Ambrose defines protective jurisdiction as applying to claims within federal jurisdiction that rest entirely on state law (and that do not qualify for diversity jurisdiction). *See* Goldberg-Ambrose, *supra* note 14, at 546–50 (defining her theory of protective jurisdiction).

51. Pfander, *Protective Jurisdiction*, *supra* note 20, at 1429; *see also* Goldberg-Ambrose, *supra* note 14, at 547–48 (rejecting Professor Mishkin's characterization of *Osborn* as an instance of protective jurisdiction).

52. Goldberg-Ambrose, *supra* note 14, at 589–91. Justice Frankfurter so named Wechsler's theory while rejecting it in *Lincoln Mills*, stating that the restrictions of Article III were not "met or respected by a beguiling phrase that the greater includes the lesser." Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 474 (1957) (Frankfurter, J., dissenting).

53. Goldberg-Ambrose, *supra* note 14, at 592–95.

54. Pfander, *Protective Jurisdiction*, *supra* note 20, at 1429 (citing Goldberg-Ambrose, *supra* note 14, at 576–83, 593). With this criticism, Goldberg-Ambrose echoes Justice Frankfurter's dissent in *Lincoln Mills*. *See infra* notes 61–67 and accompanying text (offering a more complete discussion of this case).

55. Pfander, *Protective Jurisdiction*, *supra* note 20, at 1429–30; *see also* Goldberg-Ambrose, *supra* note 14, at 577–78 (discussing the efficiencies of federal adoption of "ready-made" state law).

56. Pfander, *Protective Jurisdiction*, *supra* note 20, at 1430; *see also* Goldberg-Ambrose, *supra* note 14, at 546, 594 (discussing the importance of state autonomy).

uncertain, as the Supreme Court has not definitively approved the application of any protective jurisdiction theory.[57] Early on, in *National Mutual Insurance Co. v. Tidewater Transfer Co.*,[58] Justices Jackson, Burton, and Black implicitly endorsed protective jurisdiction in a plurality opinion.[59] While considering the constitutionality of a statute giving federal district courts jurisdiction of civil actions between citizens of states and citizens of the District of Columbia, the plurality noted that

> [u]nless we are to deny to Congress the same choice of means through which to govern the District of Columbia that we have held it to have in exercising other legislative powers enumerated in the same Article, we cannot hold that Congress lacked the power it sought to exercise in the Act before us.[60]

After *Tidewater*, however, the Court has consistently side-stepped the issue of the legitimacy and applicability of protective jurisdiction. In *Textile Workers Union v. Lincoln Mills*,[61] the Court considered the power of Congress to provide for the enforcement of labor contracts, specifically section 301 of the Labor Management Relations Act (LMRA), which confers jurisdiction on the federal courts to hear "suits for violation" of a contract between an employer and a labor organization.[62] Although section 301 apparently resulted from Congress's desire to ensure that federal courts would be able to enforce collective bargaining agreements, particularly in lawsuits against unions, the legitimacy of the jurisdictional grant was questionable.[63] Many commentators believed that, with this statute, Congress neglected to articulate any substantive body of labor contract law; instead, it "simply conferred jurisdiction on the federal courts in the expectation

57. *See* Mullenix, *supra* note 20, at 199 (maintaining that the protective jurisdiction theory is just a theory, not a means of attaining jurisdiction).

58. 337 U.S. 582 (1949).

59. *Id.* at 588–604.

60. *Id.* at 591. The plurality also argued that "[i]t is too late to hold that judicial functions incidental to Art. I powers of Congress cannot be conferred on courts existing under Art. III for it has been done with this Court's approval." *Id.* at 591–92. Ultimately, the Court upheld the statute (and the grant of federal jurisdiction) at issue. *Id.* at 604, 655. The six other justices rejected the theory of protective jurisdiction advanced by the plurality, however. Goldberg-Ambrose, *supra* note 14, at 559.

61. 353 U.S. 448 (1957).

62. 29 U.S.C. § 185 (2006). For an account of the passage of the labor contract provisions of the LMRA, see James E. Pfander, *Judicial Purpose and the Scholarly Process*: *The* Lincoln Mills *Case*, 69 WASH. U. L.Q. 243 (1991).

63. Pfander, *Protective Jurisdiction*, *supra* note 20, at 1430 (noting that "doubts arose about the source of governing law and the legitimacy of the resulting jurisdictional grant").

that state rules of contract law would apply."[64]

Although all three theories of protective jurisdiction would uphold the grant of jurisdiction under section 301,[65] the Court did not examine the applicability of protective jurisdiction in *Lincoln Mills*. Instead, it decided that section 301 created a federal substantive right to the enforcement of collective bargaining agreements, thereby requiring the federal courts to define the contours of that substantive right as a matter of federal common law.[66] Pursuant to this understanding of section 301, "suits for violation of the collective agreement arose under federal law and presented no protective jurisdictional issues."[67]

The Court has avoided relying on any theory of protective jurisdiction since *Lincoln Mills*.[68] For instance, it eschewed this opportunity in both *Verlinden* and *Mesa*.[69] In *Verlinden*, where federal jurisdiction depended on a finding that the claims at issue (brought under the FSIA for anticipatory repudiation of a letter of credit) arose under federal law,[70] the Court expressly declined to consider the argument that the FSIA "is constitutional as an aspect of so-called 'protective jurisdiction.'"[71] The Court concluded "that proper actions

64. *Id.*

65. *Id.*

66. *See Lincoln Mills*, 353 U.S. at 457 (adding that any state law applied would not be an independent basis for private rights, but would instead be absorbed as federal law).

67. Pfander, *Protective Jurisdiction*, *supra* note 20, at 1431–32. Justice Frankfurter, however, thought that section 301 should be viewed as a grant of jurisdiction that would require the federal courts to apply state law. *Lincoln Mills*, 353 U.S. at 469–70 (Frankfurter, J., dissenting). He thus had to address the constitutionality of section 301 and the arguments for protective jurisdiction that had been advanced in support of the statute. *Id.* Writing only for himself, Frankfurter concluded that section 301 exceeded the bounds of article III. *Id*. at 484.

Frankfurter cast doubt on the ingredient theory—articulated in *Osborn*—and found no substantial federal ingredient in a section 301 claim. *Id.* at 470–72. He then reviewed and criticized Wechsler's "greater power" and Mishkin's "partial occupation" theories of protective jurisdiction; with respect to Wechsler's theory, Frankfurter argued that claims cannot arise under a jurisdictional statute, even one adopted within an area of commerce over which Congress could exercise substantive control, because such a theory could "vastly extend" the jurisdiction of the federal courts to include "every contract and tort arising out of a contract affecting commerce . . . even though only state law was involved in the decision of the case" and would rest on a belief that state courts were inadequate in interpreting state law. *Id.* at 474–75.

Furthermore, Frankfurter indicated that although Mishkin's approach would apply only to claims within a field that Congress had previously regulated, it would still transfer state law claims to federal court and expand federal power. *Id.* at 476–77. Frankfurter would apparently permit Congress to shift state law matters into federal courts pursuant to party-alignment grants of jurisdiction. *Id*. at 476.

68. Pfander, *Protective Jurisdiction*, *supra* note 20, at 1433.

69. *See supra* notes 34–38 and accompanying text (introducing and briefly describing the *Verlinden* and *Mesa* cases).

70. Verlinden B.V. v. Cent. Bank of Nig., 461 U.S. 480, 483 (1983).

71. *Id.* at 492 n.17.

by foreign plaintiffs under the [FSIA] are within Article III 'arising under' jurisdiction . . . ." [72]

Similarly, in *Mesa*[73]—the Supreme Court's most recent confrontation with the concept of protective jurisdiction—the Court, relying on *Verlinden*, held that 28 U.S.C. § 1442(a)

> is a pure jurisdictional statute, seeking to do nothing more than grant district court jurisdiction over cases in which a federal officer is a defendant. Section 1442(a), therefore, cannot independently support Art. III 'arising under' jurisdiction. Rather, it is the raising of a federal question in the officer's removal petition that constitutes the federal law under which the action against the federal officer arises for Art. III purposes.[74]

The Court rejected the government's contention that the raising of a federal defense was not necessary under § 1442 by noting that "[a]dopting the [g]overnment's view would eliminate the substantive Art. III foundation of § 1442(a)(1) and unnecessarily present grave constitutional problems."[75] It was unwilling to remedy these problems by applying a theory of protective jurisdiction,[76] however, stating that it

72. *Id.* To reach this conclusion, the Court emphasized the substantive (as opposed to the jurisdictional) content of federal law, stating that the FSIA

> does not merely concern access to the federal courts. Rather, it governs the types of actions for which foreign sovereigns may be held liable in a court in the United States, federal or state. The [FSIA] codifies the standards governing foreign sovereign immunity as an aspect of substantive federal law, and applying those standards will generally require interpretation of numerous points of federal law.

Id. at 496–97 (citations omitted).

The Court also acknowledged the *Osborn* decision as controlling on the scope of Article III "arising under" jurisdiction, but concluded that it did not need to

> decide the precise boundaries of Article III jurisdiction, . . . since the present case does not involve a mere speculative possibility that a federal question may arise at some point in the proceeding. Rather, a suit against a foreign state under [the FSIA] necessarily raises questions of substantive federal law at the very outset, and hence clearly 'arises under'" federal law, as that term is used in Article III.

Id. at 493. With the FSIA, the Court reasoned, Congress exercised "its authority over foreign commerce and foreign relations . . . to decide, as a matter of federal law, whether and under what circumstances foreign nations should be amenable to suit in the United States." *Id.* As the FSIA

> must be applied by the District Courts in every action against a foreign sovereign, since subject matter jurisdiction in any such action depends on the existence of one of the specified exceptions to foreign sovereign immunity . . . . an action against a foreign sovereign arises under federal law, for purposes of Article III jurisdiction."

Id. at 493–94.

73. Mesa v. California, 489 U.S. 121, 136 (1989).

74. *Id.* (construing *Verlinden*, 461 U.S. at 491).

75. *Id.* at 137.

76. *Id.* In support of the application of protective jurisdiction, the government argued that the full protection of federal officers from interference by hostile state courts cannot be achieved if the averment of a federal defense must be a predicate to removal. More

had not previously posited "'protective jurisdiction' [theories] to support Art. III 'arising under' jurisdiction, and [that it did] not see any need for doing so here because [it did] not recognize any federal interests that are not protected by limiting removal to situations in which a federal defense is alleged."[77]

The Supreme Court has not addressed protective jurisdiction since *Mesa*. Scholars have argued, however, that "the trajectory of [the Court's] federalism rulings since *Mesa* give little reason to suppose it has developed a more spacious view of the scope of ['arising-under jurisdiction.']"[78] The Court has recently limited Congress's power to regulate matters affecting interstate commerce and its power to

> important, the [g]overnment suggest[ed] that this generalized congressional interest in protecting federal officers from state court interference suffice[d] to support Art. III "arising under" jurisdiction.

Id.

77. *Id.* The Court clarified that in the prosecutions removed in *Mesa*, "no state court hostility or interference ha[d] even been alleged by petitioners and [the Court could] discern no federal interest in potentially forcing local district attorneys to choose between prosecuting traffic violations hundreds of miles from the municipality in which the violations occurred or abandoning those prosecutions." *Mesa*, 489 U.S. at 137–38.

78. Pfander, *Protective Jurisdiction*, *supra* note 20, at 1435; *see also* Mullenix, *supra* note 20, at 200 ("Although the theory of protective jurisdiction has proved perennially popular among academic theorists, its expositors have made little advance on . . . the theory. Moreover, since the Supreme Court has consistently avoided declaring a definitive position on protective jurisdiction [in cases such as *Verlinden* and *Mesa*], the doctrine's legitimacy as a basis for expanding article III federal question jurisdiction is uncertain."); Georgene Vairo, *Judicial v. Congressional Federalism: The Implications of the New Federalism Decisions on Mass Tort Cases and Other Complex Litigation*, 33 LOY. L.A. L. REV. 1559, 1617 (2000) (acknowledging that "the Supreme Court has never embraced the [protective jurisdiction] doctrine").

Several lessons can be gleaned from the Supreme Court's treatment of cases potentially implicating protective jurisdiction. First, "Congress cannot simply transfer state law claims to the federal courts because it has protected an area of federal concern by empowering the federal courts to apply state law. Cases do not arise under jurisdictional statutes for purposes of satisfying Article III." Pfander, *Protective Jurisdiction*, *supra* note 20, at 1436.

> [In order to permit] the federal courts to exercise federal question jurisdiction, Congress must establish federal substantive rights on which the success of the claims in some sense must depend. Congress may declare the content of federal substantive law itself, of course, or, as in the majority's account of labor contract enforcement under section 301, direct the federal courts to do so. The Court's willingness to fashion federal common law at Congress's behest may depend in part on the degree of guidance Congress has provided.

Id.

> [Although federal] entities like the Bank, created by an act of Congress, may bring suit in federal court, even to enforce state law rights of action, because their very existence depends on federal law[,] . . . a simple declaration that, within a certain area of federal concern, federal courts should hear state law claims or that federal law incorporates state law without altering its content, neither warrants the creation of federal common law nor establishes any rules of federal substance under which claims may arise.

Id.

implement its regulatory initiatives through the agency of the states.[79] Furthermore, it narrowly construed Congress's power to permit individuals to sue states to enforce federal regulatory schemes.[80] These recent rulings have attempted to identify the limits of congressional power, which concerned both Justice Frankfurter and the *Verlinden* and *Mesa* Courts.[81]

III. AN OVERVIEW OF THE EDGE ACT AND SECTION 632[82]

This Part introduces various aspects of the Edge Act that will ultimately aid in evaluating its constitutionality. Part III.A describes the Act's historical context, Part III.B discusses the modern interpretations (broad and narrow) of the Act, and Part III.C summarizes the recent case law that has further broadened the reach of Edge Act jurisdiction. Finally, Part III.D outlines a statutory-level approach to interpreting and applying the Edge Act that addresses the many problems associated with the current broad, unstructured, and inconsistent understanding and application of the provisions of section 632 by the federal courts.

79. *See* United States v. Morrison, 529 U.S. 598 (2000) (concluding that a federal statute creating a private right of action for gender-based violence was unconstitutional because it exceeded the scope of the congressional power over commerce); United States v. Lopez, 514 U.S. 549 (1995) (invalidating a federal law that criminalized drug possession because it exceeded Congress's power to regulate commerce); *see also* Printz v. United States, 521 U.S. 898 (1997) (finding to be unconstitutional federal laws directed at securing state administrative enforcement of federal statutes); New York v. United States, 505 U.S. 144 (1992) (invalidating a federal statute that commandeered state legislatures into adopting a state law that incorporated federal standards); STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 59–60 (2005) (discussing recent decisions that "limit the federal government's ability to control the activities of individuals and businesses."). *Cf.* Gonzales v. Raich, 545 U.S. 1 (2005) (upholding Congress's ability to criminalize private cultivation and use of marijuana for medicinal purposes).

80. *See* Alden v. Maine, 527 U.S. 706 (1999) (holding that a federal statute adopted under the Commerce Clause was unconstitutional to the extent that it authorized individuals to sue a state for damages in state court); Seminole Tribe v. Florida, 517 U.S. 44 (1996) (concluding that the Eleventh Amendment bars Congress from authorizing individuals to sue states in federal court to enforce a federal commerce statute); *cf.* Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356 (2006) (holding that the constitutional grant of plenary power enables Congress to subject states to suit in bankruptcy proceedings); Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) (upholding Congress's power to abrogate state sovereign immunity through legislation enacted pursuant to the Fourteenth Amendment); BREYER, *supra* note 79, at 60–61 (discussing the Court's limitations on Congress's Commerce Clause power through restrictions on Congress's ability to abrogate the States' Eleventh Amendment immunity).

81. *See* Pfander, *Protective Jurisdiction*, *supra* note 20, at 1435–36.

82. Portions of Part III are derived from Elizabeth R. Sheyn, *The "Technicalities" of Edge Act Jurisdiction: Advocating for the Federal Courts' Adoption of and Adherence to a Uniform and Narrow Interpretation of 12 U.S.C. § 632*, 41 U. TOL. L. REV. (forthcoming 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1461823.

A. Historical Context of the Edge Act

The Edge Act was enacted after the first World War "to encourage the flow of private capital (as opposed to direct[ing] U.S. government outlays) to help rebuild war[-]torn Europe."[83] It was also a response to the tension between American trade and fiscal policies after World War I: as "Americans saw it, the problem was to keep responsibility for the war-debt payments in Europe [while giving] the Europeans enough financial breathing space to reconstruct their economy, restore the trade network, and earn enough dollars to pay their debts and buy American exports."[84]

Sponsored by Senator Walter Edge,[85] the bill that eventually became the Edge Act necessitated a number of modifications to the U.S. economy. Specifically, it required the formation of federally incorporated and regulated investment trusts that took "foreign securities in payment for exports and reimburse[d] the exporters with funds gathered through the public sale of debentures which [were] backed by foreign securities."[86] This export trust plan permitted experts

83. Thomas C. Baxter, Jr. & James H. Freis, Jr., *Fostering Competition in Financial Services: From Domestic Supervision to Global Standards*, 34 NEW ENG. L. REV. 57, 65–66 (1999); *see also* WILLIAM F. NOTZ & RICHARD S. HARVEY, AMERICAN FOREIGN TRADE: AS PROMOTED BY THE WEBB-POMERENE AND EDGE ACTS 11 (1921) (noting that the Edge Act was passed to promote the export trade of the United States).

> [T]he United States undertook a number of initiatives in 1918 and 1919 to encourage investment abroad. Perhaps the most noteworthy initiative, in addition to the foreign tax credit, was the Edge Act, passed by Congress in late 1919, which promoted the development of federally-chartered banking enterprises designed to channel private domestic capital to European reconstruction.

Michael J. Graetz & Michael M. O'Hear, *The "Original Intent" of U.S. International Taxation*, 46 DUKE L.J. 1021, 1053 (1997).

84. Paul P. Abrahams, *American Bankers and the Economic Tactics of Peace: 1919*, 56 J. AM. HIST. 572, 575 (1969).

85. See Walter E. Edge Papers, 1782–1968 (bulk 1905–1956), http://diglib.princeton.edu/ead/getEad?eadid=MC042&kw=#bioghist (last visited Feb. 5, 2010) for a biography of Senator Edge—a New Jersey businessman and politician.

86. Abrahams, *supra* note 84, at 577–78. "The planners counted on the War Finance Corporation to supplement the flow of private capital to these risk-taking export banks by subscribing up to 20 percent of their debentures." *Id.* at 578; *see also* Franklin D. Jones, *Historical Development of the Law of Business Competition*, 36 YALE L.J. 351, 361 (1927).

> In April, 1918, the War Finance Corporation was created with a capital of one-half billion dollars. This corporation was not only given the power to make advances to enterprises aiding in the prosecution of the War, but a Capital Issues Committee was established which had a large control over the use of the capital of the nation through its power to prevent or prohibit (with certain exceptions) the sale or subscription to any issue of securities in excess of $100,000."). This plan "was expected to have a 'good moral effect' and to attract private investment by showing that the government of the United States had confidence in the banks.

Abrahams, *supra* note 84, at 578.

to make the investment decisions while raising the needed capital by having the United States back the trusts both morally and financially.[87]

Section 632 was incorporated into the Edge Act during the Great Depression as part of a remedial banking legislation scheme. Congress passed the Act to remedy the problems and abuses within the banking system, many of which manifested themselves in 1929.[88] This section was part of the amendments to the Federal Reserve Act[89] proposed by Senator Carter Glass and Representative Henry Steagall, commonly known as the Glass-Steagall Act.[90] It was "thus considered a part of a comprehensive package of reforms of the national banking system."[91]

87. *Id.* (citations omitted). Senator Edge told the Senate: '"Every step in the transaction would be under the supervision of the United States through the Federal Reserve Board . . . such investments would be thoroughly safeguarded.'" *Id.* (citations omitted). Further, Senator Robert Owen of the Senate Banking Committee warned that if the Edge Act was not passed, America would '"meet with an obstruction to [its] foreign commerce that [would bring] the most injurious consequences upon the people of the United States, upon the home markets, and upon all sorts of stocks and securities."' *Id.* (citations omitted).

88. Robert M. Brill & James J. Bjorkman, *Federal Court Jurisdiction Over International Banking Transactions*, 110 BANKING L.J. 118, 119 (1993) (citing S. REP. NO. 77, 73rd Cong., 1st Sess. 2 (May 15, 1933)).

89. The Federal Reserve Act of 1913 was designed to "provide for the establishment of Federal reserve banks, to furnish an elastic currency, to afford means of rediscounting commercial paper, to establish a more effective supervision of banking in the United States, and for other purposes." Pub. L. No. 73-33, 38 Stat. 251, 251 (1913). *See also* Abrahams, *supra* note 84, at 572 ("The [Federal Reserve Act of 1913] provided the United States with the machinery for international banking."). Milton Friedman and Anna Schwartz contended that the wave of bank failures, which began in late 1930, occurred because the Federal Reserve System failed in its responsibility under the Federal Reserve Act to maintain the banking system's liquidity. MILTON FRIEDMAN & ANNA JACOBSON SCHWARTZ, A MONETARY HISTORY OF THE UNITED STATES: 1867–1960, at 299–419 (1963).

90. FRIEDMAN & SCHWARTZ, *supra* note 89, at 299–419. "Section 632 was enacted as [s]ection 15 of the Banking Act of 1933, 48 Stat. 184, to amend [s]ection 25 of the Federal Reserve Act of 1913, 38 Stat. 273." *Id.* (citations omitted). Congress enacted the Glass-Steagall Act during the Great Depression to separate commercial and investment banking and to establish deposit insurance to protect Americans' savings. John Armour & David A. Skeel, Jr., *Who Writes the Rules for Hostile Takeovers, and Why?—The Peculiar Divergence of U.S. and U.K. Takeover Regulation*, 95 GEO. L.J. 1727, 1752 (2007); John K. Forst, Comment, *Legislative Reform of Glass-Steagall: Bank Sponsorship and Distribution of Mutual Funds is Long Overdue*, 19 CAP. U. L. REV. 521, 527 (1990) (noting that "[w]hile the Glass-Steagall Act had far-reaching consequences vis-à-vis banks' securities activities, it did not affect the exercise of fiduciary powers allowed banks two decades earlier under the Federal Reserve Act.").

> The purpose of the Glass-Steagall Act is evidenced by a quote by Senator Glass stating that '[t]he purpose of the regulatory provisions of this bill is to call back to the service of agriculture and commerce and industry the bank credit and the bank service designed by the framers of the Federal Reserve Act.'

Mark E. Nance & Bernd Singhof, *Banking's Influence Over Non-Bank Companies After Glass-Steagall: A German Universal Comparison*, 14 EMORY INT'L L. REV. 1305, 1334 (2000) (citing Inv. Co. Inst. v. Camp, 401 U.S. 617, 632 n.29 (1971)).

91. Brill & Bjorkman, *supra* note 88, at 119 (citing H.R. REP. NO. 150, 73rd Cong., 1st Sess. 2

In light of the abovementioned historical background, Congress has explicitly stated that the purpose of the Edge Act was to:

> provide for the establishment of international banking and financial corporations operating under Federal supervision with powers sufficiently broad to enable them to compete effectively with similar foreign-owned institutions in the United States and abroad; to afford to the United States exporter and importer in particular . . . at all times a means of financing international trade, especially United States exports; to foster the participation by regional and smaller banks throughout the United States in the provision of international banking and financing services . . . ; to stimulate competition in the provision of international banking and financial services throughout the United States; and, . . . to facilitate and stimulate the export of United States goods . . . and . . . to achieve a sound United States international trade position.[92]

The Congressional purpose of the Edge Act paralleled its purpose as it was described by Senator Edge on the floor of the Senate in 1919:

> When an American producer or manufacturer sells a bill of goods abroad under present conditions, . . . the credit demanded is practically impossible, so far as the individual producer or manufacturer is concerned. That situation will be relieved through the incorporation of these banks. . . . These banks will then be in a position to take the securities offered to the American manufacturer or producer, so that the [sic] can turn the securities into the bank under regular ordinary banking conditions and form. On those securities he receives the amount of the bills that would otherwise be paid him abroad if credit conditions were anything like normal. The bank in turn, . . . will hold the securities of various kinds. . . under supervision of the Federal Reserve Board . . . to issue bonds or debentures to the American public. . . . Our banks at the present time are not in a position to finance foreign sales, and it is necessary . . . that we supplement the banking system in this carefully protected manner.[93]

On the other hand, section 632 had no defined purpose.[94] In fact, Senator Glass, in his remarks on the floor of the Senate, stated that he was "not so familiar with the technicalities of [section 632],"[95] and noted that he was "rather inclined to object to [this section], having

(May 15, 1933)).

92. 12 U.S.C. § 611(a) (1994).

93. Davidoff, *supra* note 6, at 688 n.4 (citations omitted).

94. *See id.* at 689 ("Despite the wealth of legislative history on the Glass-Steagall Act in general, relatively little legislative history is available on [s]ection 632 itself. The available legislative history does suggest an absence of any definitive congressional intent concerning this section.").

95. 75 CONG. REC. 9889 (1932).

gotten some faint idea that when lawyers in this or any other body begin a discussion of jurisdictional matters they consume a great deal of time, and [he] wanted to get the bill through."[96] Ultimately, Glass concluded that "the Senators who are lawyers can determine whether or not that provision of the bill shall remain in it."[97] Commentators have suggested that without evidence of clear congressional intent, section 632's purpose can be gleaned from the objectives of the Edge and Glass-Steagall Acts: "to establish and strengthen a national banking system and provide a comprehensive national regulatory apparatus."[98] Decisions by several federal courts have supported this notion.[99]

96. *Id.*

97. *Id.*

98. Davidoff, *supra* note 6, at 689.

> Inferentially, then, the role of [s]ection 632 is to permit the establishment of a uniform body of law for national banks and provide a federal forum for disputes in which national banks are involved in international or foreign transactions, thereby lending an added measure of certainty, reliability and enhanced scrutiny to the banks' interactions with their customers throughout the world.

Id. at 690.

99. *See* Fed. Reserve Bank of Atlanta v. Thomas, 220 F.3d 1235, 1241–42 (11th Cir. 2000) (citing People *ex rel*. Cosentino v. Fed. Reserve Bank of Chi., 579 F. Supp. 1261, 1264–65 n.2 (N.D. Ill. 1984)) (stating that section 632 was enacted to (1) prevent "inconsistent state court interpretations of the Federal Reserve Act and accompanying regulations"; (2) recognize "that federal reserve banks were deemed citizens of no state and thus could not remove cases against them to federal court on diversity grounds"; and (3) recognize that "the extension of federal jurisdiction over federal reserve banks was based on [an understanding] of the central role the federal reserve banks played in the nation's economy and their actions as fiscal agents and sub-treasuries for the federal government."); A.I. Trade Fin., Inc. v. Petra Int'l Banking Corp., 62 F.3d 1454, 1462 (D.C. Cir. 1995) (suggesting that "one can divine the likely reasons for the grant of federal jurisdiction [set forth in section 632]," explaining that as it was "[c]rafted in the wake of the turmoil that the World War had caused in international financial markets, the Edge Act called forth a new type of federally controlled institution intended to increase the stability of, and the public's confidence in, international markets," and inferring that section 632 was "intended to facilitate and stimulate international trade by providing the uniformity of federal law").

In *A.I. Trade Finance*, the D.C. Circuit also posited that section 632 was intended to remedy the "unavailability of diversity jurisdiction under the rule of *Bankers' Trust*." *Id.* at 1463. In Bankers' Trust Co. v. Texas & Pacific Railway Co., 241 U.S. 295, 309–10 (1916), the Supreme Court held that a corporation chartered pursuant to an act of Congress is not a citizen of any state for the purpose of diversity jurisdiction. *See also* Dudley O. McGovney, *A Supreme Court Fiction: Corporations in the Diverse Citizenship Jurisdiction of the Federal Courts*, 56 HARV. L. REV. 853, 861 (1943) ("Over and over again, early and late, the Supreme Court has held that a corporation is not a 'citizen' as that term is used in the Constitution."). "In 1958, however, []Congress specifically sought to restrict []diversity jurisdiction by providing that a corporation shall be 'deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business.'" *A.I. Trade Fin., Inc.*, 62 F.3d at 1458 (citing 28 U.S.C. § 1332(c)(1)). Thus, Congress combated "'the evil whereby a local institution, engaged in a local business and[,] in many cases[,] locally owned, is enabled to bring its litigation into the [f]ederal courts simply because it has obtained a corporate charter from another State.'" *Id.* (citing H.R. REP. No. 1706, at 4 (1958)).

B. Modern Interpretations of Section 632 of the Edge Act

In relevant part, the Edge Act states that federal courts have original jurisdiction over:

> all suits of a civil nature at common law or in equity to which any corporation organized under the laws of the United States shall be a party, arising out of transactions involving international or foreign banking or banking in a dependency or insular possession of the United States, or out of other international or foreign financial operations, either directly or through the agency, ownership, or control of branches or local institutions in dependencies or insular possessions of the United States or in foreign countries. . . .[100]

Some federal courts have broadly interpreted the Act, indicating that any potential connection to an international or foreign banking transaction is enough for Edge Act jurisdiction; such a transaction need not be central to the lawsuit in question. Other federal courts, however, have narrowly interpreted the Act, holding that "[s]ection 632 jurisdiction must be founded upon a case centered [on] a 'traditional banking transaction' or 'banking law issues.'"[101] Thus, there exists a clear disagreement (if not a traditional circuit split) among the federal courts regarding the true meaning and the proper application of the Act.

1. The Broad Interpretation of Section 632 of the Edge Act

The broad interpretation of the Edge Act arises primarily from two federal circuit court decisions that have attached an expansive meaning to the phrase "involving international or foreign banking."[102] Indeed, these decisions have found that Edge Act jurisdiction extends to cases that "bear some connection, even if tangential, to an international or foreign banking transaction. . . . In other words, the suit does not have to focus [or center] on banking issues, but must simply arise from a banking transaction."[103]

In *Conjugal Society Composed of Juvenal Rosa v. Chicago Title Insurance Co.* ("*Juvenal Rosa*"),[104] the United States Court of Appeals

100. 12 U.S.C. § 632 (1991). Stated another way, "[t]o establish jurisdiction under the Edge Act, (1) the suit must be civil in nature; (2) one of the parties in interest must be a corporation organized under the laws of the United States; and (3) the suit must arise out of a transaction involving international or foreign banking." Sollitt v. KeyCorp, No. 1:09-CV-43, 2009 WL 367494, at *3 (N.D. Ohio Feb. 11, 2009) (citing *In re* Currency Conversion Fee Antitrust Litig., No. 1409, 21-95, 2003 WL 22097502, at *2 (S.D.N.Y. Sept. 10, 2003)).

101. Davidoff, *supra* note 6, at 693 (citations omitted).

102. *Id.*

103. *Id.* at 691.

104. Conjugal Soc'y Composed of Juvenal Rosa v. Chi. Title Ins. Co. (*Juvenal Rosa*), 690 F.2d 1 (1st Cir. 1982).

for the First Circuit broadly construed the Edge Act and held that the plaintiffs had set out sufficient facts to invoke section 632 jurisdiction because the "plaintiffs' rights [were] alleged to have arisen out of [the] defendants' mortgage agreements and thus out of a transaction involving banking within the meaning of section 632."[105] The First Circuit reached this decision despite the fact that the defendants argued that "section 632 jurisdiction is absent because the gist of [the plaintiffs'] claim is negligence and conspiracy[,] which by themselves bear no relationship to banking."[106] The *Juvenal Rosa* court reasoned that "[s]ection 632 reaches only traditional banking activities, not all cases in which a bank organized under federal law is a party."[107]

The broad interpretation of the Edge Act also arose in *Corporación Venezolana de Fomento v. Vintero Sales Corp.* ("*CVF*").[108] In *CVF*, the United States Court of Appeals for the Second Circuit concluded that the application of "[s]ection 632 is not limited to the original two parties to a banking transaction."[109] It found that the case before it involved

105. *Id.* at 5.

106. *Id.* The First Circuit thus "found the action to have arisen out of transactions involving banking within the meaning of section 632 even though the core of the plaintiffs' claims consisted of allegations of fraud and negligence." Davidoff, *supra* note 6, at 693.

107. *Juvenal Rosa*, 690 F.2d at 4 (citing Diaz v. Pan Am. Fed. Sav. & Loan Ass'n, 635 F.2d 30, 32 (1st Cir. 1980)). These traditional banking activities, according to the First Circuit, "include mortgage agreements[] and foreclosures on mortgages." *Id.*

Subsequently, the First Circuit added a number of other "traditional banking activities" to this list, including "loan guarantor agreements, subordination agreements, and suits to recover on defaulted loans," Burgos v. Citibank N.A., 432 F.3d 46, 49 (1st Cir. 2005), "though these activities must contain some foreign aspect to qualify for Edge Act jurisdiction." Sollitt v. KeyCorp, No. 1:09-CV-43, 2009 WL 367494, at *3 (N.D. Ohio Feb. 11, 2009). Other courts have also deemed currency conversion and the imposition of foreign currency conversion fees to be traditional banking functions. *See* Clarken v. Citicorp Diners Club, Inc., No. 01-C-5123, 2001 WL 1263366, at *1 (N.D. Ill. Oct. 22, 2001); *see also* Highland Crusader Offshore Partners, L.P. v. LifeCare Holdings, Inc., 627 F. Supp. 2d 730, 735–37 (N.D. Tex. 2008) (citations omitted) (containing a comprehensive list of traditional banking activities).

108. Corp. Venezolana de Fomento v. Vintero Sales Corp. (*CVF*), 629 F.2d 786 (2d Cir. 1980), *cert. denied*, 449 U.S. 1080 (1981).

109. *Juvenal Rosa*, 690 F.2d at 4. Previously, the United States District Court for the District of Puerto Rico held that section 632 jurisdiction extended to a claim by one cosigner of a letter of guaranty against another cosigner contesting the validity of the letter, when a bank that was organized under the laws of the United States relied on the letter in granting a loan. *See* Nat'l City Bank of N.Y. v. Puig, 106 F. Supp. 1, 2–3 (D.P.R. 1952). Although summary judgment had been granted in favor of Plaintiff National City Bank, the court held that it had jurisdiction to decide the claim between the two cosigners—the third-party plaintiff and defendant, respectively, who were both domiciled in Puerto Rico—under the Edge Act because

> National City Bank . . . is a corporation organized under the laws of the United States, . . . this litigation was initiated by said corporation. . . . this action arose from a transaction involving banking in Puerto Rico . . . . the validity and nature of said banking transaction, as well as the determination as to who are the parties bound thereby[,] . . . is the principal and only issue of the third-party proceedings. . . . [and]

international or foreign banking for the purposes of Edge Act jurisdiction "based on the role of SPIB, a nationally chartered bank that was an original defendant, but which had settled by the time of the appeal."[110] Ultimately, the *CVF* court upheld federal jurisdiction under section 632

> even though (1) the federally chartered bank that provided the predicate for jurisdiction was no longer a defendant in the action; (2) the banking transaction on which [s]ection 632 jurisdiction was premised . . . took place entirely in the United States; and (3) the lawsuit focused on the actions of defendants other than the federally chartered bank.[111]

2. The Narrow Interpretation of Section 632 of the Edge Act

Several federal district courts have rejected the broad approach to section 632 jurisdiction. Instead, they have concluded that section 632 jurisdiction extends only to cases that center upon "traditional banking transactions" or "banking law issues."[112]

In *Telecredit Service Center v. First National Bank of the Florida Keys*,[113] for example, the United States District Court for the Southern District of Florida held that the Edge Act "encompass[es] only those transactions characterized as traditional banking activities, such as transactions involving mortgage foreclosures, letters of credit, letters of

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> [P]laintiff National City Bank . . . as creditor on said contested banking transaction has a substantial interest in said issue.

Id. at 3. The court rejected the third-party defendant's allegations that the claim regarding the transaction in question

> had been finally disposed of by the [entry of] summary judgment . . . and that . . . jurisdiction has . . . ceased to exist with respect to the issues raised in the third-party proceedings, because both the third-party plaintiff and the third-party defendant . . . are citizens of and domiciled in Puerto Rico, and even if said proceedings were considered ancillary to the main litigation, the same have ceased to be ancillary . . . [after] summary judgment was entered, and should thereafter be classed as an independent action between two residents to be litigated in the local courts.

Id.

110. Thomas J. McCormack, et al., *Edge Act Enables National Banks to Invoke Federal Jurisdiction Over Suits Involving International Banking or Financial Operations*, 124 BANKING L.J. 907, 911 (2007). The Second Circuit indicated that SPIB had provided a letter of credit for the benefit of Defendant Vintero and allegedly wrongfully allowed Vintero to draw against the letter of credit. *See CVF*, 629 F.2d at 792. Because "CVF's complaint clearly viewed SPIB as potentially liable for damages[,] SPIB is a federally chartered bank, and the transaction [involving] Vintero, in New York, dr[awing] on a letter of credit on the account of a Venezuelan corporation, Cariven, [the Second Circuit determined that the transaction] was one involving 'international or foreign banking.'" *Id.*

111. Davidoff, *supra* note 6, at 692–93.

112. *Id.*

113. 679 F. Supp. 1101 (S.D. Fla. 1988).

guaranty when the bank relied on the letter in granting a loan, and transactions involving Federal Reserve Banks."[114] The *Telecredit* court stated that in analyzing the existence of section 632 jurisdiction, "[t]he focus of the court's inquiry must be whether 'the transaction in question be one arising out of . . . international or foreign banking.'"[115]

The court in *Telecredit* used this approach to determine whether section 632 jurisdiction extended to a dispute between Telecredit Service Center ("Telecredit"), which processed credit card charges for sales of travel club memberships that a large number of purported buyers later refused to pay, and First National Bank of the Florida Keys ("First National"), which accepted for deposit credit card invoices from the sellers of the travel club memberships.[116] "There was an exceptionally high percentage of 'chargebacks,'[117] on the . . . submitted sales drafts, totaling more than $639,000. . . ."[118] As a result, Telecredit brought a lawsuit against First National for fraud and misrepresentation.[119] In its counterclaim, First National alleged that Telecredit wrongfully demanded that it pay for the chargebacks.[120] It then removed the action to federal court, arguing that federal question jurisdiction existed under section 632.[121]

The *Telecredit* court found that the transaction was not a traditional banking transaction under 12 U.S.C. § 632. Instead, the court determined that the true nature of the transaction at issue, "the allocation of risk with respect to fraudulent chargebacks," was contractual[122] and did not merit Edge Act jurisdiction.[123]

114. *Id.* at 1103 (citations omitted).

115. *Id.* (citing *CVF*, 629 F.2d at 791–92 (quoting 12 U.S.C. § 632)) (internal quotation marks omitted).

116. *Id.* at 1102–04.

117. "Chargebacks are those charges that the card holder's issuing bank declines to pay at the insistence of the card holder, who claims that the charges were not of her doing." *Id.* at 1102.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* at 1102–03. Specifically, arguing in support of section 632 jurisdiction, First National alleged that "the supposed fraud involved the sale of travel club memberships in Elbow Cay Club of Abaco, Bahamas, a foreign jurisdiction." *Id.* at 1103. Further, First National noted that the sale of the travel club memberships implicated

> Visa and Master Card transactions involv[ing] billions of dollars throughout this nation and abroad. . . . [T]hese transactions are subject to a variety of internal (Visa and Mastercard) and federal regulations and. . . . th[e] court's resolution of the chargeback issue is one of first impression [and is] likely to have national and international significance.

Id. Thus, First National contended, on both statutory and policy grounds, that the federal district court "should adjudicate the action, rather than the state court." *Id.*

122. *Id.* at 1104.

The United States District Court for the Southern District of New York, in *Bank of New York v. Bank of America* ("*BNY*"),[124] further limited the reach of section 632 jurisdiction. In that case, Bank of New York Australia ("BNYA"), an Australian corporation that is a wholly-owned subsidiary of the Bank of New York ("BNY"), entered into a letter agreement with Bank of America Australia ("BOAA"), an Australian corporation that is a wholly-owned subsidiary of Bank of America ("BOA"). Under this agreement, BNYA and BOAA committed "to engage in exclusive negotiations for the . . . possible sale of BNYA's interest in several loans made by BNYA to a group of Australian companies."[125]

When the parties did not reach an agreement on the sale,[126] BOAA and BOA filed suit in an Australian court[127] and BNYA and BNY, in turn, sued in the Supreme Court of the State of New York.[128] BOAA and BOA removed the New York state action to the Southern District of New York, alleging 12 U.S.C. § 632 as a basis for jurisdiction[129] and maintaining that because the action stemmed "from a failed purchase of loans by [BOA's] foreign subsidiary, it ar[ose] out of a transaction involving foreign banking."[130]

The District Court for the Southern District of New York appeared to utilize the same analysis as the *Telecredit* court in deciding whether Edge Act jurisdiction applied to the dispute between BNYA/BNY and BOAA/BOA. The *BNY* court examined the true nature of the transaction and ultimately concluded that removal pursuant to section 632 was inappropriate because "[d]espite its appearance of having

123. *Id.* In addition to examining the true nature of the transaction in question to determine whether the Edge Act conferred jurisdiction on the court to decide the case, the *Telecredit* court also considered the undesirable results flowing from its grant of First National's request for the removal of the case to federal court based on section 632, noting that "[o]ne could hardly say that [a]. . . transaction involve[ed] international banking merely because the service being purchased was to be consumed in a foreign land." *Id.* If the court granted First National's request for removal, it reasoned that federal district courts everywhere would be required to extend Edge Act jurisdiction to "every chargeback dispute involving a foreign product or service, consumed in the United States by an American consumer, sold by an American corporation, simply because the consumer purchased the product or service with her credit card." *Id.* Such a result would "stretch[] the statute well beyond what Congress intended, and well beyond what has been considered a traditional banking activity." *Id.*

124. Bank of N.Y. v. Bank of Am. (*BNY*), 861 F. Supp. 225 (S.D.N.Y. 1994).

125. *Id.* at 227.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* at 232.

arisen from a failed banking transaction, the case is essentially contractual and presents only the most elementary contract law issue: Did the parties reach a binding agreement?"[131] In reality, it went one step further, seemingly establishing a more stringent standard for the application of Edge Act jurisdiction. Although it acknowledged that the lawsuit arose "out of a failed loan purchase and sale transaction,"[132] the *BNY* court found that Edge Act jurisdiction did not extend to the case because the claims involved in the suit were not "integrally tied to banking activity, such that the court[] [was] required to consider and apply principles of banking law to resolve them."[133] This finding essentially mandated, as a prerequisite for section 632 jurisdiction, not only the presence of a traditional banking activity, but also that this banking activity "be legally significant in the case."[134]

131. *Id.* at 233.

132. *Id.* at 232.

133. *Id.* at 232–33.

134. *Id.* at 233. As the *BNY* court itself stated, this kind of showing is not required by 12 U.S.C. § 632. *See id.* ("On its face, the statute only requires that a case arise out of a transaction involving foreign banking. I interpret this, however, to mean that the banking aspect of the jurisdictional transaction must be legally significant in the case."). It explained, however, that an interpretation of the Edge Act suggesting "that a banking transaction need only appear somewhere in the chain of causation—makes federal jurisdiction turn on chance rather than substance. A purely contractual dispute over a failed loan sale would be a federal case, but the same dispute involving a sale of repossessed automobiles would not." *Id.* Additionally, the court in *BNY* noted that this more expansive interpretation "confers jurisdiction on virtually any case where a bank is involved on account of the regular conduct of its business. Concededly, that is a plausible reading of § 632, but if 'Congress had intended to reach all cases in which a bank is a party . . . it could have stated its intent more easily.'" *Id.* (citing Diaz v. Pan Am. Fed. Sav. & Loan Ass'n, 635 F.2d 30, 32 (1st Cir. 1980)).

In *Diaz*, which—like the *Telecredit* and *BNY* decisions—narrowly construed section 632, the plaintiff alleged that the defendant, Pan American Federal Savings and Loan Association ("Pan American"), "maliciously or negligently caused a criminal prosecution to be instituted against [the] plaintiff in a Puerto Rico court. The criminal charge alleged that [the] plaintiff had caused to be circulated two checks drawn against [Pan American], for which there were insufficient funds." *Diaz*, 635 F.2d at 31. The plaintiff subsequently "invoked federal jurisdiction under 12 U.S.C. § 632." *Id.* The district court dismissed the case for lack of jurisdiction and the First Circuit affirmed, declining to read the term "banking transaction" so broadly as to encompass the "filing of a criminal complaint based on the alleged passing of bad checks." *Id.* First, the *Diaz* court noted that section 632 "is otherwise limited to cases arising from 'transactions' and 'other . . . financial operations' of banking institutions. . . . [T]his limited range of companion parts of the same statutory section militates in favor of a similar narrow limitation for the term 'banking.'" *Id.* (citations omitted). Further, the court in *Diaz* noted that "a commonsense approach to a statute principally concerned with financial transactions of an international character suggests that 'banking' includes only traditional banking activities." *Id.* at 31–32 (citations omitted). Thus, the *Diaz* court held that "the filing of a criminal complaint as a result of plaintiff's alleged passing of bad checks falls outside the scope of traditional banking and that the district court properly dismissed." *Id.* at 32.

C. Recent Case Law Further Broadening the Reach of Edge Act Jurisdiction

Federal courts have recently broadened the reach of section 632 even beyond the interpretations advanced in *Juvenal Rosa* and *CVF*. This broadening has taken two forms. First, courts have started to treat the previously seldom-used "arising . . . out of other international or foreign financial operations" provision to function as a "catch-all," construing it to supply a basis for federal jurisdiction in cases where (traditional) banking transactions may not be clearly implicated. Additionally, they have begun to read section 632 so expansively as to allow federal question jurisdiction to extend to cases involving—in essence—only state law claims (that arguably do not implicate the Edge Act) and having no other basis for federal jurisdiction.

1. The Courts' Treatment of the Recently "Discovered" "International or Foreign Financial Operations" Provision of Section 632 of the Edge Act

Courts have ignored the "arising out of other international or foreign financial operations" provision of the Edge Act until relatively recently.[135] Several recent decisions have relied on this provision to supply federal question jurisdiction under section 632, however, even when the presence of banking transactions (as required by the first provision of section 632) was marginal or essentially non-existent. Thus, these decisions have treated the "international or foreign financial operations" provision of section 632 as a broad "catch-all" provision.

The first recent case relying on and analyzing this provision to any significant extent was In re *Lloyd's American Trust Fund Litigation* ("*LATF*").[136] In *LATF*, the plaintiffs—underwriting members of Lloyd's of London ("Lloyd's")—brought suit in New York state court against Citibank, N.A., arguing "that Citibank [had] breached its duties and responsibilities as the trustee of the trust fund of each plaintiff."[137] Citibank removed the action to federal court by way of section 632, relying in part on the "other international or foreign financial operations" provision. The plaintiffs moved to remand the case, relying on *Telecredit* and *BNY*.[138]

135. A 1938 case from a New York district court was the only decision that examined and generally dealt with this provision of section 632. *See* Travis v. Nat'l City Bank of N.Y., 23 F. Supp. 363, 366 (E.D.N.Y. 1938) (finding section 632 jurisdiction because "the complaint disclose[d] that the defendant was involved in foreign financial operations").

136. *In re* Lloyd's Am. Trust Fund. Litig. (*LATF*), 928 F. Supp. 333 (S.D.N.Y. 1996).

137. *Id.* at 335.

138. *Id.* at 339–41.

The *LATF* court not only held that, under the reasoning espoused by *Juvenal Rosa* and *CVF*,[139] it had section 632 jurisdiction over the case pursuant to the "transactions involving international or foreign banking" provision, but it also relied on the "other international or foreign financial operations" provision to reach the same conclusion regarding federal question jurisdiction.[140] The *LATF* court defined "the phrase 'other international or foreign financial operations' . . . [to mean] international or foreign financial operations other than banking."[141] It then held that "[e]ven if the transactions in question . . . d[id] not constitute banking proper, they [were] so close that they surely f[e]ll within the ambit of the 'financial operations' contemplated by the [Edge Act]."[142]

Several recent cases have followed *LATF*, viewing the "other international or foreign financial operations" provision as essentially a "catch-all" that broadly supports a grant of federal jurisdiction under section 632.[143] In *Clarken v. Citicorp Diners Club, Inc.*,[144] for example, the United States District Court for the Northern District of Illinois relied on *LATF* in holding that the "other international or foreign financial operations" provision of section 632 provided federal jurisdiction for the defendants' claims.[145] The *Clarken* court cited

139. *Id.* at 340–41.

140. *Id.* at 341. In doing so, the court in *LATF* pointed out that "under [s]ection 632, jurisdiction may be premised either on the presence in the case of 'transactions involving international or foreign banking' or on the presence of 'international or foreign financial operations.'" *Id.* (citations omitted).

141. *Id.* (citations omitted); *see also* Stamm v. Barclays Bank of N.Y., No. 96-CV-5158(SAS), 1996 WL 614087, at *2 (S.D.N.Y. Oct. 24, 1996) (adopting the definition of this provision as it was set out by the *LATF* court). This definition seems to suggest that the "other international or foreign financial operations" provision of section 632 acts as a "catch-all" for those cases that are not encompassed by the "transactions involving international or foreign banking" provision, thus greatly broadening the reach of section 632 even beyond the realm of banking. A subsequent decision by the district court for the Southern District of New York provided a context for this broad definition, stating that "'financial operations' are commonly understood as those operations that 'provide . . . capital or loan money as needed to carry on business.'" Stamm v. Barclays Bank of N.Y., 960 F. Supp. 724, 728 (S.D.N.Y. 1997) (citing BLACK'S LAW DICTIONARY 568 (5th ed. 1979)).

142. *LATF*, 928 F. Supp. at 341.

143. Generally these decisions also analyze or at least mention the section 632 provision concerning international or foreign banking transactions, but they make clear their reliance on the second provision of section 632 regarding international or foreign financial operations in ultimately reaching conclusions about the appropriateness of removal and the presence of federal question jurisdiction under the Edge Act.

144. No. 01-C-5123, 2001 WL 1263366 (N.D. Ill. Oct. 22, 2001).

145. *See id.* at *2; *see also* Warter v. Boston Sec., S.A., No. 03-81026, 2004 WL 691787, at *8–9 (internal quotations omitted) (concluding that Edge Act jurisdiction extended to the case because the plaintiffs alleged "duties and conspiracies involving millions of dollars in allegedly fake sales of securities" and therefore demonstrated the presence of foreign financial operations

LATF for the proposition that section 632 "confers jurisdiction in cases involving international or foreign financial operations *even if they do not concern banking*."[146]

Similarly, in *Bank of America Corp. v. Lemgruber*,[147] the United States District Court for the Southern District of New York held that Edge Act jurisdiction was appropriate under the "other international or foreign financial operations" provision in a case that centered on a claim for a breach of a stock purchase contract.[148] In reaching this decision, the *Lemgruber* court explained that even though the Edge Act "does not explicitly define 'other international or foreign financial operations,'"[149] the stock purchase, "*regardless of whether it involved any traditional banking activity*, . . . satisfies the second requirement for Edge Act jurisdiction as an 'international financial operation.'"[150]

2. The Federal Courts' Recent (and General) Broadening of Edge Act Jurisdiction

The federal courts have recently used both provisions of section 632 to facilitate their consideration of cases that essentially involve pure state law claims and provide no other basis for federal jurisdiction. The approaches used by the courts in these cases to resolve the question of Edge Act jurisdiction are neither internally consistent nor necessarily

and dismissing the argument that extending section 632 jurisdiction to the case "would open the flood gate of litigation in the federal courts to all securities cases involving foreign brokers," as the "mere presence of a foreign securities broker is insufficient to warrant federal jurisdiction pursuant to the Edge Act . . . [because] the Edge Act also requires the presence of a nationally chartered bank as a condition of removal"); *see also* Pinto v. Bank One Corp., No. 02-CV-8477, 2003 WL 21297300, at *6 (S.D.N.Y. June 4, 2003) (holding, without any significant analysis of the case's facts, that federal question jurisdiction under the Edge Act was available because the "[t]he actions of the merchant bank, Bank of Bermuda Ltd., and any other foreign merchant banks that acted to clear Pinto's charges through international credit card clearing facilities *constitute[d] financial operations* under the Act") (emphasis added).

146. 2001 WL 1263366, at *2 (emphasis added).

147. 385 F. Supp. 2d 200 (S.D.N.Y. 2005).

148. *See id.* at 215–16. This alleged breach "was accomplished in part through overdrafts and inter-bank wire transfers of . . . [b]ank funds into the United States, fraudulent loans, and purchases of bogus certificates of deposit." *Id.* at 215.

149. *Id.* at 215 n.13.

150. *Id.* (emphasis added); s*ee also In re* Lloyd's Am. Trust Fund. Litig. (*LATF*), 928 F. Supp. 333, 341 (S.D.N.Y. 1996) (holding that Edge Act jurisdiction may be premised upon foreign financial operations other than banking). By way of example, the court in *Lemgruber* noted that

> Section 615 of the Act provides that one of the powers granted to Edge Act corporations, which are organized specifically 'for the purpose of engaging in . . . international or foreign financial operations,' is the power 'to purchase and hold stock or other certificates of ownership in any other corporation organized . . . under the laws of any foreign country.

Lemgruber, 385 F. Supp. 2d at 215 n.13 (citations omitted) (citing 12 U.S.C. § 615).

consistent with any one previously advanced interpretation (broad or narrow) of section 632.

A primary example of these cases is *Sollitt v. KeyCorp*.[151] In *Sollitt*, the plaintiff alleged a single cause of action in his state court complaint: wrongful discharge in violation of the public policy of the State of Ohio.[152] Defendant KeyCorp sought to keep the case in federal court solely on the basis of the Edge Act,[153] arguing that the case involved international banking transactions because Sollitt contended that he was terminated as a result of complaints he made about allegedly fraudulent foreign exchange transactions,[154] and not because Sollitt was found to have violated KeyCorp's computer and electronic communications usage policy.[155] Sollitt, on the other hand, requested that the case be remanded to state court because, based on the *Diaz*, *Telecredit*, and *BNY* decisions,[156] his wrongful discharge claim did "not 'arise out' of international or foreign banking activities."[157]

The United States District Court for the Northern District of Ohio concluded that "'the banking aspect of the jurisdictional transaction [is] legally significant in [this] case,'[158] and the [c]ourt therefore has federal

151. Sollitt v. KeyCorp, No. 1:09-CV-43, 2009 WL 367494, at *4 (N.D. Ohio Feb. 11, 2009).

152. *Id.* at *1. To prove the elements of this state law tort, a plaintiff must demonstrate: (1) the existence of a clear public policy that manifests itself in a state or federal constitution, statute or administrative regulation, or in the common law; (2) the fact that the dismissal of employees under circumstances like those involved in the plaintiff's dismissal would jeopardize the public policy; (3) that the plaintiff's dismissal was motivated by conduct related to the public policy; and (4) that the employer lacked an overriding legitimate business justification for the dismissal. *Id.* at *4 (citing Wiles v. Medina Auto Parts, 773 N.E.2d 526, 529–30 (Ohio 2002)).

153. *See id.* at *1.

154. *See id.* at *4.

155. Complaint at 8, *Sollitt*, 2009 WL 210606 (No. 1:09-CV-43).

156. *See* Plaintiff's Motion for Remand to the Court of Common Pleas, Cuyahoga County, Ohio at 7–9, *Sollitt*, 2009 WL 210608 (No. 1:09-CV-43); *see also supra* notes 113–34 and accompanying text (describing the *Diaz*, *Telecredit*, and *BNY* decisions).

157. Sollitt argued that "the intricacies of the foreign currency transactions and practices about which [he] expressed concerns [were] neither legally significant nor central to his wrongful discharge claim." Plaintiff's Reply Brief in Support of the Motion for Remand at 1, *Sollitt*, 2009 WL 412580 (No. 1:09-CV-43). At one point the Defendant seemingly agreed with this characterization, claiming that "Sollitt filed the lawsuit in retaliation for being fired and that there's no evidence he complained about the alleged sales practices." Peter Krouse, *Fired Employee Sues Key Bank, Charging Unethical Practices*, PLAIN DEALER (Cleveland, Ohio), Jan. 19, 2009, at B1.

158. The *Sollitt* court noted that the case centered on "KeyCorp's foreign exchange banking practices and transactions [because the plaintiff] argue[d] that these practices and transactions were unlawful or otherwise improper while contending that his own actions were lawful and proper." *Sollitt*, 2009 WL 367494, at *4. Specifically, the plaintiff alleged in his complaint that KeyCorp "fraudulently induced its customer . . . to pay an improper exchange rate on a March 2008 transactions, netting KeyCorp 'hundreds of thousands of dollars in additional profit on this single transaction.'" *Id.*

question jurisdiction over this case pursuant to the Edge Act. . . ."[159] Moreover, the court suggested that the plaintiff's "state law claim of wrongful discharge in violation of the state's public policy [was] integrally tied to banking activity, such that the [court was] required to consider and apply principles of banking law to resolve it."[160]

Edge Act jurisdiction should not have been extended to *Sollitt* under the narrow interpretation of section 632 set out in *Diaz*, *Telecredit*, and *BNY*, as "the true nature"[161] of the suit was an action for wrongful termination under state law and this state law tort claim was not "integrally tied to banking activity."[162] Edge Act jurisdiction in *Sollitt* would even be inappropriate under the broad interpretation of section 632 advanced in *Juvenal Rosa* and *CVF* because both of these cases still require the presence of a transaction involving banking as a prerequisite for jurisdiction.[163] As *Sollitt* contended, however, there is no authority demonstrating that the Edge Act extends to a state law wrongful termination claim or that the firing of a bank employee for an alleged

159. *Id.* at *5 (quoting Bank of N.Y. v. Bank of Am. (*BNY*), 861 F. Supp. 225, 233 (S.D.N.Y. 1994)).

160. *Id.* at *4 (citing *BNY*, 861 F. Supp. at 232–33). Without an explanation, the court in *Sollitt* posited that the determination of whether the plaintiff was discharged in violation of Ohio's public policy would require the court to "delve deeply into the policies and practices of . . . KeyCorp with respect to its foreign exchange banking transactions and operations." *Id.* An examination of the elements of this state law tort claim reveals no need for such an inquiry, however, as the plaintiff in this case would merely need to show that he was discharged for being a whistleblower and not because he did not comply with his employer's computer usage policy. *See supra* note 152 (setting out the elements of a wrongful discharge in violation of Ohio's public policy claim).

161. Telecredit Serv. Ctr. v. First Nat'l Bank of the Fla. Keys, 679 F. Supp. 1101, 1103 (S.D. Fla. 1988).

162. *BNY*, 861 F. Supp. at 232–33. Principally, the *Sollitt* court would have to determine whether the plaintiff was fired for being a whistle-blower; whether or not the employees that he complained about actually acted improperly is a tangential issue with respect to this inquiry. Thus, banking activity would not "be legally significant in the case." *Id.* at 233. As the plaintiff noted, "it is not [the defendant's] foreign exchange business practices that are at issues in this case, but [its] motivations in terminating [the plaintiff's] employment. The propriety of their foreign exchange business dealings are, at best, a peripheral matter." Plaintiff's Motion for Remand to the Court of Common Pleas, Cuyahoga County, Ohio at 10, *Sollitt*, 2009 WL 210608 (No. 1:09-CV-43).

163. In *Juvenal Rosa* the First Circuit ultimately determined the requirement that a claim arise out of a transaction involving banking to fit within the meaning of section 632. *See* Conjugal Soc'y Composed of Juvenal Rosa v. Chi. Title Ins. Co. (*Juvenal Rosa*), 690 F.2d 1, 5 (1st Cir. 1982) (Plaintiffs argued "they were denied rights provided by the guaranty and the performance bond. Whether defendants' acts are viewed as ones in tort or contract, plaintiffs' rights are alleged to have arisen out of defendants' mortgage agreements and thus out of a transaction involving banking [under] section 632."). In *CVF* a traditional banking transaction was still involved in the case—it was the presence of a federally charted bank that was the central question. *See supra* note 111 and accompanying text.

public policy violation constitutes "banking."[164]

The First Circuit's decision in *Burgos v. Citibank, N.A.*,[165] which held that "the repossession of a vehicle following the borrower's default . . . [was] simply 'part and parcel' of a customary banking activity in consumer automobile loan activities,"[166] constitutes a similar (and glaring) example of the federal courts' recent broadening of section 632 jurisdiction to essentially encompass purely state law claims.[167]

At issue in *Burgos* was the plaintiff's claim—based originally on

164. *See* Plaintiff's Motion for Remand to the Court of Common Pleas, Cuyahoga County, Ohio at 10, *Sollitt*, 2009 WL 210608 (No. 1:09-CV-43).

165. 432 F.3d 46, 47 (1st Cir. 2005).

166. *Id.* at 49.

167. Another such case is Warter v. Boston Sec., S.A., No. 03-81026, 2004 WL 691787, at *1 (S.D. Fla. Mar. 22, 2004). In *Warter*, the plaintiffs sued several banks and individuals for embezzling the plaintiffs' funds, which they had invested with Boston Securities, S.A. ("BSEC"), an Argentine securities brokerage. *See id.* at *1. The plaintiffs had discovered that their investment accounts "either did not exist or were inactive." *Id.* at *2. In the ensuing months, the plaintiffs were alternatively told that "the money was safe in a neighboring country and that it would be returned if they surrendered all BSEC account statements and papers . . . [and that] they should not say a word to anyone or all would be lost." *Id.* at *3. They also received threatening phone calls during which the callers advised the plaintiffs to not speak to anyone about these matters. *See id.* Moreover, after the plaintiffs wrote to BSEC's Massachusetts headquarters demanding compensation for their losses, one of the banks involved with BSEC allegedly "used this letter as a basis for filing a criminal complaint against [one of the plaintiffs] in Argentina." *Id.* As a result, the plaintiffs filed a lawsuit against the defendants in a Florida state court, alleging fraud, negligence, fraudulent conversion, intentional infliction of emotional distress, and conspiracy to commit fraud. *See id.* at *4. In turn, the defendants removed the matter to the federal district court, arguing that the court had Edge Act jurisdiction over the case because it involved international banking activities, such as the wiring and depositing of funds and the receipt of "fraudulent investment advice in furtherance of [the] embezzle[ment of] funds." *Id.* at *6. Arguing for remand, however, the plaintiffs alleged that their case was "entirely based on [the] alleged embezzlement—which they claim[ed] [was] not a banking activity—and cite[d] *Diaz* and *Telecredit* for the proposition that the mere presence of a bank or a banking transaction is insufficient to confer Edge Act jurisdiction." *Id.* at *7.

The *Warte*r court rejected the plaintiffs' arguments, however, reasoning that unlike the facts underlying the claims in *Diaz* and *Telecredit*, "the facts underlying [the p]laintiffs' claims, wire transfers, managing deposits, and providing investment advice, constitute banking activities. That the Amended Complaint sounds in tort is no basis for discounting the centrality of banking activity to this action." *Id.* The *Warte*r court also held that even if the action did not involve international banking activities, Edge Act jurisdiction still existed because the action involved international financial operations. *See supra* note 145 (describing the treatment of this proposition by the court in *Warter*).

Under the analysis used in *Telecredit* and *BNY*, however, the *Warter* court should have determined that section 632 jurisdiction was inappropriate because the banking transactions were not all central to the action; as the *Warter* court itself pointed out, the plaintiffs' complaint involved only state law tort claims such as that for intentional infliction of emotional distress arising out of the defendants' purported harassment of the plaintiffs. Certainly, the case would not meet the *BNY* standard because the claims were not "integrally tied to banking activity, such that the [*Warter*] court [would be] required to consider and apply principles of banking law to resolve them." *BNY*, 861 F. Supp. 225, 232–33 (S.D.N.Y. 1994).

diversity jurisdiction[168]—that Citibank violated the parties' conditional sales agreement relating to the plaintiff's automobile purchase.[169] The First Circuit, "[w]ithout deciding whether the second claim—which appear[ed] to allege the tort of malicious prosecution—ar[ose] out of a traditional banking activity,"[170] found that "the first claim—*which allege[d] a breach of contract*—me[t] the section 632 criteria."[171] The *Burgos* court seemingly analyzed the suit under *Telecredit*'s narrow interpretation of section 632 jurisdiction, stating that in evaluating the applicability of the Edge Act, it would need "to determine the *nature* of the transaction or activity giving rise to the alleged claims."[172] Despite this analysis, the court in *Burgos* concluded that the contract at issue in the case clearly arose out of a traditional banking activity because it concerned "the parties' contractual agreement to repay a loan granted by Citibank pursuant to a conditional sales contract for the vehicle, and the respective rights of the parties *vis-á-vis* the vehicle."[173] In other words, the court found section 632 jurisdiction even though the contract concerned the sale of a vehicle.[174]

The approach of the *Burgos* court is inconsistent with existing interpretations of the Edge Act and internally incoherent in several respects. First, it distinguished between the nature of the defendant's acts and of the plaintiff's acts, suggesting that as long as the actions of one of the parties arose out of a transaction involving banking within

168. The suit was originally not premised on the Edge Act. However, while the issue of diversity jurisdiction "remained under advisement, the district court requested, *sua sponte*, that the parties brief the issue as to whether 12 U.S.C. § 632 could constitute an independent basis for subject matter jurisdiction." Burgos v. Citibank, N.A., 432 F.3d 46, 48 (1st Cir. 2005). Following the briefing, the court ruled that diversity jurisdiction was inappropriate and that "section 632 [was] not an autonomous basis for subject matter jurisdiction, given that the action did not arise out of a 'traditional banking activity,' but merely from claims for malicious prosecution and breach of contract." *Id.* (citations omitted).

169. *See id.* "Citibank financed the purchase of [the plaintiff's] automobile pursuant to a conditional sales agreement. After [the plaintiff] defaulted on her payments under the agreement, Citibank referred her account to a collection agency." *Id*. Although the collection agency entered into a repayment agreement with the plaintiff, "Citibank notified local police that the automobile was stolen, and the plaintiff was subpoenaed to appear at the police station. Upon her arrival, she was placed under arrest and her automobile was confiscated." *Id.* The police eventually dismissed the charges against the plaintiff for lack of probable cause and the automobile was returned to the plaintiff. *See id.*

170. *Id.* at 49.

171. *Id.* (emphasis added).

172. *Id.* (citing Telecredit Serv. Ctr v. First Nat'l Bank of the Fla. Keys, 679 F. Supp. 1101, 1103 (S.D. Fla. 1988)).

173. *Id.*

174. In fact, the court explicitly stated that "[i]t cannot be disputed that the repayment contract remained a contract relating to an automobile loan." *Id.* at 50.

the meaning of section 632, Edge Act jurisdiction was appropriate.[175] Additionally, the court in *Burgos* seemed to construct its own understanding of section 632, borrowing from both broad and narrow readings of the Edge Act, by asserting that the necessarily broad meaning of "arising out of" supplanted the narrow definition of "traditional banking activity."[176] This understanding conveniently supported the court's conclusion that "a successor lending agreement—like the one in the instant case, whose subject matter remains the rights of the parties under a conditional sales agreement—[does not possess] an overly tenuous connection to traditional banking activities."[177]

D. Proposed Interpretation of Section 632 of the Edge Act

If the Edge Act is found to be constitutional, a new statutory-level approach to understanding the provisions of section 632 will be necessary to address the federal courts' recent broadening of Edge Act jurisdiction to encompass cases that involve purely state law claims and apparently contain no other Article III ground for jurisdiction. This approach would also solve the other problems associated with the federal courts' recent approach to section 632; their overbroad interpretation transcends the purpose and intent of the Act, provides a means for defendants to avoid satisfying the constitutional, statutory, and judicial requirements for federal jurisdiction, encourages forum shopping, and promotes inefficiencies in the judicial process.

To decide whether Edge Act jurisdiction exists in particular cases, courts should adhere to an approach that combines the views of *Telecredit* and *BNY*. Specifically, courts should first look to the "true nature" of the transactions in question to determine whether they

175. "'Whether [defendant's] acts are viewed as ones in tort or contract, [plaintiff's] rights are alleged to have arisen out of [defendant's] mortgage agreements and thus out of a transaction involving banking within the meaning of section 632.'" *Id.* at 49 (quoting Conjugal Soc'y Composed of Juvenal Rosa v. Chi. Title Ins. Co. (*Juvenal Rosa*), 690 F.2d 1, 5 (1st Cir. 1982)).

176. *See id.* at 49–50; *see also* United Nat'l Ins. Co. v. Penuche's, Inc., 128 F.3d 28, 32 (1st Cir. 1997) (noting that the concept of "arising out of" is broader than proximate causation). Significantly, the phrase "arising out of" is only considered to be unquestionably broad in the insurance law context. *See* Randall L. Smith & Fred A. Simpson, *Causation in Insurance Law*, 48 S. TEX. L. REV. 305, 307 n.8 (2006); Peter Nash Swisher, *Judicial Rationales in Insurance Law: Dusting off the Formal for the Function*, 52 OHIO ST. L.J. 1037, 1069 n.109 (1991) (describing the liberal interpretation of the phrase "arising out of" in understanding insurance coverage for automobile accidents). No such broad interpretation of this phrase has been advanced in the banking context, not to mention in the context of section 632.

177. *Burgos*, 432 F.3d at 50. The *Burgos* court stubbornly stuck to its holding even though immediately after making this statement, it acknowledged that it felt that the successor contract may have triggered section 632 jurisdiction only because the original contract, which was not at issue in the case, would have done so. *Id.* The court did not explain why Edge Act jurisdiction could rest on the successor, as opposed to the original agreement. *Id.*

constitute traditional banking transactions. In evaluating whether a transaction is indeed traditional, courts should refer to a recognized list of such activities, as they have been set out by Congress in another statute: "loan[s], discount[s], deposit[s], or trust service[s]."[178] "[C]redit cards, insurance, underwriting of stocks and bonds, sale of mutual funds, real estate transactions, and creation of various interstate facilities"[179] would not constitute traditional banking activities, however. This approach explains decisions like *Telecredit*, where the court found that the implicated transactions were credit card-related charges and declined to extend section 632 jurisdiction as a result.

Second, even if a case implicates a traditional banking activity, courts should determine whether the activity is central to the case "such that the court [is] required to consider and apply principles of banking law to resolve them."[180] In other words, the traditional banking activity must "be legally significant in the case."[181] Although, as the *BNY* court acknowledged, this requirement is not grounded in the language of 12 U.S.C. § 632, it follows from the suggested intent of section 632 of the Edge Act:[182] section 632 was meant to (1) prevent "inconsistent state

178. 12 U.S.C. § 1972(1)(C) (2006); Timothy D. Naegele, *The Anti-Tying Provision: Its Potential is Still There*, 100 BANKING L.J. 138, 141 (1983) ("Congress provided a limited exemption in [s]ection 1972 for transactions exclusively involving four so-called traditional banking services—specifically, loans, discounts, deposits, or trust services."); *see also* Stephen J. Friedman & Connie M. Friesen, *A New Paradigm for Financial Regulation: Getting From Here to There*, 43 MD. L. REV. 413, 451 (1984) ("Yet it is clear that when major banks have found themselves in trouble in recent years, it has been because of traditional banking activities—real estate loans, energy loans, loans to developing countries, and government securities activities—not because of securities transactions or other exotic activities."); Bruce L. Rockwood, *Interstate Banking and Nonbanking in America: A New Recipe for an Old Prescription or Why Does the Elephant Banker Wear Tennis Shoes and Waterwings, and Carry an Economist Pocket Diary?*, 12 SETON HALL LEGIS. J. 137, 140 n.3 (1989) (stating that the markets traditionally reserved for banks include "checking and savings plans, and commercial and mortgage lending").

179. Rockwood, *supra* note 178, at 140 n.3.

180. Bank of N.Y. v. Bank of Am. (*BNY*), 861 F. Supp. 225, 232–33 (S.D.N.Y. 1994).

181. *Id.* at 233.

182. The Supreme Court and legal scholars have held out consideration of a statute's intent as an important factor in gleaning the proper interpretation of the statute. *See* Philbrook v. Glodgett, 421 U.S. 707, 713 (1975) ("Our objective in a case [turning on the interpretation of a statute] is to ascertain the congressional intent and give effect to the legislative will."); Church of the Holy Trinity v. United States, 143 U.S. 457, 459 (1892) ("[A] thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers."); Maureen B. Cavanaugh, *Order in Multiplicity: Aristotle on Text, Context, and the Rule of Law*, 79 N.C. L. REV. 577, 587 (2001) (explaining that in light of the "common law tradition, . . . interpretive techniques that began with the text of the statute [have] employed … a 'soft' plain meaning approach, emphasizing the statute's purpose and . . . policy, a method . . . closer to . . . common law . . . adjudication than . . . focus[ing] on the statutory text alone." In other words, according to this approach, "the statute's 'plain meaning' can be trumped by contradictory legislative history because the sole task of any judge interpreting a given statute is simply to give

court interpretations of the Federal Reserve Act and accompanying regulations;"[183] (2) recognize "that federal reserve banks were deemed citizens of no state and thus could not remove cases against them to federal court on diversity grounds;"[184] and (3) recognize that "the extension of federal jurisdiction over federal reserve banks was based on [an understanding] of the central role the federal reserve banks played in the nation's economy and their actions as fiscal agents and sub-treasuries for the federal government."[185] Accordingly, cases that do not require courts to interpret the Federal Reserve Act and other banking regulations or that do not implicate the central role of banks do not merit Edge Act jurisdiction.[186]

Just as the first provision of section 632—implicating civil suits arising out of "transactions involving international or foreign banking"—should be narrowly construed, so should the second, which concerns civil suits arising "out of other international or foreign financial operations." To do otherwise essentially negates the narrow interpretation of the first provision and reinforces the recent trend of using the second provision as a broad "catch-all."

In particular, Congress likely intended a narrow construction for both provisions of section 632.[187] As a result, the term "financial

effect to the legislature's intent in enacting the statute"); Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988–89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277, 301–02 (1990) (stating that judges should always seek to understand a statute's intent because the text is rarely clear).

183. Fed. Reserve Bank of Atlanta v. Thomas, 220 F.3d 1235, 1241 (11th Cir. 2000) (citing People *ex rel.* Cosentino v. Fed. Reserve Bank of Chi., 579 F. Supp. 1261, 1265 (N.D. Ill. 1984)).

184. *Id.* (citing *Cosentino*, 579 F. Supp. at 1265).

185. *Id.* at 1241–42 (citing *Cosentino*, 579 F. Supp. at 1265).

186. Further support for a narrow interpretation of section 632 comes from the fact that one potential reason for its enactment, the rule established in *Bankers' Trust* that diversity jurisdiction is not available to corporations, is no longer applicable. *See supra* note 99 and accompanying text (describing this rule). Corporations (or banks) are now able to bring suits as citizens in federal court under 28 U.S.C. § 1332(c)(1) (2005). *See supra* note 99. Thus, the Act is no longer the only vehicle into federal court for lawsuits filed by or against banks.

187. The presence of the phrase "other international or foreign financial operations" in section 632 parallels its inclusion in the statute providing for federal incorporation of organizations (Edge Act "corporations") that would engage in "international or foreign banking or other international or foreign financial operations." 12 U.S.C. § 611 (1991). Through the establishment of such corporations, as well as through the adoption of the Edge Act,

> Congress intended not only to encourage United States exports, but also to use American capital to help rebuild war-devastated Europe. Congress specifically expected Edge Corporations to act as merchant banks, taking equity and long-term debt interests in European enterprises. Thus, . . . Edge Corporations were granted broad banking powers, including such banking and *financial operations* as the Fed might determine to be usual abroad where the Edge Corporation was conducting its business . . . .

operations" would, at most, include a slightly broader range of traditional banking activities.[188] Furthermore, even if it is considered to be a "catch-all," the second provision of section 632 should not be read broadly; courts generally construe "catch-all" provisions narrowly.[189]

IV. THE CONSTITUTIONALITY OF THE EDGE ACT

Even more important than the proper statutory interpretation of the Edge Act is the broader or constitutional analysis of the Act. Courts have been neglecting this constitutional analysis, which would require them to explore the limits of Article III. Particularly during this time of financial uncertainty and bank failures, when issues concerning the (federal) jurisdiction of lawsuits against or implicating banks and other financial institutions come to the fore, courts must evaluate and resolve the question of the constitutionality of the Edge Act.

Section 632 of the Edge Act is likely unconstitutional because it does not fit within the traditional framework of federal question jurisdiction set out in Article III. Additionally, none of the three recognized theories of "protective jurisdiction" fully apply to the Edge Act; even if one did, the Supreme Court has not yet legitimized protective jurisdiction and it does not appear that it will do so in the near future.

The text of section 632 suggests that the Act's jurisdiction reaches beyond that of Article III. Specifically, the Act provides that

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Cynthia C. Lichtenstein, *Thinking the Unthinkable: What Should Commercial Banks or Their Holding Companies be Allowed to Own?*, 67 IND. L.J. 251, 257 (1992).

188. *See* Racepoint Partners, LLC v. JP Morgan Chase Bank, No. 06-CIV-2500-2501 (MGC), 2006 WL 2044416, at *3 (S.D.N.Y. Oct. 26, 2006) ("The phrase 'financial operations' in [s]ection 632 is read according to its usual meaning."); *see also* Bank of Am. Corp v. Lemgruber, 385 F. Supp. 2d 200, 215 n.13 (S.D.N.Y. 2005) (noting that the "common meaning" of "finance" is "to supply with funds through the issuance of stocks, bonds, notes or mortgages"); Stamm v. Barclays Bank of N.Y., 960 F. Supp. 724, 728 (S.D.N.Y. 1997) (stating that "financial operations" are "commonly understood as" those operations that "provide . . . capital or loan money as needed to carry on business").

189. *See* P.J.M. Declercq, *Modern Analysis of the Legal Effect of Force Majeure Clauses in Situations of Commercial Impracticability*, 15 J.L. & COM. 213, 234 (1995). In addition, the *ejusdem generis* canon of construction requires "that when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same type as those listed." BLACK'S LAW DICTIONARY 556 (8th ed. 2004). *See also* Hall Street Assocs., LLC v. Mattel, Inc., 552 U.S. 576, 586 (2008) (stating that under *ejusdem generis*, "when a statute sets out a series of specific items ending with a general term, that general term is confined to covering subjects comparable to the specifics it follows"); John F. Decker, *Addressing Vagueness, Ambiguity, and Other Uncertainty in American Criminal Laws*, 80 DENV. U. L. REV. 241, 261 (2002) (explaining that one of the five established principles of statutory interpretation includes the notion that "catch-all phrases are limited by the rule of *ejusdem generis* (Latin for 'of the same kind') which [confines] interpretation to a common theme or factor").

> all suits of a civil nature at common law or in equity to which any corporation organized under the laws of the United States shall be a party, arising out of transactions involving international or foreign banking or banking in a dependency or insular possession of the United States, or out of other international or foreign financial operations . . . *shall be deemed* to arise under the laws of the United States . . . .[190]

The phrase "all suits" appears to include suits between non-diverse parties that would be controlled by state law. Taking aside the admonition of the Edge Act, such suits would not generally arise under federal law.[191] Thus, the Edge Act seems to exceed the bounds of Article III "arising under" jurisdiction.

Only one federal court has evaluated the constitutionality of the Edge Act under Article III. In *A.I. Trade Finance, Inc. v. Petra International Banking Corp.*, the United States Court of Appeals for the District of Columbia, as part of determining whether it had jurisdiction over a case concerning a "suit to hold an Edge Act corporation liable upon the controlling bank's guaranty of negotiable instruments,"[192] had to decide "whether the jurisdiction contemplated by [section] 632 is within 'the judicial Power of the United States,' and thus within the constitutional power of the Congress to confer upon the federal courts."[193] This jurisdictional inquiry was prompted both by the court's need to establish whether it had jurisdiction over the case and by its desire to determine applicable choice-of-law rules.[194] Ultimately, the court concluded that "there is *enough substantive federal law* underlying the grant of jurisdiction in [section] 632 to render it constitutional,"[195] stating that "[t]he Edge Act regime is unquestionably a valid exercise of the Congress's [enumerated Article I] powers . . . , and its substance lies *close enough* to the heart of any case involving an international transaction with an Edge Act bank to sustain the assertion of federal subject-matter jurisdiction."[196] It found that Congress has the power to

190. 12 U.S.C. § 632 (1991) (emphasis added).

191. *Cf.* Rosenberg, *supra* note 2, at 935 (explaining that federal courts would not have jurisdiction over suits to enforce state claims involving the FDIC if not for a federal statute similar to the Edge Act).

192. A.I. Trade Fin., Inc. v. Petra Int'l Banking Corp., 62 F.3d 1454, 1460 (D.C. Cir. 1995).

193. *Id.*

194. *Id.* (citing FW/PBS Inc. v. City of Dallas, 493 U.S. 215, 231 (1990)).

195. *Id.* at 1463 (emphasis added).

196. *Id.* at 1462–63 (emphasis added). The court relied on the *Osborn* decision in supporting this statement, noting that

> [a]s in *Osborn*, where it was enough for federal jurisdiction that the Bank's ability to enter into a transaction depended upon the terms of its federal charter, an issue of federal law *might well arise* in a suit involving a foreign or international banking

prevent divergent outcomes in the state courts of last resort by extending federal question jurisdiction to such cases.[197]

The decision in *A.I. Trade Finance* demonstrates the questionable relationship between Article III and the Edge Act, particularly in light of current decisions implicating section 632. First, *A.I. Trade Finance* relies on *Osborn*'s "original ingredient" theory to support section 632's grant of federal question jurisdiction while the Supreme Court has continued to retreat from *Osborn*'s expansive understanding of Article III "arising under" jurisdiction.[198] Second, this case seems to suggest that Edge Act jurisdiction is within the bounds of Article III because the Act's "regime" is a valid exercise of Congress's power under Article I, Section 8; this argument implicates Wechsler's theory of protective jurisdiction, which is the most broad and likely the most tenuous and constitutionally problematic of the three protective jurisdiction theories.[199] Third, the concerns described by *A.I. Trade Finance* in support of Edge Act jurisdiction, such as divergent outcomes with respect to cases involving international transactions, are simply not evinced in many current cases invoking section 632 jurisdiction. As described above, these cases almost uniformly have non-diverse parties and involve pure state law claims, and not the application of a scheme of federal banking regulations.[200]

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transaction of an Edge Act corporation.

Id. at 1463 (citations omitted) (emphasis added).

197. *Id.*

198. See *supra* note 31 and accompanying text. Congress and the Supreme Court have narrowly construed the Constitution's limited grant of federal question jurisdiction. *See* U.S. CONST. art. III, § 2, cl. 1 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . ."); 28 U.S.C. § 1331 (1980) ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."); F. Andrew Hessick III, *The Common Law of Federal Question Jurisdiction*, 60 ALA. L. REV. 895, 928–29 (2009) ("[T]he historical tenor of the Court's opinions ha[s] been against finding jurisdiction, as is reflected in the narrow constructions of not only the federal question statute[,] but other jurisdictional statutes as well."); *see also* Romero v. Int'l Terminal Operating Co., 358 U.S. 354, 379 (1959) (noting the "deeply felt and traditional reluctance of this Court to expand the jurisdiction of the federal courts through a broad reading of jurisdictional statutes").

199. *See supra* notes 42–45 and accompanying text for a description of Wechsler's theory; *see also* Ralph Brubaker, *On the Nature of Federal Bankruptcy Jurisdiction: A General Statutory and Constitutional Theory*, 41 WM. & MARY L. REV. 743, 809–10 (2000) (arguing that "[t]o the extent protective jurisdiction relies solely upon Congress's Article I powers, it rings inharmoniously with the conventional wisdom that the Framers intended Article III as both the source and limits of the federal judicial power" and suggesting that this version of protective jurisdiction theory "does not respond to the concern that Article III was designed to restrain the federal judicial power").

200. *See supra* Part III.C.2. Additionally, the federal courts' current treatment of cases that

None of the three theories of protective jurisdiction legitimize Edge Act jurisdiction, thereby remedying its impermissible expansion of Article III. Wechsler's, and, to a much lesser extent, Mishkin's theories could potentially support the extension of federal question jurisdiction under the Edge Act because Congress could (and has, to some degree) exercised its powers in the field of international banking.[201] However, both of these theories have been criticized by scholars including Goldberg-Ambrose.[202]

Perhaps more importantly, regardless of the applicability of Wechsler and Mishkin's theories to the Edge Act, the Supreme Court has rejected the application of protective jurisdiction generally and with respect to a statute that is remarkably similar to section 632.[203] In *Mesa v. California*, the Court held that "a pure jurisdictional statute, seeking to do nothing more than grant district court jurisdiction over cases in which a federal officer is a defendant . . . cannot independently support Art. III 'arising under' jurisdiction."[204] The Court indicated that Article III jurisdiction would be supported only if the officer raised a federal question in her removal petition.[205]

Just like the statute involved in *Mesa*, section 632 is a "pure jurisdictional statute" that does "nothing more than grant district court jurisdiction over cases"[206] in which a corporation organized under the laws of the United States is a party. Thus, section 632 cannot, as it

were removed based on the alleged presence of Edge Act jurisdiction contradicts the purported intent of section 632 (which the *A.I. Trade Finance* court apparently desired to uphold), allows a number of "borderline" cases or suits that have no federal claims and essentially no basis for federal jurisdiction to be considered by the federal courts, contradicts the narrow construction of federal jurisdiction advanced and adhered to by the Constitution, Congress, and the Supreme Court, and promotes inefficiencies in the judicial process by requiring federal courts to wade through unfamiliar law and arguments to resolve cases that should not have been on their dockets in the first place, thereby involuntarily encroaching on the province of the state courts.

201. *See supra* notes 42–49 and accompanying text. This would assume that recent section 632 case law actually concerned international banking—a shaky assumption at present.

202. *See supra* notes 50–56 and accompanying text.

203. *See supra* notes 68–81 and accompanying text (explaining the Court's treatment of protective jurisdiction generally and under the FSIA); *see also* Michael P. Allen, *A Survey and Some Commentary on Federal "Tort Reform,"* 39 AKRON L. REV. 909, 935 n.122 (2006) (citing *Mesa* and *Verlinden* for the proposition that the Supreme Court "has refused to squarely hold whether 'protective jurisdiction' is constitutionally permissible" and noting that "academic opinions have been mixed concerning the constitutionality of this means of conferring federal court jurisdiction," with some commentators arguing that protective jurisdiction is not "a valid means by which Congress can confer jurisdiction"); Bellia, *supra* note 15, at 342, n.324 (indicating that the Supreme court has refrained from adopting theories of protective jurisdiction).

204. Mesa v. California, 489 U.S. 121, 136 (1989).

205. *See id.*

206. *Id.*

currently stands, "independently support Art. III. 'arising under' jurisdiction;" without the presence of a separate federal question—a federal defense was required in *Mesa*—the statute raises "grave constitutional problems."[207] Moreover, just as the application of protective jurisdiction could not support a purely jurisdictional understanding of the statute at issue in *Mesa* because this approach would not be constitutionally sound under Article III,[208] protective jurisdiction also cannot salvage a purely jurisdictional statute like section 632.[209]

In light of Article III and the Supreme Court's negative treatment of protective jurisdiction and of "pure jurisdictional statutes," section 632 of the Edge Act is likely unconstitutional or, at the very least, its current application by the federal courts raises not only statutory-level questions, but also "grave constitutional questions." Federal courts should not be required to extend federal question jurisdiction to cases that neither involve contested issues of federal law nor satisfy the requirements for the application of protective jurisdiction.[210] Yet, this is exactly what the Edge Act now asks federal courts to do.

V. CONCLUSION

The federal courts' recent interpretation and application of section 632 of the Edge Act have created issues of statutory interpretation and constitutional problems. The Act, which places all civil suits arising out of "transactions involving international or foreign banking" or "out of other international or foreign financial operations" in the federal courts, has recently been interpreted to essentially establish federal question jurisdiction over cases with non-diverse parties and involving purely state law claims. More importantly, the Edge Act—both generally and as it is now being used—is likely unconstitutional because it does not fit within the traditional framework of federal question jurisdiction set out in Article III and it cannot be supported by theories of protective

207. *Id.* at 137. In *Verlinden*, however, the Court held that such a federal question was necessarily present in every case brought under the FSIA because that statute was not purely jurisdictional, and included a comprehensive scheme which required courts to resolve whether the foreign state has immunity. Verlinden B.V. v. Cent. Bank of Nig., 461 U.S. 480, 492 (1983).

208. *Id.* (citing 28 U.S.C. § 1442(a)(1) (1996)).

209. The same reasons for rejecting the application of protective jurisdiction in *Mesa* apply to the Edge Act. In *Mesa*, "no state court hostility or interference ha[d] even been alleged by petitioners . . . ," and no federal interests would be left unprotected if removal were unavailable or limited to situations in which a separate federal question were alleged. *Mesa*, 489 U.S. 121 at 137–38.

210. *See* William Cohen, *The Broken Compass: The Requirement That a Case Arise "Directly" Under Federal Law*, 115 U. PA. L. REV. 890, 891 (1967).

jurisdiction or upheld in light of the Supreme Court's rulings in this sphere of the law.

The constitutionality of the Edge Act (and of its proper statutory interpretation, if it is deemed to be constitutional) is a particularly vital legal question during periods of financial uncertainty and bank failures, when issues concerning the federal jurisdiction of lawsuits against or implicating banks and other financial institutions come to the fore. Federal courts must confront these issues now in order to bring clarity and predictability to this murky area of the law.