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Abstract

In 1917, the United States Supreme Court held in Southern Pacific v. Jensen that a state statute is invalid if it "interferes with the proper harmony and uniformity of [the general maritime law]." Over a century after Jensen, we still do not know the limits of this "uniformity principle." Just two years ago, the United States Supreme Court found that this question—what is the role of state law in maritime cases?—remains "one of the most perplexing in the law."

This Article tracks the Court's struggle to make sense of the Uniformity principle. It surveys the Court's inconsistent rulings and criticisms of the Court's jurisprudence levied by the Court, individual Justices, and other critics. Although the Court's ruling in Executive Jet v. Cleveland (1972)—linking admiralty jurisdiction and choice of law—might have clarified choice of law in maritime tort cases, the Court has not followed its precedent. In 1995, the Court rejected the idea that it should do what it did in Executive Jet—"synchronize the jurisdictional enquiry with the test for determining the applicable substantive law"—because that would "discard a fundamental feature of admiralty law, that the federal admiralty courts sometimes do apply state law." The issue remains "perplexing."

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The Author argues that if confusing perplexities are a "fundamental feature" of maritime law, a change is in order. He argues that the Court should follow its precedent in Executive Jet. If a tort case falls within admiralty jurisdiction because its subject has traditionally been governed by maritime law, then all the substantive (as opposed to procedural) issues in the case should be governed by maritime law, subject to a few well-defined exceptions.

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INTRODUCTION: SUMMARY OF THE ISSUE

For the last hundred years, the United States Supreme Court has repeatedly attempted to reconcile two competing concepts. On the one hand, the idea that an efficient system of maritime commerce requires a uniform body of law—the "uniformity doctrine;" and on the other, the principle that a state has broad authority to regulate matters within its territory. As the Court observed back in 1917 in *Southern Pacific Co. v. Jensen*,[1] it would be "difficult, if not impossible" to determine when state law applies in maritime cases.[2] *Jensen*'s guiding

1. 244 U.S. 205 (1917).
2. *Id.* at 216.

principle was that state legislation was not valid if it conflicts with federal legislation or "works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations."[3]

The Court has never explained when or under what circumstances "harmony and uniformity" are "proper" or necessary.[4] To this day, no one knows when the uniformity doctrine trumps state law (beyond a few narrow holdings that lack any meaningful principled basis). As the Court commented recently, "[T]he scope of application of state law in maritime cases is one of the most perplexing issues in the law."[5] Professors Robertson and Sturley wrote in 2003 that "[t]he most pervasively difficult issue in U.S. maritime law is the extent to which state law is displaced by the federal general maritime law."[6] As one federal judge put it, "[A] search for consistency in maritime cases on [the reach of state law] is akin to Captain Ahab's search for Moby Dick—mostly fruitless and occasionally destructive."[7]

From 1917 to 1973, the Court focused on *Jensen*'s uniformity doctrine as a free-standing legal concept. The issue in these cases was whether the need for uniformity required preemption of state law.[8] This changed in 1972 when the Court decided *Executive Jet Aviation v. City of Cleveland*.[9] In that case and in three follow-on rulings, the Court held that a requirement of admiralty jurisdiction in tort cases was that the tortfeasor's activity at issue has traditionally been governed by

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3. *Id.*

4. *See id.*

5. Great Lakes Ins. SE v. Raiders Retreat Realty Co., 601 U.S. 65, 70 (2024) (quoting 1 THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW, § 4:4 (6th ed. 2018)).

6. David W. Robertson and Michael F. Sturley, *The Admiralty Extension Act Solution*, 34 J. MAR. L. & COM. 209, 210 n. 6 (2003).

7. Pucci v. Carnival Corp., 160 F. Supp. 3d 1329, 1335 (S.D. Fla. 2016).

8. *See, e.g.*, *Jensen*, 244 U.S. at 206

> The power of the States to . . . affect the general maritime law . . . may not contravene the essential purposes of an act of Congress, work material prejudice to the characteristic features of the general maritime law or interfere with the proper harmony and uniformity of that law in its international and interstate relations.

9. 409 U.S. 249 (1972).

maritime law.[10] Under this new approach, if maritime law is ill-suited to the dispute, the case falls outside admiralty jurisdiction and it is governed by state law.[11] In *Executive Jet*, for example, the Court held that a case involving a plane crash on navigable waters did not fall within admiralty jurisdiction because it made no sense to apply maritime law to an aviation tort.[12] Here, we argue that *Executive Jet* and not *Jensen* holds the key to solving the "difficult if not impossible" problem.

I. FROM JENSEN TO EXECUTIVE JET—THE UNIFORMITY DOCTRINE PRIOR TO 1973.

The United States Supreme Court first recognized the uniformity doctrine back in the 19th century. In *The Lottawanna*[13] the Court found that the Admiralty Clause of the Constitution referred "to a system of law coextensive with, and operating uniformly in, the whole country."[14] The Court held that the "rules and limits of maritime law" were not subject to state law "as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states."[15]

In 1886, the Court held in *The Harrisburg*[16] that the general maritime law did not provide a wrongful death remedy.[17] At the time, there were no federal remedial statutes (e.g., the Jones Act[18]) covering wrongful death within admiralty jurisdiction. If a seaman, longshoreman, shipyard worker, passenger or recreational boater was killed on navigable waters, his/her estate recovered nothing. The Court's efforts to fill this remedial

10. *See id.* at 253 ("Determination of the question whether a tort is 'maritime' and thus within the admiralty jurisdiction of the federal courts has traditionally depended upon the locality of the wrong.").

11. *See id.* ("If the wrong occurred on navigable waters, the action is within admiralty jurisdiction; if the wrong occurred on land, it is not.").

12. *Id.* at 274.

13. 88 U.S. (21 Wall.) 558 (1874).

14. *Id.* at 575.

15. *Id.*

16. 119 U.S. 199 (1886).

17. *Id.* at 199–200.

18. The Jones Act (Merchant Marine Act) of 1920, 46 U.S.C. § 30104 (providing a remedy for seamen who are fatally injured).

gap repeatedly brought the Court face-to-face with the "impossible" problem.[19]

In 1917 the Court made clear, however, that state law could apply in maritime cases. In *Jensen*, the Court explained that it "would be difficult, if not impossible to define with exactness just how far the general maritime law may be changed, modified, or affected by state legislation," but that "this may be done to some extent."[20] The governing principle was that state legislation was not valid if it "contravenes the essential purpose expressed by an act of Congress or works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations."[21] Applying these principles, the Court held that the estate of a longshoreman killed on a gangway during cargo operations could not recover under New York's workman's compensation statute.[22]

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19. *See, e.g.*, *The Harrisburg*, 119 U.S. at 204

> [I]n the absence of an act of congress or a statute of a state giving a right of action therefor, a suit in admiralty cannot be maintained . . . to recover damages for the death of a human being on the high seas, or on waters navigable from the sea, which is caused by negligence.

20. S. Pac. Co. v. Jensen, 244 U.S. 205, 216 (1917). One reason for the holding was that the New York Statute imposed reporting and financial obligations on ships calling at New York ports. *Id.* at 217. Under New York's statute "no ship may load or discharge her cargo at a dock [in New York] without incurring a penalty, unless her owners comply with the act" which required the owners to secure payment of compensation claims. *Id.* at 213–214. The financial penalty imposed on ship owners for failing to secure workers' compensation coverage was "the pro rata premium which would have been payable for insurance." *Id.* at 214. The Court held that the New York statute was unconstitutional as applied to merchant ships. *Id.* at 217–18. As the Court wrote, "If New York can subject foreign ships coming into her ports to such obligations . . . other states may do likewise." *Id.* at 217. The consequences of this would be "destruction of . . . uniformity in respect to maritime matters" and "freedom of navigation" would be "seriously hampered." *Id.* The *Jensen* Court emphasized, however, that Congress had not passed a workers' compensation statute, and "the absence of any law of Congress on the subject is equivalent to its declaration that commerce in that matter shall be free." *Id.* (quoting Bowman v. Chicago & Nw. Ry. Co. 125 U.S. 465, 508 (1888)).

21. *Id.* at 216.

22. *Id.* at 207.

Just four years after *Jensen*, the Court held in *Western Fuel Co. v. Garcia*[23] that the estate of a longshoreman killed during cargo operations on a commercial ship anchored in the Port of San Francisco could recover under California's wrongful death statute, but not its workers' compensation statute.[24] State law applied, the Court held, where "[t]he subject in maritime and local in character" and the state rule will not undermine "proper harmony and uniformity."[25]

A year after *Garcia*, the Court held in *Grant Smith-Porter Ship Co. v. Rohde*,[26] that a shipyard worker killed on a vessel under construction on navigable waters was covered by the state's workers' compensation statute because a new vessel construction contract is not a maritime contract.[27] In other words, as the Court put it, *Jensen* did not apply because the "application of the local law cannot materially affect any rules of the sea whose uniformity is essential."[28] Following this holding, federal courts applied state workers' compensation law to deaths of shipyard workers on new constructions (because the underlying contract was not maritime) but held that state workers' compensation statutes did not apply where the shipyard worker was killed during vessel repairs (because those contracts were maritime).[29]

State death and workman's compensation statutes were not the only state laws aimed at maritime matters. In *Kelly v.*

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23. 257 U.S. 233 (1921).

24. *See id.* at 242 ("[W]here death upon such waters follows from a maritime tort committed on navigable waters within a state whose statutes give a right of action on account of death by wrongful act, the admiralty courts will entertain a libel in personam for the damages."). This was an unfortunate ruling for the plaintiff. The plaintiff had filed a workers' compensation claim, but it was annulled a year and a day after the accident. *Id.* at 239. Thereafter, she filed her wrongful death claim in admiralty, seeking recovery under California's statute. *Id.* The statute of limitations under California's wrongful death statute was one year, so the widow and children recovered nothing. *Id.*

25. *Id.* at 242 (citing S. Pac. Co., v. Jensen, 244 U.S. 205, 216 (1917)).

26. 257 U.S. 469 (1922).

27. *Id.* at 473.

28. *Id.* at 477.

29. *See, e.g.*, Avondale Shipyards, Inc. v. Donovan, 293 F.2d 51, 52 (5th Cir. 1961); Travelers Ins. Co. v. Calbeck, 293 F.2d 52, 60 (5th Cir. 1961), *rev'd* 370 U.S. 114 (1962).

Washington ex rel. Foss Co.,[30] decided in 1937, the Court validated the state's "comprehensive and complete code for the inspection and regulation of every vesse[l] operated by machinery," except vessels inspected under federal law.[31] The statute therefore applied to all commercial tugs engaged within the state in interstate and international commerce.[32] Upholding this state statute, the Court followed the maritime and local formula, explaining that states had "a wide range for the permissible exercise of power" to cope with "local exigencies."[33] The Court also acknowledged that state law could not cover a subject "demanding uniformity of regulation," because for those subjects, "the Constitution itself occupies the field even if there is no federal legislation."[34] The Court emphasized that state laws have been applied in admiralty cases "even, at times, when [the state laws] conflicted with a rule of maritime law which did not require uniformity."[35] But that case did not reveal how one determines whether a rule "requires uniformity."

In the meantime, back in 1927, Congress had enacted the Longshore and Harbor Workers' Compensation Act,[36] (LHWCA) a worker's compensation statute covering certain workers engaged in maritime employment.[37] The statute covered injuries on navigable waters "if recovery . . . through workmen's compensation proceedings may not validly be provided by State

30. 302 U.S. 1 (1937).

31. *Id.* at 4.

32. *Id.* at 4–5.

33. *Id.* at 9–10.

34. *Id.* at 9.

35. Romero v. Int'l Terminal Operating Co., 358 U.S. 354, 373–74 (1959).

36. 33 U.S.C. §§ 901–950.

37. Insofar as the Court considered a matter "maritime and local" and inoffensive to uniformity because of the gap that existed in maritime law with respect to death cases, the gaps were partially filled by legislation in the 1920s. In addition to the LHWCA, Congress enacted the Jones Act, 46 U.S.C. § 30104, and the Death on the High Seas Act (DOHSA), 46 U.S.C. §§ 30301–30308—both wrongful death statues adopted in 1920. Both statutes preempted state law. In 1970, the Court created a general maritime law wrongful death right of action. *See* Moragne v. States Marine Lines, Inc., 398 U.S. 375, 391 (1970) (overruling *The Harrisonburg* and holding "that an action does lie under general maritime law for death caused by violation of maritime duties").

law."[38] In other words, if the state act was maritime and local and did not improperly undermine uniformity, the state act, and not the LHWCA, applied.[39] The problem was that in borderline cases no one really knew whether a given employment fell within the maritime and local sphere.

As the Court explained in *Davis v. Department of Labor & Industries*,[40] the "line separating the scope of the two [state and federal acts]" was "undefined and undefinable" such that even "the most competent counsel may be unable to predict on which side of the line particular employment will fall."[41] The Court found that marginal cases fall within a "twilight zone" in which "employees must have their rights determined case by case."[42]

The maritime and local and uniformity concepts played no apparent role in the Court's 1955 ruling in *Wilburn Boat Co. v. Fireman's Fund Insurance Co.*[43] The issue was whether an assured's breach of warranty in a marine insurance policy voided coverage.[44] The policy covered a house-boat used commercially to carry passengers on an inland man-made lake at the border of Texas and Oklahoma, but the assured warranted that the vessel would not be used commercially.[45] The vessel was destroyed by a fire that was unrelated to its commercial use.[46] The Court noted that state law governed unless there is a "judicially established federal admiralty rule governing these warranties" and, if no rule existed, the Court asked whether it should "fashion one."[47] Finding no admiralty rule on point,[48] the Court elected not to fashion a rule because

38. Longshore and Harbor Workers' Compensation Act, ch. 509, § 3, Pub. L. No. 69-803, 44 Stat. 1426 (1927) (current version at 33 U.S.C. § 903(a)).

39. Nacirema Operating Co. v. Johnson, 396 U.S. 212, 217–18 & n.14 (1969) (explaining that, although dockside injuries were understood to remain within state jurisdiction, uncertainty remained whether "maritime but local" injuries on navigable waters fell under the LHWCA's coverage).

40. 317 U.S. 249 (1942).

41. *Id.* at 255.

42. *Id.* at 256.

43. 348 U.S. 310 (1955).

44. *Id.* at 311, 314–15.

45. *Id.* at 311.

46. *Id.*

47. *Id.* at 314.

48. *Id.* at 315–16. In his concurring opinion in *Great Lakes Insurance SE v. Raiders Retreat Realty Co.*, Justice Thomas found the Court's conclusion on

"[t]he whole judicial and legislative history of insurance regulation in the United States warns us against the judicial creation of admiralty rules to govern marine policy terms and warranties."[49] Further, the Court explained that courts are ill-suited to develop marine insurance law on a case-by-case basis.[50]

The majority did not mention the uniformity doctrine nor its maritime and local proviso. Indeed, the Court's holding applied whether the matter at issue was "local" or not. As Justice Frankfurter wrote in his concurring opinion, "[F]or reasons that I do not appreciate, the Court's opinion goes beyond the needs of the problem before it."[51] As written, he said that the majority's "language would be invoked when cases so decisively different in degree as to be different in kind come before this Court."[52] Justice Frankfurter added that the Court's opinion "seem[ed] directed with equal force to ocean-going vessels in international maritime trade, as well as coastal, intercoastal and river commerce."[53] Two justices dissented because they concluded that the "strict compliance" rule was an established admiralty rule.[54]

A few years later, in 1961, the Court seemed to limit *Wilburn Boat* by expressly re-adopting the maritime and local formula. In *Kossick v. United Fruit Co.*,[55] the Court held that a state's statute of frauds did not apply to enforcement of an oral contract involving a seaman's cure, explaining that the matter was not "maritime and local" because it had a "genuinely salty flavor."[56] This decision, coming just six years after *Wilburn Boat*'s abandonment of the concept, provided the Court's most

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this point "indefensible." 601 U.S. 65, 81 (2024) (Thomas, J., concurring). To prove his point, he cited a number of treatises and several federal courts of appeals cases enforcing warranties in marine policies, all of which existed in 1955. *Id.* at 81–82.

49. *Wilburn Boat*, 348 U.S. at 316.
50. *Id.* at 316–17, 319–20.
51. *Id.* at 323 (Frankfurter, J., concurring).
52. *Id.*
53. *Id.*
54. *Id.* at 324–26 (Reed & Burton, JJ., dissenting).
55. 365 U.S. 731 (1961).
56. *Id.* at 738, 741–42.

coherent explanation of the doctrine.[57] The Court wrote, "Although the doctrines of the uniformity and supremacy of the maritime law have been vigorously criticized . . . the qualifications and exceptions which this Court has built up to that imperative doctrine have not been considered notably more adequate."[58] The "most often heard criticism of the suprem[acy] doctrine," the Court explained, was that because maritime law was federal there existed "the implication that wherever a maritime interest is involved, no matter how slight or marginal, it must displace a local interest, no matter how pressing and significant."[59] The Court concluded that the "process is surely rather one of accommodation, entirely familiar in many areas of overlapping state and federal concern, or a process somewhat analogous to the normal conflict of laws situation where two sovereignties assert divergent interests in a transaction as to which both have some concern."[60] While this explanation made sense, it did not change the fact that "maritime and local" remained vague and difficult to consistently apply in cases.

After *Wilburn Boat*, the Court ruled in several cases that maritime law governed in matters that arguably involved a predominantly local concern. The Court held in *Kermarec v. Compagnie Generale Transatlantique*[61] that the general maritime law, and not New York law, governed an injury claim brought against a shipowner by a person visiting the vessel at a New York port.[62] Citing the *Lottawanna* (but not *Jensen*), the Court found that applying New York premises liability law would "import . . . conceptual distinctions" that were "entirely alien to the law of the sea."[63] The Court did not address an

57. *Id.* at 738–40.

58. *Id.* at 738. In his concurring opinion in *American Dredging Co. v. Miller*, Justice Stevens wrote that "*Jensen* is just as untrustworthy a guide in an admiralty case today as [*Lochner v. New York*] would be in a case under the Due Process Clause." 510 U.S. 443, 458 (1994) (Stevens, J., concurring in part). He concluded that "*Jensen* and its progeny represent an unwarranted assertion of judicial authority to strike down or confine state legislation." *Id.* at 459.

59. *Kossick*, 365 U.S. at 738–39.

60. *Id.* at 739.

61. 358 U.S. 625 (1959).

62. *Id.* at 626–28.

63. *Id.* at 631–32 (citing The Lottawanna, 88 U.S. (21 Wall.) 558, 575 (1874)).

obvious anomaly: if the visitor had been killed, the matter would have been "maritime and local" and therefore governed by New York law.

Looking back, it is now clear that the Court's holdings that state wrongful death statutes applied in maritime cases were not based on anything akin to an accommodation principle. In *Western Fuel Co. v. Garcia*, for example, the Court held that the matter was local and that there was no need for uniformity in a case involving the death of a longshoreman engaged in cargo operations on a ship engaged in international commerce—a scenario with a "genuinely salty flavor."[64] The Court explained years later (in 1996) that *Garcia* was meant to "temper[] the harshness of *The Harrisburg*'s rule [that the maritime law did not provide a death remedy] by allowing recovery under state wrongful-death and survival statutes."[65] In other words, the "maritime and local" idea was a pretext for filling a remedial gap. Stated another way, "maritime and local" did not actually mean maritime and local. Indeed, every tort arising in state waters is "local" in some sense. Furthermore, while the local concern idea was supposedly balanced against the need for uniformity, no one knew when uniformity was paramount. Why, for example, was uniformity of law unnecessary for the commercial ship involved in *Garcia*?

A few years later, in *Calbeck v. Travelers Insurance Co.*,[66] the Court found that its case law provided "[n]o dependable definition of the area—described as 'maritime but local,' or 'of local concern.'"[67] The Court observed that when comparing cases holding that state compensation statutes applied with those where the federal act applied, "the effect on uniformity was often difficult to distinguish."[68] Because "the contours of the 'local concern' concept were and have remained necessarily vague and

64. W. Fuel Co. v. Garcia, 257 U.S. 233, 242 (1921); Kossick v. United Fruit Co., 365 U.S. 731, 742 (1961).

65. Yamaha Motor Corp. v. Calhoun, 516 U.S. 199, 200 (1996).

66. 370 U.S. 114 (1962).

67. *Id.* at 119.

68. *Id.* The "maritime and local" concept applied in other contexts as well. *See* Just v. Chambers, 312 U.S. 383, 388 (1941) ("[T]here are numerous instances in which the general maritime law has been modified or supplemented by state action, as e.g. in creating liens for repairs or supplies furnished to a vessel in her home port.").

uncertain[,]" injured employees were "at the mercy of the uncertainty, expense, and delay of fighting out in litigation whether their particular cases fell within or without state acts under the 'local concern' doctrine."[69] The Court's solution was to disregard the language of the statute (the statute specified that the LHWCA did not apply where the worker could recover workers' compensation under state law[70]) and hold that the LHWCA applied to all injuries of covered workers on navigable waters.[71] In other words, because no one could figure out in advance whether state law applied in "twilight zone" cases,[72] the Court dropped the "maritime and local" concept—but only in this narrow context.

Heading into the 1970s, the Court had developed what Justice Stevens later called a "patchwork maritime pre-emption doctrine" that was "haphazard" and "capricious" and therefore "unlikely to aid the free flow of commerce, and threaten[ed] to have the opposite effect."[73] Indeed, the Court had always acknowledged that its cases failed to resolve the "difficult, if not impossible" choice-of-law problem it identified in *Jensen* back in 1917.[74] The Court acknowledged the problem in 1921 (stating that "no complete solution of the question has been announced"),[75] in 1942 (recognizing that "shadowy area within which, at some undefined and undefinable point, state laws can validly provide compensation" and conceding "much serious confusion"),[76] and in 1962 (describing the Court's decisions on

69. *Calbeck*, 370 U.S. at 122, 124–25.

70. 33 U.S.C. § 903(a), (e).

71. *Calbeck*, 370 U.S. at 125–27.

72. *Id.* at 128–29. *The Twilight Zone*, a well-known science fiction program that featured strange and surreal phenomena, first aired in 1959. John Kiesewetter, *'The Twilight Zone' Premiered 60 Years Ago Today in 1959*, 91.7 WVXU NEWS (Oct. 2, 2019), https://perma.cc/SH2N-J9KN. One wonders whether the program was inspired by the *Davis* case. Davis v. Dep't of Lab. & Indus., 317 U.S. 249, 256 (1942). To this day, trying to determine whether some borderline cases fall within admiralty jurisdiction is akin to watching an episode of *The Twilight Zone*. *See* John E. Holloway, *Judicial Activism in Maritime Cases*, 43 TUL. MAR. L.J. 21, 47–56 (2018).

73. Am. Dredging Co. v. Miller, 510 U.S. 443, 460 (1994) (Stevens, J., concurring in part).

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

75. W. Fuel Co. v. Garcia, 257 U.S. 233, 240 (1921).

76. *Davis*, 317 U.S. at 253–254.

the scope of "valid state law coverage" as "[un]reliable").[77] In sum, *Jensen*'s uniformity doctrine had no fixed meaning. As Justice Frankfurter put it, *Jensen*'s "loose doctrine"[78] caused "judicial chaos."[79]

Legal scholars agreed. In 1995, Professor David W. Robertson observed, "Nobody has any clear idea just how big [the] state role is" in maritime cases.[80] Professor Robert Force observed in 2001 that the Supreme Court "has not formulated a comprehensive rule, or discrete set of rules, to resolve choice-of-law disputes in admiralty cases."[81]

By the early 1970s, it was clear that *Jensen*'s "difficult, if not impossible" persisted. Up to this point, however, the Court's formulation of admiralty tort jurisdiction was clear and simple—if the tort occurred entirely on navigable waters, it fell within admiralty jurisdiction[82] and the choice-of-law issue was entirely separate. In 1973, however, the Court compounded the confusion by redefining admiralty jurisdiction.

II. ADMIRALTY TORT JURISDICTION

As of 1973, the Court had always recognized that "[w]ith admiralty jurisdiction . . . comes the application of substantive admiralty law"[83] but the existence of admiralty jurisdiction did

77. Calbeck v. Travelers Ins. Co., 370 U.S. 114, 118 (1962).

78. Kossick v. United Fruit Co., 365 U.S. 731, 742 (1961) (Frankfurter, J., dissenting).

79. *Davis*, 317 U.S. at 259 (Frankfurter, J., concurring).

80. David W. Robertson, *Displacement of State Law by Federal Maritime Law*, 26 J. MAR. L. & COM. 325, 328 (1995).

81. Robert Force, *Choice of Law in Admiralty Cases: "National Interests" and the Admiralty Clause*, 75 TUL. L. REV. 1421, 1435 (2001) [hereinafter *Choice of Law*].

82. The Plymouth, 70 U.S. (3 Wall.) 20, 20 n.1 (1865). The last hotly contested admiralty jurisdiction case had been on the eve of the Civil War when the Court expanded admiralty jurisdiction to all navigable waters, which extended federal jurisdiction well up the Alabama River, to the consternation of some southerners. *See* Jackson v. The Magnolia, 61 U.S. (20 How.) 296, 308–11 (1857) (Daniel, J., dissenting).

83. Yamaha Motor Corp. v. Calhoun, 516 U.S. 199, 206 (1996) (quoting E. River S.S. Corp. v. Transamerica Delaval Inc., 476 U.S. 858, 864 (1986)) (noting the exception that "[t]he exercise of admiralty jurisdiction . . . 'does not result in automatic displacement of state law'" (citation omitted)).

not depend on the choice of law (it was based on locality alone).[84] Stated another way, choice of law depended on admiralty jurisdiction; admiralty jurisdiction did not depend on choice of law.

In 1973, however, the Court decided the first of a line of cases that flipped the analysis by making admiralty jurisdiction *dependent* on the choice-of-law question. In its 1973 ruling in *Executive Jet Aviation, Inc. v. City of Cleveland*,[85] the Court addressed whether tort claims arising out of a plane crash on navigable waters fell within admiralty tort jurisdiction.[86] During takeoff, the aircraft flushed and ingested a flock of birds.[87] The plane lost power, bounced off a pickup truck, and came to rest in Lake Erie near the shoreline.[88] Because the plane came to rest on navigable waters, the matter arguably fell within admiralty jurisdiction under the locality test.[89] The Court observed that admiralty law was not well suited to aviation tort cases, however.[90] As it explained:

> The law of admiralty has evolved over many centuries, designed and molded to handle problems of vessels relegated to ply the waterways of the world, beyond whose shores they cannot go. That law deals with navigational rules—rules that govern the manner and direction those vessels may rightly move upon the waters. When a collision occurs or a ship founders at sea, the law of admiralty looks to those rules to determine fault, liability, and all other questions that may arise from such a catastrophe. Through long experience, the law of the sea knows how to determine whether a particular ship is seaworthy, and it knows the nature of maintenance and cure. It is concerned with maritime liens, the general average, captures and prizes, limitation of liability, cargo damage, and claims for salvage.
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> Rules and concepts such as these are wholly alien to air commerce.[91]

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84. *Id.* at 206–07.
85. 409 U.S. 249 (1973).
86. *Id.* at 250–51.
87. *Id.* at 250.
88. *Id.*
89. *Id.* at 253–54.
90. *Id.* at 274.
91. *Id.* at 269–270.

The Court might have justified application of Ohio tort law by finding that the case failed to meet the locality requirement for admiralty jurisdiction.[92] Alternatively, the Court might have found that the crash was "maritime and local" and applied state law. Instead, it redefined admiralty tort jurisdiction.

The new test required a showing that the tort occurred on a maritime locality, as before, but also another requirement—that "the wrong bear a significant relationship to traditional maritime activity."[93] The Court "elaborated on the enquiry"[94] in a series of cases that followed: *Foremost Insurance Co. v. Richardson* (1982);[95] *Sisson v. Ruby* (1990);[96] and *Grubart v. Great Lakes Dredge & Dock Co.* (1995).[97] By 1995, the test for admiralty tort jurisdiction had three components. First, the tort must have occurred on navigable waters.[98] Second, the "general features of the type of incident involved"(described as "an intermediate level of possible generality")[99] must have a

92. Under the existing locality test, the case arguably did not fall within admiralty jurisdiction. *See id.* at 268 ("[W]e conclude that the mere fact that the alleged wrong 'occurs' or 'is located' on or over navigable waters—whatever that means in an aviation context—is not of itself sufficient to turn an airplane negligence case into a 'maritime tort.'"). In *T. Smith & Son v. Taylor*, for example, a longshoreman standing on the pier was knocked into the water by a cargo laden sling from the ship. 276 U.S. 179, 180–81 (1928). The Court held that there was no admiralty jurisdiction in that case because the blow by the sling on land gave rise to the cause of action, even though the longshoreman landed in the water. *Id.* at 182. As the Court explained, "the substance and consummation of the occurrence which gave rise to the cause of action took place on land." *Id*. at 182; *see* Motts v. M/V Green Wave, 210 F.3d 565, 569–72 (5th Cir. 2000) (explaining that under DOHSA, the place of the injury on the high seas governs and finding that the location of the defendant's wrongful acts was more significant than the location of the plaintiff's initial injury); *see also* Robertson & Sturley, *supra* note 6, at 213 n.22 (noting that the *Executive Jet* lower court properly found that the tort did not occur on navigable waters).

93. *Exec. Jet Aviation, Inc.*, 409 U.S. at 268.

94. Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 533 (1995).

95. 457 U.S. 668 (1982) (collision of recreational vessels).

96. 497 U.S. 358 (1990) (fire damage to marina originating on moored yacht).

97. 513 U.S. 527 (1995) (damage by vessel in navigable water to underwater structure).

98. *Id.* at 534.

99. *Id.* at 534, 538 (quoting *Sisson*, 497 U.S. at 363). Robertson and Sturley describe this as Justice Souter's "Goldilocks requirement" —not too

"potentially disruptive impact on maritime commerce."[100] Third, "the general character" of the "activity giving rise to the incident" must have a "substantial relationship to traditional maritime activity."[101] For this third element of the test, the Court asks "whether a tortfeasor's activity, commercial or noncommercial, on navigable waters is so closely related to activity traditionally subject to admiralty law that the reasons for applying special admiralty rules would apply in the suit at hand."[102] Thus, the third prong was satisfied when the activity involved has traditionally been governed by maritime law.

The Court's new test for admiralty tort jurisdiction complicated the already intractable "difficult if not impossible" problem by linking its jurisdiction test with *Jensen*'s uniformity doctrine without synchronizing these two lines of cases.[103] In other words the Court linked two lines of cases that had developed independently and which applied different (and sometimes conflicting) inquiries to the same issue. On the one

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specific, not to general, but just right. *See* Robertson & Sturley *supra* note 6, at 222. Of course, whether the porridge temperature was just right was a matter of subjective taste for Goldilocks . . . and now this kind of subjective determination—a matter of personal taste—is a definitive element of admiralty jurisdiction.

100. *Id.* at 534 (quoting *Sisson*, 497 U.S. at 364 n.2).

101. *Id.* (quoting *Sisson*, 497 U.S. at 364 n.2, 365).

102. *Id.* at 539–40. This three-tiered formula for determining admiralty tort jurisdiction has often been criticized as hopelessly confusing and likely to lead to inconsistent and conflicting outcomes in similar cases. As Justice Scalia put it in his concurring opinion in *Sisson*, the test produces a "vague boundary." *Sisson*, 497 U.S. at 375 (Scalia, J., concurring). In his concurring opinion in *Grubart*, Justice Thomas observed that the test for jurisdiction after *Executive Jet* "produced only confusion and disarray." *Grubart*, 513 U.S. at 554 (Thomas, J., concurring). Robertson and Sturley have commented that the Court's new test for admiralty jurisdiction "cannot generate much predictive power because it is inherently vague" and that the Court's decision in *Foremost*, one of the Court's post *Executive Jet* jurisdiction cases, is "not coherent" and is "not useful enough to justify its complexity." Robertson & Sturley, *supra* note 6, at 215–16. Another critic commented that "American admiralty jurisdiction has historically been such a confusing patchwork that anyone seeking to make sense from it has been advised to treat it as one would a list of irregular verbs—it is to be memorized but not to be understood on any principled basis." Armand M. Paré, Jr., *Admiralty Jurisdiction at the Millennium*, 24 TUL. MAR. L.J. 187, 187 (1999).

103. *See Sisson*, 497 U.S. at 359 (grounding the court's inquiry about whether maritime law is applicable in the need for uniform rules of maritime conduct and liability).

hand, the Court's uniformity cases which granted state law "wide scope," and on the other, the Court's new jurisdiction cases that linked admiralty jurisdiction to applicable maritime law without reference to state law.

III. THE ROLE OF STATE LAW AFTER EXECUTIVE JET

By 1973, and certainly by today, large chunks of the "difficult if not impossible problem" were and have been resolved by Congress. The Court has held that enforceability of state statutes directed at vessels (their safety, condition, and ability to enter state waters) and pollution within territorial waters hinges on the supremacy clause of the Constitution and preemption doctrines.[104] Federal remedial statutes also preempt the field.[105] The Jones Act and the Death on the High Seas Act preempt state law and neither statute can be "supplemented" by state law.[106] But the "difficult if not impossible" problem persists in areas not governed by federal statutes.

From 1973 to 2025—fifty-three years—the Court addressed the role of state law in *just two* general maritime law tort cases.[107] In both cases, the Court recognized that its jurisprudence in this area was flawed, but the Court nevertheless decided both cases, *American Dredging Co. v. Miller*[108] and *Yamaha Motor Corp. v. Calhoun*,[109] on narrow grounds and avoided the broader problems. For this reason, the cases have limited utility. Neither case provides a unifying

104. *See, e.g.,* Ray v. Atl. Richfield Co., 435 U.S. 151, 165 (1978) ("The Supremacy Clause dictates that the federal judgment that a vessel is safe to navigate United States waters prevail over the contrary state judgment.").

105. *See, e.g.,* Death on the High Seas Act (DOHSA), 46 U.S.C. §§ 30301–30308.

106. Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 216–17, 23 (1986) (examining whether state law remedies can supplement federal law remedies, and finding that they cannot); Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 624–26 (1978) (holding that DOHSA's saving clause is only a jurisdictional saving clause and that state statutes are pre-empted by DOHSA where it applies).

107. *See, e.g.*, Am. Dredging Co. v. Miller, 510 U.S. 443, 445 (1994) (recognizing that the case presented a question about the pre-emption of state law by admiralty law); Yamaha Motor Corp. v. Calhoun, 516 U.S. 199, 206 (1996) (recognizing a conflict between state law and admiralty law).

108. 510 U.S. 443 (1994).

109. 516 U.S. 199 (1996).

theme reconciling the Courts disjointed case law.[110] Neither addresses the confusion stemming from its refusal to synchronize its case law interpreting the uniformity doctrine and its jurisdiction cases.

A. *American Dredging Co. v. Miller: 1994*

At issue in *American Dredging Co. v. Miller* was a Louisiana statute that "renders the doctrine of *forum non conveniens* unavailable in Jones Act and maritime law cases brought in Louisiana state courts . . . ."[111] As the Court framed it, the question was whether "under the Jones Act and the 'savings to suitors clause,' federal law pre-empts state law regarding the doctrine of *forum non conveniens*."[112]

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110. During this same period, however, the Court decided several cases involving maritime contracts. While *Wilburn Boat* stands out as an anomaly, the Court has otherwise provided relatively clear guidance for maritime contract cases based on the uniformity doctrine and "local concern" principles. In its two most recent contract cases where the role of state law was at issue, the Court applied maritime law in both, though it applied differing tests. In *Norfolk Southern Railway Co. v. Kirby*, the Court held that a cargo damage claim arising from an inland train accident was governed by maritime law because the container was being carried under an intermodal bill of lading, which the Court found was predominantly a maritime contract. 543 U.S 14, 33–36 (2004). The Court held, however, that the maritime contract would be governed by state law if the case was "inherently local." *Id.* at 27. The Court explained that "[a] maritime contract's interpretation may so implicate local interests as to beckon interpretation by state law." *Id.* More recently, in *Great Lakes Insurance SE v. Raiders Retreat Realty Co.*, the Court enforced a choice of law provision in a marine insurance contract as a matter of substantive maritime law. 601 U.S. 65, 79 (2024). The Court recognized that the "issue of federalism in admiralty and scope of application of state law in maritime cases is one of the most perplexing issues in the law." *Id.* at 70 (quoting T. Schoenbaum, Admiralty and Maritime Law 1, § 4:4 (6th ed. 2018)). The Court wrote that state law may apply when there is no existing or newly created maritime law on point. *Id.* The Court did not mention the "inherently local" proviso it acknowledged in *Kirby*. Even though the Court seemingly applies different tests from time to time in this perplexing area, putting aside the Court's strange and anomalous ruling in *Wilburn Boat*, the contract cases are more predictable. This may be because a substantial body of maritime law has over the years built up around traditional maritime contracts—towage, affreightment, charters, insurance, bills of lading, salvage, and the like. In any event, admiralty contract jurisdiction does not depend on the choice of law and these cases present a different challenge than we see in the tort cases.

111. *American Dredging*, 510 U.S. at 446.

112. *Id.* at 445 (citations omitted).

To resolve the issue, the Court looked to *Jensen*. The Court concluded that the Louisiana statute did not "work material prejudice to a characteristic feature of the general maritime law" because the doctrine of *forum non conveniens* "neither originated in admiralty nor has exclusive application there."[113] The Court then turned to the uniformity doctrine. The Court explained that "the requirement of uniformity is not . . . absolute."[114] The Court recognized that "it would be idle to pretend that the line separating permissible from impermissible state regulation is readily discernible in our admiralty jurisprudence, or indeed is even entirely consistent within our admiralty jurisprudence."[115] The Court was *thrilled*, however, to avoid drawing that line with any degree of clarity. As it explained: "[h]appily, it is unnecessary to wrestle with that difficulty today."[116] Though the Court did observe that "whatever might be the unifying theme of this aspect of our admiralty jurisprudence, it is assuredly *not* . . . the principle that the States may not impair maritime commerce . . . ."[117] Therefore, without "wrestling" with the "difficult if not impossible" problem, the Court held that Louisiana's statute did not violate *Jensen*'s uniformity doctrine because *forum non conveniens* is a procedural rule.[118] Furthermore, the doctrine "is most unlikely to produce uniform results" because of its "discretionary nature . . . combined with the multifariousness of the factors relevant to its application."[119]

The lessons of *American Dredging* were that *Jensen* still applies, characteristic features of maritime law are rules that originated in admiralty and have exclusive application there, the uniformity doctrine does not apply to procedural rules, that uniformity of maritime law is not expected or required for issues governed my discretionary multi-factored legal tests, and that

113. *Id.* at 450 (citation omitted).

114. *Id.* at 451.

115. *Id.* at 452.

116. *Id.* at 452–53.

117. *Id.* at 452 n.3.

118. *Id.* at 443–44 (holding that *forum non conveniens* "is a sort of venue rule—procedural in nature—rather than a substantive rule upon which maritime actors rely in making decisions about how to manage their business").

119. *Id.* at 453–55.

state law may impair maritime commerce. All this is useful information, as far as it goes. The next case had broader implications.

B. *Yamaha Motor Corp. v. Calhoun:1996*

Yamaha, decided in 1996, involved the death of a teenager in a jet ski accident on the territorial waters of Puerto Rico.[120] In 1970, the Court had created a general maritime law wrongful death action in *Moragne v. States Marine Lines, Inc.*[121] The issue in *Yamaha* was whether the teenager's estate was entitled to wrongful death remedies provided by state law, or whether those remedies were preempted by *Moragne.*[122] The Court held that the plaintiff's remedies were defined by state law because the teenager was a "nonseafarer."[123] Emphasizing the narrow scope if its holding, the Court explained that it was "attempt[ing] no grand synthesis or reconciliation of [its] precedent" but was confining its "inquiry to the modest question whether it was *Moragne*'s design to terminate recourse to state remedies when nonseafarerers meet death in territorial waters."[124] The case provided no principled solution to *Jensen*'s "difficult if not impossible problem."[125] At the same time, the case created a broader problem by muddying its already confusing admiralty jurisdiction test.

The Court found that the case fell within admiralty jurisdiction, apparently based on the old locality test—it did not look to its quartet of admiralty jurisdiction cases (*Executive Jet*

120. Yamaha Motor Corp., 516 U.S. 199, 201 (1996) (describing the factual background of the case).

121. 398 U.S. 375 (1970).

122. *Yamaha*, 516 U.S. at 205.

123. *Id.* at 202, 215 (holding that "state remedies remain applicable in such cases and have not been displaced by the federal maritime wrongful-death action recognized in *Moragne*" and explaining that "Congress has not prescribed remedies for the wrongful deaths of nonseafarers in territorial waters").

124. *Id.* at 210 n.8 (alteration in original).

125. *Id.* (acknowledging that the Court's admiralty precedent does not "precisely delineate" the boundary between permissible and impermissible state law and making "no grand synthesis or reconciliation" of those cases).

et al.).[126] The Court wrote simply that it had admiralty jurisdiction because the case "involves a watercraft collision on navigable waters."[127] The Court cited *Foremost* and *Sisson*, but did not mention its test for admiralty tort jurisdiction.[128]

Had the Court applied its multi-pronged admiralty tort jurisdiction rules, however, it may have found that admiralty jurisdiction was lacking. The Court's three-pronged test requires a maritime location, an incident of the type that could potentially interfere with commerce and a "substantial relationship" to "traditional maritime activity"—defined as the kind of activity ordinarily governed by maritime law.[129] *Yamaha* probably satisfies the first two prongs—the accident was on navigable waters, and a vessel collision is the type of thing that can impact commerce.[130] But what about the third prong? In

126. Although beyond the scope of this article, it is possible that the three-pronged *Grubart* test for admiralty jurisdiction has limited application. Even before the Court decided *Grubart*, the Court acknowledged an open question respecting its post-*Executive Jet* jurisdiction cases. In 1986, the Court wrote in *East River S.S. Corp. v. Transamerica Delaval, Inc.*, a maritime product liability case, that "[w]e need not reach the question whether a maritime nexus also must be established when a tort occurs on the high seas." 476 U.S. 858, 864 (1986). In 2006, the Seventh Circuit held that the Extension of Admiralty Jurisdiction Act (AEA) conferred admiralty jurisdiction to an accident on a vessel used as a casino even where the subject matter of the case was more suited to state law resolution. *See* Tagliere v. Harrah's Illinois Corp., 445 F.3d 1012, 1014 (7th Cir. 2006) (noting that "an accident that occurs on a vessel afloat on a navigable body of water, and that is caused by the vessel," fell within admiralty jurisdiction under the AEA). *See also* Robertson & Sturley, *supra* note 6, at 239–40 (noting that *Foremost*, *Sisson*, and *Grubart* left open whether the AEA independently confers admiralty jurisdiction, without the later maritime-connection requirements).

127. Lawrence D. Bradley, Jr., *The Supreme Court and Maritime Jurisdiction*, 25 TUL. MAR. L.J. 207, 235 (2000) ("What did Justice Ginsberg's terse jurisdiction statement mean? If the Supreme Court was adopting the views of Justices Scalia, White, and Thomas, [calling for reinstatement of the locality rule in cases involving vessels on navigable waters,] "it did not so state.").

128. *Yamaha*, 516 U.S. at 206 (citing *Foremost* and *Sisson* as support for the application of admiralty law).

129. Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 539–40 (1995).

130. In *Lanzi v. Yamaha Motor Corp.*, No. 8:17-cv-2020, 2019 U.S. Dist. LEXIS 234361 (M.D. Fla. Oct. 8, 2019), the court found in a product liability case based on alleged defective design of a jet ski that "the tort occurs 'where the alleged negligence took effect, rather than where the negligent act was done.'" *Id.* at *7 (citation omitted).

Yamaha the Plaintiff asserted product liability claims based on negligent design of the jet ski's throttle mechanism and failure to warn.[131]

The third prong focuses on the "general character" of the *tortfeasor's* activity, not the general character of the incident (that would be prong two).[132] As the Court emphasized repeatedly in *Grubart*, the issue is whether "the *tortfeasor's* activity" or "the wrong" or the "maritime activity of a *tortfeasor*" or the "allegedly wrongful activity" involves "traditional maritime activity."[133] Focusing on the alleged tortfeasor, Yamaha, we ask whether its engineer sitting in an office designing a new vessel is engaged in "traditional maritime activity."[134] What about the marketing department preparing sales materials with the usual litany of warnings? The Court has held that a tortfeasor's activity is a "traditional maritime activity" when it is "on navigable waters" and "so closely related to activity traditionally subject to admiralty law that the reasons for applying special admiralty rules would apply in the suit at hand."[135] What if we follow that rule here?

In *Sisson*, "the relevant activity was the storage and maintenance of a vessel at a marina on navigable waters."[136] In *Foremost*, the "relevant activity [was] navigation of vessels generally."[137] In *Yamaha*, the tortfeasor's activity was defectively designing the jet ski's "accelerating mechanism, which is referred to as a 'squeeze finger throttle'" that resembles a bicycle break and providing inadequate warnings.[138] If we followed the Court's precedent, the question would be whether the activity at issue—design and sale of a new vessel—has historically been governed by shipping law.

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131. *Yamaha*, 516 U.S. at 203.

132. *Lanzi*, 2019 U.S. Dist. LEXIS 234361, at *9.

133. Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 533, 538, 541 (1995) (emphasis added).

134. *Id.* at 533.

135. *Id.* at 539–40.

136. Sisson v. Ruby, 497 U.S. 358, 365 (1990).

137. *Id.* at 364 (citing *Foremost Inc. Co. v. Richardson*, 457 U.S. 668, 675–77 (1982)).

138. Calhoun v. Yamaha Motor Corp., 350 F.3d 316, 319 (3d Cir. 2003).

The answer is no.[139] A contract to build a new vessel is not a maritime contract.[140] In fact, the Court has held in a case involving a shipyard worker killed on a vessel afloat during new construction that the death case was governed by state law because the contract to build a new vessel was not a maritime contract.[141] Furthermore, state law has "traditionally" governed maritime death cases arising in state waters (unless covered by a federal statute).[142] Therefore, the tortfeasor's activity at issue in *Yamaha*, office work in connection with construction of a *new vessel*, does not appear to be activity traditionally governed by shipping law or traditionally maritime.[143] So the case does not satisfy the Court's jurisdictional requirements for admiralty jurisdiction.

To be sure, in *East River S.S. Corp. v. Transamerica Delaval*,[144] decided in 1986, the Court held that a product liability case alleging a defect in a newly constructed oil tanker fell within admiralty jurisdiction and was therefore governed by maritime law.[145] Citing *Executive Jet* and *Foremost*, the Court observed that the claims "satisfy the traditional 'locality' requirement" because the engines failed on the high seas."[146] With respect to the requirement that the tortfeasor's activity have a substantial connection to traditional maritime activity, the Court did not "reach the question whether a maritime nexus also must be established when a tort occurs on the high seas[,]" though the Court found that "[w]ere there such a requirement, it clearly was met here, for these ships were engaged in

139. The Jefferson, 61 U.S. 393, 401 (1857).

140. *See id.* ("The admiralty jurisdiction, in cases of contract, depends primarily upon the nature of the contract, and is limited to contracts, claims, and services, purely maritime, and touching rights and duties appertaining to commerce and navigation.").

141. Grant Smith-Porter Ship Co. v. Rohde, 257 U.S. 469, 475–76 (1922). This case fell within admiralty jurisdiction even though the work was on a new build—but that was before the Court scrapped the locality rule in 1973. To apply state law in the case, the Court looked to the "maritime and local" rationale. *Id.* at 476.

142. Yamaha Motor Corp. v. Calhoun, 516 U.S. 199, 202 (1996).

143. *Id.*

144. 476 U.S. 858 (1986).

145. *Id.* at 863.

146. *Id.* at 863–64.

maritime commerce, a primary concern of admiralty law."[147] Having found that the case fell within admiralty jurisdiction, the Court adopted into the general maritime law state substantive law concepts, citing cases from California, New York, Wisconsin, Alaska, New Jersey, and others.[148] Of note, however, is the fact that if the Court did not apply maritime law, no law would apply—the failure did not occur in state waters.[149]

Yamaha presented a different case entirely. The Court in *East River* was filling a gap in maritime law by adopting into that law state substantive concepts in a high seas case.[150] The Court looked to state law because "traditionally" there was no maritime law on point.[151] When a tort arises on land or in state waters (*e.g.*, *Yamaha*), however, there is a full body of state law available to adjudicate the case.[152] There is no gap to fill.

In 2021 a federal court in Virginia addressed the jurisdiction issue on material facts identical to those in *Yamaha.* In *Varner v. Yamaha Motor Corp.*,[153] the plaintiff, a nonseafarer who fell off a jet ski, sued Yamaha in admiralty based on claims of design defect and failure to warn.[154] The critical issue was whether the case was governed by maritime law, which recognized strict liability in product cases, or Virginia law, which did not.[155] Yamaha argued that Virginia law should apply because "the activity in which [the plaintiff] was engaged [allegedly 'wave jumping or horsing around'] was not a traditional maritime activity such as navigation" and therefore the case should be governed by Virginia law.[156]

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147. *Id.* at 864.

148. *Id.* at 867–73.

149. *Id.* at 860–61.

150. *Id.* at 865.

151. *Id.* at 864–65.

152. *Yamaha*, 516 U.S. at 202.

153. No. 3:21-cv-290, 2021 U.S. Dist. LEXIS 207879 (E.D. Va. Oct. 27, 2021).

154. *Id.* at *3.

155. *Id.* at *2.

156. *Id.* at *10. Yamaha apparently did not argue that, even if the case fell within admiralty jurisdiction, state substantive law applied because the accident—a swimmer falling off a jet ski in the Rappahannock river—was "maritime and local." *See* Grant Smith-Porter Ship Co. v. Rohde, 257 U.S. 469, 476 (1922).

The court worked through the elements of the *Sisson/Grubart* test and found that the case satisfied all three prongs, but its finding respecting the third prong (traditional maritime activity) misapplied the Supreme Court's precedent.[157] The district court in Virginia correctly recognized that the third prong of the test focuses on the *activity of the tortfeasor*, not the injured party.[158] As the court explained, whether the plaintiff was "horsing around" on the jet ski missed the point that the case was "a products liability action brought against a commercial entity for the design of a vessel, and not a tort action brought against another person for some action committed on or near a body of water."[159] After accurately identifying the test criteria, the district court then, inexplicably, based its ruling on the activity of the plaintiff, *not the tortfeasor*—the opposite of the approach it endorsed previously in the same opinion.[160] In any event, in the second half of the opinion, the court explained that Yamaha's wave-jumping argument failed because characterizing the activity as "wave jumping and horsing around" was "not the right level of generality at which to construe events."[161] The court explained that viewing the matter "at an intermediate level of generality . . . the event is related to traditional maritime activities."[162] This too was error. The level of generality assessment applies to the second prong (whether the incident is the sort of thing that could potentially interfere with commerce) not the third prong. So, we're left with *Yamaha v. Calhoun*, where the Court did not apply its own test, and *Varner v. Yamaha*, where the district court misapplied the test. We're not even sure at this point whether the *Sisson/Grubart* test remains viable.

Other courts have similarly misread the third prong of the Court's test. In *Lanzi*, for example, the court held that the design and manufacture of a new jet ski "clearly has a maritime

157. *Varner*, 2021 U.S. Dist. LEXIS 207879, at *7–*13.

158. *Id.* at *6.

159. *Id.* at *12.

160. *Id.* at *12. The two halves of the opinion were seemingly written by different people (perhaps a new law clerk joined chambers) and no one reconciled the halves.

161. *Id.* at *12–*13.

162. *Id.* at *13.

connection" and therefore satisfied the test.[163] Likewise, in *Gibbs v. Carnival Cruise Lines*, the court found that "the defective design or manufacture of parts of a boat designed for maritime use, such as the deck of a cruise ship, bears a substantial relationship to traditional maritime activity."[164] Neither of these courts addressed the controlling question: "whether a tortfeasor's activity, commercial or noncommercial, on navigable waters is so closely related to activity traditionally subject to admiralty law that the reasons for applying special admiralty rules would apply in the suit at hand."[165] In *Executive Jet*, the case fell outside admiralty jurisdiction because state law was better suited to the aviation tort at issue.[166] The same is true in these product liability cases. States have fully developed bodies of product liability law; shipping law does not. In the high seas case, *East River*, the Court looked to state law for substantive concepts because maritime law provided none.[167]

Another uncertainty stemming from *Yamaha* is its scope. While we know that it applies to accidents like the one at issue there—a recreational boater killed when her jet ski collided with an anchored recreational vessel—we don't know whether the uniformity doctrine applies differently when commercial shipping is directly involved.[168] The Eleventh Circuit faced this question in *In re Amtrack "Sunset Limited" Train Crash*.[169] A commercial tug had pushed a flotilla of barges against a railroad bridge.[170] Soon thereafter, an Amtrack train derailed and fell into the river.[171] Forty nonseafarers died in the incident.[172] The issue was whether Alabama's wrongful death statute or the

163. Lanzi v. Yamaha Motor Corp., No. 8:17-cv-2020, 2019 U.S. Dist. LEXIS 234361 (M.D. Fla. Oct. 8, 2019), at *13.

164. 314 F.3d 125, 132 (3d Cir. 2002).

165. Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 539–40 (1995).

166. Exec. Jet Aviation v. City of Cleveland, 409 U.S. 249, 273 (1972).

167. E. River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 864–65 (1986).

168. Yamaha Motor Corp. v. Calhoun, 516 U.S. 199, 209–10 (1996).

169. 121 F.3d 1421 (11th Cir. 1997).

170. *Id.* at 1423.

171. *Id.*

172. *Id.*

general maritime law governed the case.[173] The Eleventh Circuit cited the "bedrock admiralty principles recognized in [*Jensen*]" and observed that the Court in *Yamaha* had emphasized that "where substantive admiralty principles are placed at risk by the potential application of state law, there is 'no leeway for variation or supplementation by state law.'"[174] With this in mind, the court wrote that it "must balance Alabama's interests in having its wrongful death statute apply against the federal maritime law principles of uniformity and harmony."[175] The Eleventh Circuit struck this balance in favor of maritime uniformity because (1) the Alabama statute "conflicts with two fundamental admiralty law principles" (apportionment of damages and standard for imposing punitive damages), and (2) the matter involved "allision of a commercial tug and tow with a railroad bridge, that took place in the ordinary course of maritime business, on a waterway subject to heavy commercial traffic."[176]

Similarly, *In re Diamond B Marine Services*[177] involved a passenger's personal injury claims arising out of a collision of commercial vessels.[178] The Court found that *Yamaha* did not apply to passenger claims because "quite unlike *Yamaha*," the case "involves the personal injury claims of passengers aboard a commercial vessel as the result of a head-on collision with another commercial vessel in navigable waters."[179]

Another difficulty posed by *Yamaha* is its contradiction of *Executive Jet*. In both cases the Court found that maritime law was ill suited to issues in the case.[180] In one (*Executive Jet*) that finding defeated admiralty jurisdiction.[181] In the other, it did

173. *Id.*

174. *Id.* at 1425, 1426 (quoting *Yamaha*, 516 U.S. at 210).

175. *Id.* at 1426.

176. *Id.*

177. No. 99-cv-951, 2000 U.S. Dist. LEXIS 9047 (E.D. La. June 22, 2000).

178. *Id.* at *2.

179. *Id.* at *6–*7. *See also* Pucci v. Carnival Corp., 160 F. Supp. 3d 1329, 1334 (S.D. Fla. 2016) (finding that the drowning of cruise passenger on an excursion was governed by *Yamaha* because "no commercial activity was involved").

180. Exec. Jet Aviation v. City of Cleveland, 409 U.S. 249, 267–68 (1972); Yamaha Motor Corp. v. Calhoun, 516 U.S. 199, 208–09 (1996).

181. *Exec. Jet Aviation*, 409 U.S. at 268.

not.[182] The Court did not address or explain this inconsistency, just as it did not explain why *Grubart* did not apply.[183] An explanation for this apparent contradiction is that the choice of law may be issue rather than case specific. In *Yamaha*, the remedies were governed by state law but liability was governed by maritime law.[184] In *American Dredging*, the *forum non conveniens* issue was governed by state law, but liability and damages issues were no doubt governed by the Jones Act and the general maritime law.[185] In *Executive Jet* the Court examined the case as a whole where there was no obvious maritime issue.[186] Given the fact that admiralty jurisdiction now applies only in cases traditionally governed by maritime law, it is not clear why certain discrete issues in these cases should be governed by state law. As the Court held in *The Tungus*,[187] when an admiralty court looks to state law, it must apply that law "as an integrated whole" and it may not "pick or choose" parts of a state wrongful death statute to augment maritime law.[188]

Furthermore, the Court's issue-by-issue approach makes the "law" even more chaotic and unpredictable. *Yamaha* illustrates this point. On remand, the Third Circuit found that the law of Puerto Rico governed the punitive damages issue.[189] Pennsylvania law governed compensatory damages.[190] The general maritime law governed liability.[191] Any system that requires the parties to endure eleven years of litigation to find out that the case is governed by three separate bodies of substantive law is dysfunctional.[192]

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182. *Yamaha*, 516 U.S. at 206.

183. *Exec. Jet Aviation*, 409 U.S. at 267–68; *Yamaha*, 516 U.S. at 206.

184. *Yamaha*, 516 U.S. at 216.

185. Am. Dredging Co. v. Miller, 510 U.S. 443, 447 (1994).

186. *Exec. Jet Aviation*, 409 U.S. at 253.

187. 358 U.S. 588 (1959)

188. *Id.* at 592, 593 (1959).

189. Calhoun v. Yamaha Motor Corp., 216 F.3d 338, 351 (3d Cir. 2000).

190. *Id.* at 348.

191. *Id.* at 351.

192. Natalie Calhoun's accident occurred on July 6, 1989. *Id.* at 340. The Third Circuit announced the applicable law in 2000. *Id.* at 338.

IV. A BETTER APPROACH

Many courts and commentators have argued that the uniformity doctrine has little utility. Professor Ernest A. Young argued that "federal common lawmaking in admiralty cases should be sharply curtailed or even eliminated" and that "admiralty's 'special' constitutional status cannot be justified."[193] Martin Redish argued that the general maritime law should be abolished.[194] The Third Circuit has commented that maritime supremacy doctrine "is little more than a convenient slogan, providing little guidance" and that "the concept of uniformity has a good deal less weight than has been thought."[195] The problem with this approach is that there are thousands of cases applying the general maritime law, and throwing out dozens of developed and specialized maritime doctrines would create large gaps in the law. Furthermore, state laws are not competent to fill the gaps. Indeed, the states do not even have police power over the high seas.[196] What is needed are clear laws, not the absence of laws.

Taking a different view, Professor Force has argued that the general maritime law should exist but apply only where national interests are implicated.[197] As he has explained, this does not

193. Ernest A. Young, *It's Just Water: Toward the Normalization of Admiralty*, 35 J. MAR. L. & COM. 469, 470–71 (2004); *but see* Louise Weinberg, *Back to the Future: The New General Common Law*, 35 J. MAR. L. & COM. 523, 534, 538 (2004) (critiquing Professor Young's analysis).

194. *See* MARTIN REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 98–99 (1980) (arguing that "the constitutional basis for federal court authority to create a federal common law of admiralty . . . is subject to doubt," considering that the argument in favor of maritime law related to creating uniformity and predictability fails to warrant "federal courts the authority to establish a uniform common law of private commercial transactions on land").

195. Calhoun v. Yamaha Motor Corp., 40 F.3d 622, 628, 636, *aff'd*, 516 U.S. 199 (1996).

196. *See* The Scotia, 81 U.S. (14 Wall.) 170, 179 (1871) ("The high seas are outside the territory of municipal powers, and their laws have not force there."); United States v. Press Pub. Co., 219 U.S. 1, 12 (1911) ("The state courts have no jurisdiction of crimes committed on the high seas.").

197. *See* Force, *Choice of Law*, *supra* note 81, at 1487–88 ("By deriving the meaning of the term 'national interests' from the Admiralty Clause of the Constitution, and requiring that 'national interests' serve as a the point of departure for determining whether uniformity shall prevail, courts can better deal with the federalism issue."); Robert Force, *Deconstructing* Jensen*:*

include cases involving "only pleasure craft."[198] Professor Force asks, "if a yacht ran down a water skier, what national interest would be served by imposing nationally uniform rules on the subject?"[199] Indeed, back in 1875, in *The Lottawanna*, the Court held that the "uniformity and consistency at which the Constitution aimed" applied to "*subjects of a commercial character.*"[200] But in *Foremost Ins. Co. v. Richardson*,[201] the Court held that they do.[202] The problem, as the Court put it in *Foremost*, is that "uncertainty and confusion . . . would necessarily accompany a jurisdictional test tied to a commercial use of a given boat" because "smooth flow of maritime commerce is promoted when all vessel operators are subject to the same duties and liabilities."[203] A rule that applied local law to recreational vessels (albeit within admiralty jurisdiction) would create the problems *Foremost* was designed to avoid. Moreover, if the recreational vessel collided with a commercial vessel, the general maritime law would presumably govern—meaning that recreational vessels would operate under two separate sets of laws. This could lead to different liability rules and remedies depending on fortuitous circumstances, which would create the kind of anomalies that prompted the Court to create a general maritime law wrongful death remedy in *Moragne*.[204]

In contrast, Lizabeth Burrell argued in 1996 that *Jensen* still provides "the most reliable and valuable standard for whether state law may be applied in maritime actions."[205]

Admiralty and Federalism in the Twenty-First Century, 32 J. MAR. L. & COM. 517, 565 ("Unless we confine maritime law to areas where national interest requires it, we tempt some Supreme Court of the future to subject maritime law to the rationale of *Erie*.") [hereinafter *Deconstructing* Jensen].

198. Force, *Deconstructing* Jensen, *supra* note 197, at 541.

199. *Id.* at 555.

200. The Lottawanna, 88 U.S. (21 Wall.) 558, 575 (1874) (emphasis added).

201. 457 U.S. 668 (1982).

202. *See id.* at 677 (holding that the collision of two recreational vessels on navigable waters falls within federal admiralty jurisdiction).

203. *Id.* at 676–677.

204. *See* Moragne v. State Marine Lines, Inc., 398 U.S. 375, 409 (1970) (holding that a cause of action exists "under general maritime law for death caused by violation of maritime duties").

205. Lizabeth L. Burrell, *Application of State Law to Maritime Claims: Is There a Better Guide Than* Southern Pacific Co. v. Jensen?, 21 TUL. MAR. L.J. 53, 63 (1996).

Though not necessarily relying solely on *Jensen*, others have argued that the general maritime law is a legitimate body of uniform federal law that preempts state law. Professor Jonathan Gutoff has argued that "the Court should take seriously its law-making powers."[206] Professor David Bederman argued that the Court's case law, including *Jensen*, "appears . . . to uniquely privilege admiralty law as judge-made federal law"[207] and wrote that it is at least arguable that Congress may not constitutionally make "a core area of maritime law non-uniform."[208] There is no consensus about these issues. As we've seen, our courts have been unable to develop a reliable standard for determining when the uniformity doctrine trumps state law. No judicial decision nor scholarly criticism provides practical solutions.

Although the system is "perplexing," the frame of the problem at hand is not.[209] As noted in the opening paragraph of this article, there is a tension between the idea that maritime commerce requires a uniform body of national law, on the one hand, and, on the other, that sovereign states have police power within their territory.[210] Stated another way, the uniformity principle and the "maritime and local" doctrines are at odds. The challenge is to develop clear rules of law that manage this tension in a way that is predictable and consistent.

Undeniably, looking to *Jensen* has not worked. Indeed, although the Court's concern in *Jensen* was preservation of "proper harmony and uniformity,"[211] the Court later held that state law could apply even when it "conflicted with a rule of maritime law which did not require uniformity."[212] The Court has never explained when uniformity is "proper" or "required,"

206. Jonathan M. Gutoff, *Federal Common Law and Congressional Delegation: A Reconceptualization of Admiralty*, 61 U. PITT. L. REV. 367, 406 (2000).

207. David J. Bederman, *Uniformity, Delegation and the Dormant Admiralty Clause*, 28 J. MAR. L. & COM. 1, 2 (1997).

208. *Id.* at 34–35.

209. *See supra* INTRODUCTION (explaining that courts and academics consider the application of state law in maritime cases perplexing).

210. *See supra* notes 1–3 and accompanying text.

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

212. Romero v. Int'l Terminal Co., 358 U.S. 354, 373–74 (1959).

and it has "happily" avoided the issue.[213] The fact that the Court referred to this choice of law issue as "one of the most perplexing issues in the law" in 2024, more than a century after the Court deemed the problem "difficult, if not impossible," proves this point.[214]

The "maritime and local" doctrine is equally obtuse. The Court has explained that the doctrine was based on a "process . . . of accommodation, entirely familiar in many areas of overlapping state and federal concern, or a process somewhat analogous to the normal conflict of laws situation where two sovereignties assert divergent interests in a transaction as to which both have some concern."[215] But, as the Court later explained, "the effect on uniformity was often difficult to distinguish"[216] because "the contours of the 'local concern' concept were and have remained necessarily vague and uncertain."[217] The system was therefore plagued by dual (or dueling) uncertainties—no one knows when uniformity is required or when local interests require accommodation. The "proper uniformity" and "maritime and local" concepts may seem sensible in the abstract when viewed from 50,000 feet, but down at sea level, where maritime commerce happens, they are entirely impractical. Chaos reigns.

What is needed is the rule of law. The Court has observed that "adherence to precedent is 'a foundation stone of the rule of law" and that it "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process."[218] Legal doctrines that are

213. Am. Dredging Co. v. Miller, 510 U.S. 443, 452–53 ("Happily, it is unnecessary to wrestle with that difficulty today.").

214. Great Lakes Ins. SE v. Raiders Retreat Realty Co., 601 U.S. 65, 70 (2024); *Jensen*, 244 U.S. at 216.

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

216. Calbeck v. Travelers Ins. Co., 370 U.S. 114, 119 (1962). The "maritime and local" concept applied in other contexts as well. *See* Just v. Chambers, 312 U.S. 383, 388 (1941) ("[T]here are numerous instances in which the general maritime law has been modified or supplemented by state action, as e.g. in creating liens for repairs or supplies furnished to a vessel in her home port.").

217. *Calbeck*, 370 U.S. at 124–25.

218. Kisor v. Wilkie, 588 U.S. 558, 586–87 (2019) (internal quotation omitted).

"necessarily vague and uncertain" cannot mount the "foundation stone of the rule of law."[219]

A. *The Executive Jet Solution*

Prior to 1973, admiralty jurisdiction was not linked to the choice of law.[220] Therefore, applying state law in an admiralty case did not create a logical fallacy—the two issues (jurisdiction and choice of law) were free-standing and separate. As discussed above, however, that changed in 1973 when the Court held that admiralty tort jurisdiction required a showing that the tortfeasor's activity has traditionally been governed by maritime law.[221] This change planted a logical fallacy at the heart of this issue—when jurisdiction is premised on the application of maritime law, why apply state law? Nor does it make sense to apply different substantive laws to different issues in the case.

The only way to make sense of this after 1973 was and is for the Court to synchronize its jurisdiction and choice of law cases by holding that admiralty cases are governed by substantive maritime law and not state law (subject to an exception discussed below). We'll call this the *Executive Jet* solution. If it does not make sense to apply maritime law—because the activity has never or rarely been governed by maritime law—then the case falls outside admiralty jurisdiction. That was the holding in *Executive Jet*.[222]

Admittedly, the *Executive Jet* approach departs from past practice.[223] The last time the Court held that the general maritime law applied in lieu of state law in a tort case was 64 years ago.[224] Indeed, the Court has observed that "state law must yield to the needs of a uniform federal maritime law" in

219. *Id.*

220. *See supra* Part I.

221. *See supra* notes 83–97 and accompanying text.

222. Exec. Jet Aviation v. City of Cleveland, 409 U.S. 249, 249 (1973) ("[F]ederal admiralty jurisdiction . . . [exists] only when there is a significant relationship to traditional maritime activity.").

223. *See supra* notes 85–86 and accompanying text.

224. *See Kossick*, 365 U.S. at 738 (holding that a state's statute of frauds did not apply to enforcement of an oral contract involving a seaman's cure because it was subject to maritime law rather than state law). For more details, see *supra* notes 55–60 and accompanying text.

only "isolated instances."[225] Furthermore, in *Grubart*, the Court rejected "the city's proposal to synchronize the jurisdictional enquiry with the test for determining the applicable substantive law" because that rule "would discard a fundamental feature of admiralty law, that federal admiralty courts sometimes do apply state law."[226] In other words, chaos and uncertainty are "fundamental" to maritime law. This area is "one of the most perplexing . . . in the law" because the Court has refused to reconcile incompatible concepts.[227]

While the Court often defers to state law in maritime cases, as it did in *American Dredging* and *Yamaha*, state and lower federal courts have tended to apply maritime law in maritime cases without any consideration of state law.[228] The asbestos cases illustrate this point. In shipyard exposure cases (which by definition arise in territorial waters), courts finding admiralty jurisdiction apply maritime law.[229] Of course, when the court finds admiralty jurisdiction lacking, they apply state law.[230] In one such case, the court cited the rationale of *Executive Jet*, writing that the case did not fall within admiralty jurisdiction in part because asbestos work is "not uniquely maritime" and "the Court does not need to rely on 'the long experience' of the

225. Askew v. Am. Waterways Operators, Inc., 411 U.S. 325, 338 (1973) (citation omitted).

226. Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 546 (1995).

227. Great Lakes Ins. SE v. Raiders Retreat Realty Co., LLC, 601 U.S. 65, 70 (2024).

228. *See supra* Part II.

229. *See, e.g.*, Andrews v. John Crane, Inc., 604 S.W.3d 495, 502 (Tex. App. 2020) (finding maritime law applied to appellant Andrews' asbestos related claims because the injury was connected to maritime activities); Mullinex v. John Crane, Inc., 2020 U.S. Dist. LEXIS 74006, at *1–2, *10 (E.D. Va. 2020) (finding that asbestos related claims of a Machinist Mate who worked on ships in the Norfolk shipyards was subject to maritime jurisdiction); Cabasug v. Crane Co., 956 F. Supp. 2d 1178, 1180, 1190 (D. Haw. 2013) (finding that an asbestos-related claim of a pipefitter who worked at the Peal Harbor Naval Shipyard was subject to maritime law because it met the "*Sisson/Grubart* factors").

230. *See, e.g.*, Genusa v. Asbestos Corp. 18 F. Supp. 3d 773, 776, 790 (M.D. La. 2014) (finding that asbestos related claims of a dock worker at the Port of Barton Rouge in Port Allen was not subject to maritime law; it was instead subject to state law); Conner v. Alfa Laval, Inc., 799 F. Supp. 2d 455, 460, 469 (E.D. Pa. 2011) (finding that asbestos related claims of shipyard worker at the Charleston Naval Shipyard was subject to maritime jurisdiction).

'law of the sea' to decide the issues in this case."[231] All of the cases cited here, and many others, addressed specifically the question whether a shipyard exposure case was governed by maritime or state law—*none* of them cite or consider the United States Supreme Court's holding that the uniformity principle "still leaves the States a wide scope."[232] Nor do they cite the Court's pronouncement that a "fundamental feature of admiralty law [is] that federal admiralty courts sometimes do apply state law."[233] These courts simply apply maritime law in maritime cases, which is not at all perplexing.

Were the Court to synchronize jurisdiction with choice of law (as many lower courts have done already)[234] we would have a system built around a logical syllogism: if the tortfeasor's activity has traditionally been governed by maritime law; then the third prong of the jurisdiction test is satisfied and the case falls within admiralty jurisdiction (assuming prongs one and two also satisfied); and all of the substantive issues in the case are governed by substantive maritime law.

B. *When Should State Law Apply?*

If we finally put *Jensen* out of its misery and adopt a default rule based on the traditional scope of maritime law, we still must account for the states' undeniable police power within their territorial waters. As the Court held back in 1937, in *Kelly v. Washington ex rel. Foss Co.*, "there necessarily remains to the States, until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction."[235]

As discussed above, the "maritime and local" concept is as wishy-washy as the uniformity doctrine.[236] Under the *Executive Jet* approach, state ordinances and statutes that address local issues of safety and environmental protection would still apply

231. Gilstrap v. Huntington Ingalls, Inc., 2019 U.S. Dist. LEXIS 231606, *11 (E.D. Va, 2019) (quoting *Exec. Jet Aviation, Inc.*, 409 U.S. at 270).

232. Yamaha Motor Corp. v. Calhoun, 516 U.S. 199, 210 n.8 (1996) (quoting Romero v. Int'l Terminal Operating Co., 358 U.S. 354, 373 (1959)).

233. *Grubart*, 513 U.S. at 546.

234. *See supra* notes 229–233 and accompanying text.

235. Kelly v. Washington ex rel. Foss Co., 302 U.S. 1, 9–10 (1937).

236. *See supra* notes 215–217 and accompanying text.

and be enforceable insofar as they do not conflict with or undermine the general maritime law or federal statutes.

For example, in Askew v. American Waterways Operators, Inc.,[237] the Court upheld a Florida statute that permitted the state to recover clean-up costs from polluters where the terms of the Florida law did not conflict with federal statutes.[238] In United States v. Locke,[239] the Court found that numerous provisions of a Washington statute that regulated operation of oil tankers (general navigation, watch procedures, language skills, training, and casualty reporting) were preempted by federal statutes and confirmed treaties.[240] The Court remanded the case for further proceedings with respect to other provisions of the state statute.[241] A key consideration was whether the state rule was "justified by conditions unique to a particular port or waterway," such as "water depth in Puget Sound."[242] Following this rationale, a "no wake" zone near a marina established by local ordinance should be enforceable.

While the Court never provided criteria for determining whether a matter was "maritime and local," looking to state statutes or local ordinances that do not conflict with the general maritime law or federal regulations or statutes is more concrete.

C. *Executive Jet Approach Applied in Yamaha*

If we apply the *Executive Jet* approach to the facts in *Yamaha*, we get a different result. Recall that the issue in *Yamaha* was whether some unspecified state law provided the remedy in a *Moragne* death case involving a jet ski accident.[243] Back in 1970, the Court had created the *Moragne* wrongful death action.[244] The Court left to "judicial sifting" the job of determining "various subsidiary questions concerning

237. 411 U.S. 325 (1972).
238. *Id.* at 328.
239. 529 U.S. 89 (2000).
240. *Id.* at 116.
241. *Id.* at 112.
242. *Id.* at 91, 112.
243. *See supra* Part II.B.
244. *See supra* note 121 and accompanying text.

the . . . death remedy."[245] In *Miles v. Apex Marine Corp.*,[246] the Court established a framework for determining death remedies in *Moragne* death actions.[247] As the Court held, "In this era, an admiralty court should look primarily to [federal remedial statutes] for policy guidance" when determining remedies in *Moragne* actions.[248] Had Natalie Calhoun's accident occurred more than three miles offshore, her case would have been governed by the Death on the High Seas Act (DOHSA).[249] In *Yamaha*, the Court could have followed *Miles* and adopted the remedies available under the DOHSA, or some other remedies, and written an opinion telling everybody what the law is. Instead, it wrote a "modest" opinion so narrowly drawn that it has little utility and which chopped and diced the applicable legal principles—issue by issue—so finely that nobody has any idea what the law is in many cases. Following the *Executive Jet* approach, the Court would have determined the remedies for *Moragne* actions and not applied various and sundry state laws. If the general maritime law is common law, then the federal courts (including the Supreme Court of the United States) should do the job of common law judges.[250]

Applying our exception, the court would evaluate whether the wrongful death statutes in Pennsylvania or Puerto Rico are safety/pollution enactments that do not conflict with the general maritime law or a federal statute. As the Court held in *The Tungus*, the remedies in the state statues are tied to the liability standards under those statutes—the entire statute would

245. Mobile Oil Corp. v. Higginbotham, 436 U.S. 618, 622 (1978).

246. 498 U.S. 19 (1990).

247. *Id.* at 27.

248. *Id.*

249. *See id.* at 24 (stating that DOHSA provides a civil action "for the representative of anyone killed on the high seas"); *see also* 46 U.S.C. § 30302 (providing a civil cause of action for personal representatives of a decedent "[w]hen the death of an individual is caused by wrongful act, neglect or default occurring on the high seas beyond 3 nautical miles from shore of the United States").

250. As discussed above, the Court seems to have concluded that the case fell within admiralty jurisdiction based on the pre-1973 locality test. *See supra* notes 126–127 and accompanying text. If the Court applied the *Sisson*/*Grubart* test for admiralty jurisdiction, however, then the case would likely fall outside admiralty jurisdiction and the product liability issues at the heart of the case would have been subject to state law (like most product liability cases).

apply.[251] If there were no general maritime law action on point—if *Moragne* did not exist—then the state statutes could apply. But *Moragne* does exist, so the state statutes are preempted, and the exception does not apply.

CONCLUSION

It is astonishing that a century after *Jensen,* the role of state law in maritime cases remains "perplexing," as the Court put it last year.[252] Indeed, the Court's cases in this area are a confusing tangle of legal concepts—akin to a judicial exercise in abstract expressionism. Judge Cecelia Altonaga's Moby Dick simile, included in her opinion in Pucci v. Carnival Corp. back in 2016,[253] seems apt—if not melodramatic. After all, mangled legal doctrines are not as scary as a gigantic white whale in a bad mood. But it is a problem for the people who operate ships and tugs and dredges and terminals and their insurers and lawyers who must function within a chaotic and unpredictable legal system. One hopes that the Court will untangle its caselaw and provide clear and coherent principles in this area. A straightforward application of *Executive Jet* may suffice

251. The Tungus, 358 U.S. 588, 592 (1959).

252. Great Lakes Ins. SE v. Raiders Retreat Realty Co., 601 U.S. 65, 68 (2024).

253. Pucci v. Carnival Corp., 160 F. Supp. 3d 1329, 1335 (S.D. Fla. 2016).