# Judicial Decision-Making Analysis of Federalism Issues in Modern United States Supreme Court Maritime Cases

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*This Article revisits several of the fundamental legal precepts employed by judges in the decision-making process and, in particular, provides a structured inquiry into the application of these precepts in modern United States Supreme Court maritime federalism cases. It is the conclusion of this Article that, despite the continuing outcry for uniformity in the Court's maritime decisions, it appears that, for the most part, these decisions are based on established legal precepts and, therefore, reflect the application of reasoned judgment.*



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## I. INTRODUCTION

The relationship between uniformity in maritime law and federalism issues has been anything but harmonious. One commentator has chronicled fifty-three decisions by the United States Supreme Court in which state law and federal maritime law have come into conflict.[1] In twenty-nine of those cases, state law won out over competing claims of federal maritime law; the other twenty-four gave the nod to federal maritime law.[2] Indeed, many commentators have expressed frustration over the alleged lack of uniformity in the outcomes of these cases, claiming it creates uncertainty in the law and, thus, adversely affects commerce.[3] One federal court joined the flotilla of criticism and opined, "Discerning the law in this area is far from easy; one might tack a sailboat into a fog bank with more confidence."[4] In *American Dredging Co. v. Miller*, Justice Scalia acknowledged the shifting emphasis on federalism in the maritime law context, recognizing that "[i]t 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."[5] Justice Ginsburg echoed this view in *Yamaha Motor Corp., U.S.A. v. Calhoun*, and in effect, turned the Court's bow away from choppy waters by saying, "We attempt no grand synthesis or reconciliation of [admiralty law] precedent today . . . ."[6]

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1. David W. Robertson, *The Applicability of State Law in Maritime Cases After* Yamaha Motor Corp. v. Calhoun, 21 TUL. MAR. L.J. 81, 89 (1996).

2. *Id.* at 89-90.

3. *See* Howard M. McCormack, *Uniformity of Maritime Law, History, and Perspective from the U.S. Point of View*, 73 TUL. L. REV. 1481, 1546 (1999) ("Maritime law is nonetheless a web, albeit a very tangled one, and it seems impossible to straighten out one part of it without somehow making trouble in others." (internal quotations omitted) (quoting Blome v. Aerospatiale Helicopter Corp., 924 F. Supp. 805, 809-10, 1997 AMC 1072, 1076-77 (S.D. Tex. 1996))); Robertson, *supra* note 1, at 90 (observing that "the Court's opinions do not give intelligible reasons" and "this body of jurisprudence discloses few useful patterns");. *See generally* 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 (1996) [hereinafter Burrell, *Application of State Law to Maritime Claims*]; Lizabeth L. Burrell, *Current Problems in Maritime Uniformity*, 5 U.S.F. MAR. L.J. 67 (1992); David W. Robertson, *Admiralty and Maritime Litigation in State Court*, 55 LA. L. REV. 685 (1995); Ernest A. Young, *Preemption at Sea*, 67 GEO. WASH. L. REV. 273 (1999); David R. Lapp, Note, *Admiralty and Federalism in the Wake of* Yamaha Motor Corp., USA v. Calhoun*: Is* Yamaha *a Cry by the Judiciary for Legislative Action in State Territorial Waters?*, 41 WM. & MARY L. REV. 677 (2000).

4. Ballard Shipping Co. v. Beach Shellfish, 32 F.3d 623, 624, 1994 AMC 2705, 2706 (1st Cir. 1994).

5. 510 U.S. 443, 452, 1994 AMC 913, 920 (1994).

6. 516 U.S. 199, 210 n.8, 1996 AMC 305, 313 n.8 (1996).

Like the notice provided by Justice Ginsburg, this Article also attempts no grand synthesis of the United States Supreme Court's maritime federalism cases; discussion regarding uniformity of maritime law is not without commentary.[7] This Article does, however, explore the judicial decision-making processes employed in the context of several of the Court's most recent maritime federalism cases. In particular, Part II of this Article revisits several of the fundamental legal precepts employed by judges in the decision-making process, including discussion regarding the general inclinations of current United States Supreme Court Justices. Part III provides a structured inquiry into the application of these precepts in several modern United States Supreme Court maritime federalism cases. Finally, notwithstanding the discontent with the lack of uniformity in the Court's maritime federalism decisions, this Article concludes that these decisions are based on established legal precepts and, thus, appear to be the result of reasoned judgment. And despite the continuing outcry for uniformity in the Court's maritime decisions, perhaps some solace can be found in the consistency and predictability of the judicial decision-making process employed in reaching these conclusions.

## II. JUDICIAL DECISION-MAKING PROCESS OVERVIEW

According to traditional wisdom, the purpose of the government's third branch is to interpret laws enacted by the legislature and regulations promulgated by the executive branch. Moreover, although all cases require decision making, there is no precise "formula" that judges universally employ in deciding cases. However, the questions that Justice Benjamin Nathan Cardozo hypothetically posed to himself in *The Nature of the Judicial Process* at least provide a framework for analyzing how a judge decides a case:

> What is it that I do when I decide a case? To what sources of information do I appeal for guidance? In what proportions do I permit them to contribute to the result? In what proportions ought they to contribute? If a precedent is applicable, when do I refuse to follow it? If no precedent is applicable, how do I reach the rule that will make a precedent for the future? If I am seeking logical consistency, the symmetry of the legal structure, how far shall I seek it? At what point shall the quest be halted by some discrepant custom, by some

7. *See supra* note 3.

> consideration of the social welfare, by my own or the common standards of justice and morals?[8]

Justice Holmes's view was that the law is a prediction of what trial judges and appellate judges will do in any given case.[9] Roscoe Pound called the law "the body of authoritative materials, and the authoritative gradation of the materials, wherein judges are to find the grounds of decision, counsellors the basis of assured prediction as to the course of decision, and individuals the reasonable guidance toward conducting themselves in accordance with the demands of the social order."[10]

Accordingly, after the brief writers and oral advocates complete their presentations, the judge's role as dispute settler and lawmaker begins. In attempting to address Justice Cardozo's questions, it will not be my purpose to do a comprehensive critical analysis of the judicial decision-making process, nor do I purport to exhaust the subject; rather it is my objective to provide a general framework of what judges do when they decide cases.[11] Fortunately, controlling legal precepts are brightly visible in most cases, with a wealth of tried and tested reasons available for application to cases at hand. However, a small number of cases are less clear, and courts are frequently required to give meaning to the language of stated rules or even, on occasion, to create new ones.

In this role, a judge may call upon a variety of legal precepts in assuming the role as dispute settler and, oftentimes, lawmaker. My experience, however, is that regardless of the subject matter, judges employ a variety of familiar legal precepts in deciding these cases. These precepts include, but are not limited to: statutory analysis; the application of precedent; and other more subjective factors, including policy and social utility.

With this in mind, I also believe that a judge's most important objective in deciding cases should be to decide them with consistency and certainty, thus yielding some degree of predictability in the

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8. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 10 (1921).

9. Oliver W. Holmes, *The Path of Law*, 10 HARV. L. REV. 61, 61 (1897).

10. Roscoe Pound, *Hierarchy of Sources and Forms in Different Systems of Law*, 7 TUL. L. REV. 475, 476 (1933).

11. Two noteworthy studies of judicial decision making were consulted in the preparation of this Article. *See* Joel B. Grossman, *Social Backgrounds and Judicial Decision-Making*, 79 HARV. L. REV. 1551 (1966) (focusing particularly on the social and personal dimensions of judicial action); Charles D. Kelso & R. Randall Kelso, *Standing to Sue: Transformations in Supreme Court Methodology, Doctrine and Results*, 28 U. TOL. L. REV. 93 (1996) (examining four main styles of judicial decision making in the context of the Supreme Court's standing doctrine).

outcome. Only with these objectives can trust and confidence in the court system be expected. I call such a process of deciding cases based on consistent and certain principles and in a systematic fashion an application of "reasoned judgment." This approach provides reasonable stability and is good for the social order.

Along these lines, I wish to review the various legal precepts employed by judges when they are called upon to decide a case and to share, from my perspective, how these principles form the bases for decisions grounded in reasoned judgment.

### *A. Statutory Analysis in the Judicial Decision-Making Process*

Invariably, there is some statute in play, and that is where I look first in deciding a case.[12] Very few cases today involve solely common law principles. Indeed, there are many cases where the meaning of the statute is clear, but we are most concerned with those cases where there is a bona fide argument concerning the meaning or the effect of the statute.

Statutes cannot be "one size fits all." Just as a court cannot make a ruling in one case to cover all others, rarely can the legislature do so either. Therefore, to be absolutely literal will often negate the obvious intent of the legislature; when intent is revealed from the legislative history, it must be plugged into the equation. Judge Learned Hand stated, "[I]t is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning."[13] According to Justice Holmes, "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."[14] Roger Traynor

12. In practice, my threshold inquiry involves a question of jurisdiction, i.e., is the case properly before the court. Although the Florida Supreme Court's jurisdiction is expressly limited by the Florida Constitution, the United States Supreme Court has more discretion to "reach down" and decide cases of public importance. When a court does take jurisdiction of a case, lawyers are hopeful for more statements of law and, therefore, more certainty. Courts realize, however, that in speaking to a particular issue, they may nonetheless create uncertainty in other areas of the law. Moreover, the temptation is often to try to resolve issues that are not part of the case. Therefore, even a jurisdictional decision can have a tremendous impact on the shaping of the law.

13. Cabell v. Markham, 148 F.2d 737, 739 (2d Cir. 1945).

14. Towne v. Eisner, 245 U.S. 418, 425 (1917).

was not incorrect when he stated that we need "literate, not literal" judges.[15]

Likewise, and not unlike the challenge posed in statutory interpretation, any judge faced with the task of constitutional interpretation must decide, among other things, how much weight to give arguments concerning the plain meaning of the Constitution's text, the text's purpose or spirit, the history surrounding the establishment of the provision at issue, the intent of the framers and ratifiers of the Constitution, precedent interpreting that constitutional provision and, if applicable, arguments of policy.[16]

At least one commentator, Professor R. Randall Kelso, has attempted to contextualize the various approaches of the current members of the Supreme Court regarding questions of statutory interpretation.[17] As Professor Kelso postulates, there appear to be five Justices who are likely to employ a "modern natural law approach" when confronted with an issue requiring statutory interpretation: Justices O'Connor, Kennedy, Souter, Ginsburg, and Breyer.[18] In addition to focusing on the ordinary meaning of the words used in the statute, the Justices employing this approach to statutory interpretation utilize traditional maxims of statutory construction and often consider the *purpose* behind the law.[19] Such an approach supports the use of legislative history to move beyond a literal interpretation of a statute.[20] Justice O'Connor characterized the "natural law" approach when she stated:

> We start, as we must, with the language of the statute .... We consider not only the bare meaning of the word but also its placement and purpose in the statutory scheme. "The meaning of statutory language, plain or not, depends on context." ... [C]anon[s] of construction [are also used]. The amendment['s] [legislative] history ... casts further light on Congress' [sic] intended meaning.[21]

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15. Roger J. Traynor, *Reasoning in a Circle of Law*, 56 VA. L. REV. 739, 749 (1970).

16. For a more complete discussion on the various ways judges balance competing sources of constitutional meaning, see R. Randall Kelso, *Styles of Constitutional Interpretation and the Four Main Approaches to Constitutional Interpretation in American Legal History*, 29 VAL. U. L. REV. 121 (1994).

17. *See* R. Randall Kelso, *Statutory Interpretation Doctrine on the Modern Supreme Court and Four Doctrinal Approaches to Judicial Decision-Making*, 25 PEPP. L. REV. 37 (1997).

18. *Id.* at 64 n.133.

19. *Id.* at 47.

20. *Id.*

21. *Id.* (alterations in original) (quoting Bailey v. United States, 516 U.S. 137, 144-45 (1995) (quoting Brown v. Gardner, 513 U.S. 115, 118 (1994))).

The "formalist" approach to statutory decision making, arguably employed by Justices Scalia and Thomas, avoids the use of legislative history but gives great weight to the literal meaning of terms in order to determine the plain meaning of a statutory provision.[22] The formalist

> prefers clear, bright-line rules ... [and] is likely to be tempted to dispense with original intent in favor of asking merely what that statute's words mean.... In making this determination, most formalist judges will resort not only to dictionary definitions of words, but also to grammatical maxims of construction to help determine what the words mean.[23]

The "Holmesian" approach to judicial decision making, to which, as Professor Kelso has argued, Chief Justice Rehnquist is so disposed, is premised upon strong judicial deference to the legislature as the proper body to balance public policy concerns.[24] The Holmesian judge "rejects the formalist preference for mechanically applied rules" and instead looks to "clear inferences of statutory purpose, both as revealed in the statute itself and in the statute's legislative history."[25] Along those lines, a Holmesian judge will avoid using social policy justifications in interpreting a statute, unless that policy has been explicitly stated by the legislature.[26]

Finally, the "instrumentalist" judge, e.g., Justice Stevens, focuses on "how the correct purposes or policies of the statute would be either advanced or retarded in the context of a particular case."[27] "For an instrumentalist judge, the act of interpreting a ... statute ... will often call for consideration of sound social policy to resolve leeway in the law"; in any case, the instrumentalist believes "a judge must make law to help achieve a sound social policy result."[28] As such, instrumentalists are thought to frequently create "balancing tests," so

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22. *See id.* at 48.

23. *Id.* Professor Kelso also suggests there are three variations of the formalist approach: the Literal Rule, the Golden Rule, and the Plain Meaning Rule. *Id.* at 49. "Under the Literal Rule, the court should follow that statute's literal meaning even if that meaning leads to an absurd result." *Id.* "[U]nder the Golden Rule, a court should depart from the literal text of a statute if the text is ambiguous *or* the literal meaning would create an absurd result." *Id.* at 50. Finally, under the Plain Meaning Rule, a court may "consider[] purposes stated on the face of the statute when determining the meaning of particular language." *Id.* Professor Kelso suggests that "Justice Scalia follows the Golden Rule by refusing to use purpose to determine the plain meaning of text." *Id.* at 54.

24. *Id.* at 55.

25. *Id.* (footnote omitted).

26. *Id.*

27. *Id.* at 57.

28. *Id.*

that courts have the flexibility to do justice in light of the differing circumstances of particular cases.[29]

### *B. Precedent in the Judicial Decision-Making Process*

Judicial precedent has been defined as "an adjudged case or decision of a court of justice, considered as furnishing an example or rule for the determination of an identical or similar case afterwards arising, between the same or other parties, in the same or another court, or a similar question of law."[30] As such, the legal precept of precedent provides a guide on how to interpret a statute or to make sense of case law, even though past cases may appear peripheral to the case at hand.

Precedent can be a controlling or persuasive element of legal reasoning and analysis; its value is in its stability. In jurisprudence, there is a great presumption that prior decisions are correct; therefore, those decisions based upon thoughtful and disinterested consideration should be given deference and followed unless circumstances have changed. Thus, "[i]f a decision has been made upon solemn argument and mature deliberation, the presumption is in favor of its correctness; and the community have a right to regard it as a just declaration or exposition of the law, and to regulate their actions and contracts by it."[31]

Many times I might have preferred a different result in a case, but because of the importance of predictability in the law, those preferences did not matter. In my view, adherence to the doctrine of *stare decisis* is the key to establishing trust and confidence in the courts.[32] As Justice Holmes said, "I recognize without hesitation that judges do and must legislate, but they can do so only interstitially . . . ."[33]

Similar to the analysis in the statutory interpretation context, commentators have also characterized the four decision-making styles of the current United States Supreme Court Justices with respect to

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29. *See* R. Randall Kelso & Charles D. Kelso, *How the Supreme Court Is Dealing with Precedents in Constitutional Cases*, 62 BROOK. L. REV. 973, 980 (1996).

30. HENRY CAMPBELL BLACK, HANDBOOK ON THE LAW OF JUDICIAL PRECEDENT 2 (1912).

31. 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 476 (Charles M. Barnes ed., 13th ed. 1896).

32. Yet a court may be inclined to overrule "if the hardships it would impose on those who have relied upon the precedent appear not so great as the hardships that would inure to those who would remain saddled with a bad precedent." Roger J. Traynor, La Rude Vita, La Dolce Giustizia*; or Hard Cases Can Make Good Law*, 29 U. CHI. L. REV. 223, 231 (1962).

33. S. Pac. Co. v. Jensen, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting).

precedent.[34] Not surprisingly, there appears to be considerable variation with respect to how prior cases are decided depending upon the specific judicial decision-making style favored.[35] "Instrumentalist" judges, like Justice Stevens, take the most free rein in overruling prior decisions believed to be wrongly decided, even if there has been substantial reliance on precedent or if the prior precedent represented settled law.[36] "Formalist" judges, like Justices Scalia and Thomas, and "natural law" judges, like Justices O'Connor, Kennedy, Souter, Ginsburg, and Breyer, tend to be hesitant to overrule a case thought to be wrongly decided if the precedent has become "integrated into the fabric of the law."[37]

Moreover, those judges subscribing to "natural law" decision-making styles show significant deference to "reasoned elaboration of the law and respect for the work product of previous judges" and, therefore, may choose to follow precedents even if they believe them to be wrongly decided.[38] "Holmesian" judges, such as Chief Justice Rehnquist, focus heavily on the extent to which persons have *relied upon* a given precedent in the conduct of their lives, i.e., the extent to which persons have "settled expectations," and would err on the side of protecting the individual's reasonable reliance on the precedent.[39] As Chief Justice Rehnquist observed, "Considerations in favor of *stare decisis* are at their acme in cases ... where reliance interests are involved."[40]

Nonetheless, it is argued that the majority of the current Supreme Court has a bias in favor of following precedent and, as such, will likely choose to follow precedents they believe are wrongly decided—even if there has been no substantial reliance upon them or the precedents do not represent "settled law."[41] As one of its reasons for refusing to overturn *Roe v. Wade*,[42] the Court stated in *Planned Parenthood v. Casey* that "a decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided."[43] In order for the Court to overrule a precedent, it is argued,

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34. Kelso & Kelso, *supra* note 29, at 983.
35. *Id.*
36. *Id.* at 989.
37. *Id.* at 990 (quoting Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 233 (1995) (O'Connor, J.)).
38. *Id.* at 985.
39. *Id.*
40. Payne v. Tennessee, 501 U.S. 808, 828 (1991).
41. Kelso & Kelso, *supra* note 29, at 995-96.
42. 410 U.S. 113 (1973).
43. 505 U.S. 833, 864 (1992).

at least one of the following factors regarding the precedent must be present: (1) it is unworkable, (2) it creates an inconsistency in the law, (3) its factual basis has changed, (4) it is a substantially wrong or unjust interpretation of the Constitution, or (5) it raises concerns regarding the commitment to the "Rule of Law."[44]

### *C. Subjectivity in the Judicial Decision-Making Process*

We are all, in some fashion, judges. Every rational being is confronted with decisions daily. As such, we are reminded of Max Radin's anecdote: "You remember the Missouri mountaineer woman who watched a fight between her husband and a bear and remarked as she inhaled smoke through her clay pipe that this was the first fight she ever saw in which she did not care who won."[45] Indeed, many environmental, experiential, and emotional factors do play a part in the judge's decision-making process. As Justice Holmes once declared, "The life of the law has not been logic: it has been experience."[46]

Judge Abraham Freedman had a way of stating the problem at post-argument conferences: "The way you come out in [a] case depends on how you go in."[47] Indeed, all judges come to the process with different backgrounds and experiences, but I believe this is the crown jewel of the process. Although many legislators would like for judges to operate as robots, we cannot, and must not, become too scientific.[48] When judges read a brief and hear arguments, they "get a

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44. Kelso & Kelso, *supra* note 29, at 996.

45. Max Radin, *The Theory of Judicial Decision: Or How Judges Think*, 11 A.B.A. J. 357, 359 (1925).

46. OLIVER W. HOLMES, THE COMMON LAW 1 (1881).

47. Larry V. Muko, Inc. v. Southwestern Pa. Bldg. & Constr. Trades Council, 609 F.2d 1368, 1377 (3d Cir. 1979) (Aldisert, J., dissenting) (internal quotations omitted) ("Judge Freedman was expressing in a few words one of the most important aspects of the judicial process—that in judicial decision making, value judgments inhere in the choosing of the controlling legal precept.").

48. One commentator has written about his experience in using the Myers-Briggs Type Inventory (MBTI) psychometric tool to assess the impact of personality type on judicial fact-finding and decision making. *See* John W. Kennedy, Jr., *Personality Type and Judicial Decision Making*, JUDGES' J., Summer 1998, at 4. Judge Kennedy concluded that the best decision making takes place when judges force themselves to go through an eight-step process based on certain personality preferences: (1) find out how other judges are handling a similar problem (extroversion); (2) take time for private reflection (introversion); (3) determine the traditional way of handling the problem and learn all the applicable rules and procedures (sensing); (4) consider whether there is a different way of handling the problem and identify what goals are being sought (intuitive); (5) take an impartial, objective look at the situation (thinking); (6) consider the circumstances of the parties and ascertain whether a given result takes into account their personal situations (feeling); (7) make a decision (judging); (8) keep an open mind, give the problem more thought, and perhaps come up with a better solution (perception). *Id.* at 5-10.

feel" for the outcome; the role of intuition in the judicial decision-making process is unavoidable. As Judge Henry J. Friendly observed, "The conclusion which flashes before the shaving-mirror in the morning does not differ in intellectual quality from that matured from study in chambers the night before . . . ."[49] Indeed, people who are experienced in any facet of life will probably develop a "hunch" when confronted with a situation drawing upon that experience.[50] "Good hunching-power is . . . resultant of good sense, imagination, and *much* knowledge. The *more* knowledge of what courts have done, the more skilful the hunch."[51]

From my experience, however, I believe that judges attempt to remain consciously open, and this is evidenced by the fact that their minds frequently change throughout the decision-making process. This is especially true because there are frequently two (or more) good choices, and, not infrequently, those choices come down to competing options based on individual values and preferences. I see nothing "wrong" from a legal decision-making point of view when judges are required to interject such values, as long as they are not at the expense of more established and traditional legal precepts. Nonetheless, such subjective intervention does, to some extent, undermine the stated judicial decision-making objective of predictability. "Assessing the role of personal values and experiences in judicial decisions is particularly difficult because of norms which prevent judges from openly casting their decisions in such terms."[52]

"Policy" rationale and "social utility" analysis are additional subjective legal precepts frequently employed by judges in the decision-making process. In my view, however, rather than attempting to formulate my own policy determination, I prefer to follow the policy and social utility considerations set by the legislature, if, of course, they fall within constitutional grounds.[53] As such, decisions concerning morals, values, and other social factors should be left to the

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49. Henry J. Friendly, *Reactions of a Lawyer—Newly Become Judge*, 71 YALE L.J. 218, 230 (1961).

50. With thirty-two years of judicial experience, I have had many hunches, many of which are borne out—some of them not!

51. K.N. LLEWELLYN, THE BRAMBLE BUSH: OUR LAW AND ITS STUDY 98-99 (3d ed. 1960).

52. Grossman, *supra* note 11, at 1552.

53. This raises an interesting issue in the context of this Symposium. If uniformity in maritime law is such an important policy concern, why hasn't Congress acted? I can only speculate, but one plausible explanation could be because those in Congress may have more political allegiance to injured residents of their own respective states than to maritime commerce principles. More skeptically, perhaps it is because the issue of uniformity in maritime law has yet to make it to the coveted radar screen of our Congress.

legislature; judges that put too high a value on the this precept undermine predictability. In situations in which the legislature is not clear regarding the underlying policy rationale, however, a court oftentimes cannot avoid making such policy decisions when deciding cases.

Yet, no matter how subjective the criteria entering into the judicial decision-making process may be, judges are well advised not to stray far from the principled wisdom of Justice Cardozo:

> [The judge] is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to 'the primordial necessity of order in the social life.' Wide enough in all conscience is the field of discretion that remains.[54]

### *D. Drafting Opinions—The Final Step in the Judicial Decision-Making Process*

It has been said that "[a] court's public performance in reaching a conclusion is least as important as the conclusion."[55] Judge Julius Stone stated that reasoned elaboration in law finding is necessary so that the choice seems "not only to the instant judge, but to appellate courts and lawyers generally, if not right, then as right as possible."[56] Indeed, *how* the case is decided is said to be more important than *what* was decided. Professor Jones relates that when Roscoe Pound was asked

> whether a recent Supreme Court decision was a 'good' decision or a 'bad' one . . . [he] had a way of answering not in terms of correctness or incorrectness of the Court's application of constitutional precedents or doctrine but in terms of how thoughtfully and disinterestedly the Court had weighed the conflicting social interests involved in the case and how fair and durable its adjustment of interest-conflicts promised to be.[57]

Along those lines, it has been suggested to me that even an adverse ruling was palatable as long as one knew that the court had at least considered the arguments presented.

Finally, there is no question, that in order to maintain the confidence of the people, a court's decision cannot be perceived as

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54. CARDOZO, *supra* note 8, at 141 (citations omitted).

55. RUGGERO J. ALDISERT, THE JUDICIAL PROCESS: READINGS, MATERIALS AND CASES 625 (1976).

56. *Id.* at 474.

57. *Id.* at 474-75 (alterations in original).

being based upon anything other than proper legal argumentation and definitely not as a response to political pressure. In *Casey*, the Court employed this same notion as one of its justifications for not overruling *Roe v. Wade*:

> The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make.[58]

I would like to make one final point regarding judicial decision making. A naive approach would suggest that judges merely apply facts to preexisting rules, and from there the decision flows with no free choice from the judge. In reality, there is some degree of free choice for the decision maker even while employing the structured legal precepts previously discussed: *Which* of the competing legal precepts are to be employed? *In what order* are they to be used? *What is the weight* each is to be afforded? As such, some variation in the outcome of cases will undoubtedly occur. Nonetheless, if these established legal precepts are employed consistently, rationally, and coherently, i.e., with "reasoned judgment," any variation in the ultimate results will be largely outweighed by the benefit of stability and predictability in the judicial decision-making process. Accordingly, what follows is an overview of several recent United States Supreme Court maritime federalism cases, including my analysis of the judicial decision-making methods employed by the Court in reaching its results.

## III. JUDICIAL DECISION-MAKING ANALYSIS OF MODERN SUPREME COURT MARITIME FEDERALISM CASES

### *A. Background*

The basis for uniformity in maritime law can be found in the Admiralty Clause of the Constitution, which mandates that "all cases of admiralty and maritime Jurisdiction" fall to the "judicial power of the United States" and, as such, places maritime law and jurisdiction in the hands of the federal government.[59] Fairness and predictability are

58. Planned Parenthood v. Casey, 505 U.S. 833, 865-66 (1992).

59. U.S. CONST. art. III, § 2, cl. 3. The Commerce Clause, contained in Article I, Section 8, Clause 3, which allocates "the Power ... to regulate Commerce with foreign Nations, and among the several States" to the national legislature, and the Supremacy Clause, contained in Article VI, Section 2, which makes the Constitution and constitutional acts of

said to be the two primary reasons the Framers decided to place maritime matters within national control[60]: fairness because commerce would, arguably, be burdened if maritime players were subject to different rules in different ports, and predictability because it is said to be vitally important for maritime players to understand the risks involved in prospective litigation.[61] State law, however, enters into maritime cases through the "Saving to Suitors" Clause in the 1789 Judiciary Act's grant of admiralty jurisdiction.[62] This clause qualifies the exclusive grant of jurisdiction by "saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it."[63]

The Supreme Court has often discussed the importance of achieving uniformity in maritime law, as it did in *The Lottawanna*:

> [T]he convenience of the commercial world, bound together, as it is, by mutual relations of trade and intercourse, demands that, in all essential things wherein those relations bring them in contact, there should be a uniform law founded on natural reason and justice. . . .
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> One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, 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.[64]

The Court also reaffirmed the constitutional requirement of uniform application and development of maritime law under national control:

> [The Constitution] took from the States all power, by legislation or judicial decision, to contravene the essential purposes of, or to work material injury to, characteristic features of such law or to interfere with its proper harmony and uniformity in its international and interstate relations. To preserve adequate harmony and appropriate uniform rules

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Congress "the Supreme Law of the Land," further supplant the conferral of power on our national government.

60. *See* Burrell, *Application of State Law to Maritime Claims*, *supra* note 3, at 54-55.

61. *Id.*

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

63. *Id.*, 1 Stat. at 77. The modern version provides that "[t]he district courts shall have original jurisdiction, exclusive of the courts of the States, of . . . [a]ny civil case of admiralty or maritime jurisdiction." 28 U.S.C. § 1333 (1994).

64. 88 U.S. (21 Wall.) 558, 572, 575 (1875).

> relating to maritime matters and bring them within control of the Federal Government was the fundamental purpose . . . .[65]

There are several practical and arguably strategic reasons a plaintiff might choose to file a maritime action in state, rather than in federal, court. Notwithstanding the most obvious reason—that state law may be more favorable to the plaintiff's position—there might be other advantages to filing in state court: (1) state court judgments can often be rendered with less than a unanimous verdict, while federal courts generally require unanimous verdicts;[66] (2) a plaintiff may be able to bring a case to trial faster in state court;[67] (3) lawyers often find state courts more "user friendly";[68] and (4) some states provide state court maritime plaintiffs a right to choose between a bench trial and a jury trial.[69] Defendants, on the other hand, might be strategically inclined to seek removal to federal court for exactly the opposite reasons. However, these precise strategic practicalities, which frequently shape the litigation, are often lost on the courts addressing maritime federalism issues.

The cases that follow represent several of the Supreme Court's most recent maritime decisions involving questions of federalism and/or preemption. As can be seen, the subjective notion of uniformity in maritime time law is frequently addressed, but it is often outweighed by more fundamental principles of legal decision making

### *B.* American Dredging Co. v. Miller

In *American Dredging Co. v. Miller*, a seaman sought relief in Louisiana state court under the Jones Act for injuries sustained while working aboard a tug in the Delaware River.[70] The owner of the tug, American Dredging Company, was a Pennsylvania corporation with its principal place of business in New Jersey.[71] Applying federal maritime law, the state trial court dismissed the action under the doctrine of forum non conveniens.[72] The appellate court affirmed; however, the Louisiana Supreme Court reversed based on a Louisiana statute that made forum non conveniens unavailable to claimants in

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65. Knickerbocker Ice Co. v. Stewart, 253 U.S. 149, 160 (1920).
66. Robertson, *supra* note 3, at 686-87 (citing CHARLES A. WRIGHT, LAW OF FEDERAL COURTS 671 (5th ed. 1994)).
67. *Id.* at 687.
68. *Id.*
69. *See id.* (discussing LA. CODE CIV. PROC. art. 1732(6)).
70. 510 U.S. 443, 445, 1994 AMC 913, 914 (1994).
71. *Id.*
72. *Id.*

Jones Act and maritime law cases brought in Louisiana state courts and held that the statute was not preempted by federal law.[73] The United States Supreme Court granted a writ of certiorari and addressed the question of whether Louisiana would be allowed to refuse application of forum non conveniens in Jones Act and maritime cases.[74]

Initially, the Court immersed itself in a historical survey to determine the legal precepts that would guide it through its analysis. In essence, the Court looked for constitutional and legislative underpinnings of maritime law that established the ground rules for jurisdictional analysis. The Court's search led it to Article III, Section 2, Clause 1 of the Constitution, which extended the judiciary's power to "all Cases of admiralty and maritime Jurisdiction."[75] The Court correctly noted that such judicial power "has never been entirely exclusive" since the Saving to Suitors Clause of the Judiciary Act of 1789 granted claimants a right to all other remedies to which they were otherwise entitled in state court.[76] The Court highlighted the fact that state courts may not exercise in rem remedies for any cause of action in admiralty, yet noted that in personam jurisdiction allowed state courts to adopt remedies in an admiralty proceeding so long as they did not attempt to alter "substantive maritime law."[77] The Court essentially reiterated the basic legal precepts of uniformity governing admiralty jurisdiction.

With basic legal precepts in hand, the Court looked for the applicable rule—an undoubtedly critical step. Exploring precedent regarding maritime preemption issues, and with an eye on the uniformity principle of maritime law, Justice Scalia arrived at *Southern Pacific Co. v. Jensen.*[78] According to the *American Dredging* Court, *Jensen* condemned state remedies that "work[ed] material prejudice to the characteristic features of the general maritime law or interfer[ed] with the proper harmony and uniformity of that law in its international and interstate relations."[79] Borrowing language from *Jensen*, and against a backdrop of constitutional and congressional ground rules, Justice Scalia framed the Court's analysis. In essence, the analysis was

73. *Id.* at 445-46, 1994 AMC at 914-15.
74. *Id.*
75. *Id.*
76. *Id.* As noted by the Court, this language is expressed today in 28 U.S.C. § 1333(1) (1994).
77. *Am. Dredging*, 510 U.S. at 446-47, 1994 AMC at 915.
78. *Id.* at 447, 1994 AMC at 915-16 (citing S. Pac. Co. v. Jensen, 244 U.S. 205, 216 (1917)).
79. *Id.* (internal quotations omitted) (quoting *Jensen*, 244 U.S. at 216).

a determination of whether the doctrine of forum non conveniens was "either a 'characteristic feature' of admiralty or a doctrine whose uniform application [was] necessary to maintain the 'proper harmony' of maritime law."[80] Using this analysis, the Court could make a determination of whether Louisiana's rejection of forum non conveniens in Jones Act claims contravened the uniformity principle of maritime law.

Stepping back for a moment to examine the decision up to this point, one notes that, notwithstanding the criticisms of the decision, the Court applied standard judicial decision-making principles—basic legal precepts and the applicable rule—in arriving at its conclusion. Roscoe Pound once defined principles as "authoritative starting points for legal reasoning, employed continually and legitimately where cases are not covered or are not fully or obviously covered by rules."[81] Here, like most courts, the Supreme Court leaned appropriately on constitutional, legislative, and decisional law as authoritative starting points.[82] First, it explored the historical background of the issue, reviewing the constitutional origins of federal court jurisdiction over maritime cases. Second, the Court followed up its constitutional reference with a look at the legislative history. Finally, the Court examined precedent through which a state court exception was derived for remedies in an in personam action in maritime law. From the judicial decision-making perspective, the Court's decision is reasonable and principled.

The selection of *Jensen* was by no means without its critics.[83] Precedent, as mentioned in the introduction, is a controlling and persuasive element of analysis and reasoning. The choice of precedent is critical to the decision-making process. Justice Stevens argued that *Jensen* was not a "reliable compass for navigating maritime pre-emption problems."[84] Not unlike many legal commentators, he asserted that the court misused *Jensen*'s language.[85] Specifically, he

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80. *Id.* at 447, 1994 AMC at 916.

81. Pound, *supra* note 10, at 483.

82. *See Am. Dredging*, 510 U.S. at 446-57, 1994 AMC at 915-24.

83. *Id.* at 458, 1994 AMC at 924-25 (Stevens, J., concurring in part and concurring in the judgment) (characterizing *Jensen* as an "untrustworthy ... guide in admiralty jurisprudence").

84. *Id.* at 459, 1994 AMC at 925 (Stevens, J., concurring in part and concurring in the judgment). In light of Justice Stevens's "instrumentalist decision-making style," his disdain for *Jensen* was predictable. *See supra* note 36 and accompanying text.

85. *See Am. Dredging*, 510 U.S. at 459, 1994 AMC at 924-26 (Stevens, J., concurring in part and concurring in the judgment); *see also* Harris L. Kay, Note, *Torpedoing the Uniformity of Maritime Law:* American Dredging v. Miller, 28 U. RICH. L. REV. 1405, 1415 (1994).

focused on how the Court framed the issue as a determination of whether forum non conveniens is a "characteristic feature" of maritime law.[86] One author asserted that *Jensen* did not require that "'characteristic features' of admiralty be entirely exclusive to admiralty; rather, 'characteristic' means merely a distinguishing feature or quality."[87] In support, he argued that "[n]owhere does [*Jensen*] ... equate 'characteristic feature' with a feature not applied anywhere else."[88] Another commentator argued that the *Jensen* "'characteristic' test employed by the majority is too limiting and leads to perverse results."[89]

However, the turn toward *Jensen* was not a haphazard one. The Court responded to criticism by noting that the petitioner's preemption argument was "primarily based on those principles established in *Jensen*" and that the "[r]espondent did not assert that those principles were repudiated."[90] In fact, the Court stressed that overruling *Jensen* in dictum, "without argument or ... invitation [would be] inappropriate."[91]

Courts often realize that speaking to one issue may create uncertainty in other areas. Obviously, the temptation is to simultaneously resolve ancillary issues. However, the wiser court puts aside those ancillary issues and deals with the specific issue on appeal. In this instance, the Court stood firm and attempted to address only the primary issue of forum non conveniens. This strategy is consistent with "reasoned judgment" and is often rewarded by a decision closer to the elusive bright-line rule applicable to future fact patterns.

While I do not deny the merit of the critics' contentions, the Court's methodology in arriving at *Jensen* was nevertheless sound. The Court demonstrated logical progression from the origins of federal judicial power over maritime law through statutory and decisional law.[92] While clearly not oblivious to the presence of other precedent addressing the same issue, the Court reasoned that *Jensen* provided the applicable rule under the circumstances and avoided launching into ancillary analysis. Although critics might have found better choices of

86. *See Am. Dredging*, 510 U.S. at 459, 1994 AMC at 924-26.
87. *Id.*
88. *Id.*
89. Marilyn Maxwell Gaffen, Note, *Maritime Law*—American Dredging Company v. Miller*: The Supreme Court Leaves the Forum Non Conveniens Debate Unresolved*, 19 W. NEW ENG. L. REV. 275, 300 (1997).
90. *Am. Dredging*, 510 U.S. at 447 n.1, 1994 AMC at 916 n.1.
91. *Id.* Perhaps the Court was signaling a turn in a different direction in future cases.
92. *See id.* at 446-57, 1994 AMC at 915-24.

precedent, the logical route that led the Court to *Jensen* was arguably sound.

Having found an applicable rule in *Jensen*, the Court first addressed whether the doctrine of forum non conveniens was a "characteristic feature" of admiralty.[93] The Court admitted that the origins of forum non conveniens were "murky" in Anglo-American law.[94] The Court pointed out that most authorities agreed that the doctrine had it origins in Scottish estate cases.[95] In fact, the Court had illuminated this fact in *Piper Aircraft Co. v. Reyno*, in which it recognized forum non conveniens as a doctrine originating in Scotland and adopted as common law in many states.[96] As a result, the *American Dredging* Court found "no basis for regarding *forum non conveniens* as a doctrine that originated in admiralty."[97] In its search to discover whether the doctrine was applied exclusively in admiralty law, it came up empty-handed.[98] Therefore, the Court concluded that forum non conveniens was a doctrine of general applicability.[99]

The Court's approach is consistent with the judicial decision-making model. In approaching the determination of whether forum non conveniens was a "characteristic feature" of admiralty law, the Court simply did what most courts do in such a situation. It asked itself, "Where did we get the doctrine?" This simple but effective analysis led the Court to the Scottish estate cases.[100] Having found the suspected source, it then followed the doctrine's trail forward through precedent to its modern-day application. The Court's retrospective analysis was simple, yet well reasoned. Thus, the Court discovered that forum non conveniens has traditionally been a doctrine of general application not exclusive to admiralty cases.[101]

The Court's reasoning was also quite clear when it examined the second part of the *Jensen* analysis. The Court had to decide whether forum non conveniens was a doctrine whose uniform application was necessary to maintain the "proper harmony" of maritime law. The Court had to find an authoritative starting point on which to anchor its

93. *Id.* at 447, 1994 AMC at 916.
94. *Id.* at 449, 1994 AMC at 917.
95. *Id.*; *see also* Lou-Anne Milliman, Note, American Dredging Co. v. Miller: *State Law of Forum Non Conveniens Applies in Savings to Suitors Cases*, 69 TUL. L. REV. 247, 249 (1994).
96. 454 U.S. 235, 1982 AMC 214 (1981).
97. *Am. Dredging*, 510 U.S. at 449, 1994 AMC at 918.
98. *Id.* at 450, 1994 AMC at 918.
99. *See id.*
100. *See id.* at 449, 1994 AMC at 917.
101. *See id.* at 450, 1994 AMC at 918.

analysis. Here, *stare decisis*, more so than a strict historical analysis, weighed heavily on the Court's analysis. As the Court developed its analysis, each step was carefully reasoned.

With a thorough review of precedent, the Court seemed to have discovered a general rule. The Court reached as far as *The Lottawanna* to find where it had previously affirmed the uniformity principle.[102] In that case, the Court had disallowed the rules and limits of maritime law to be placed in the hands of state courts.[103] Additionally, the *American Dredging* Court noted that its decisions in *Jensen*, *Knickerbocker Ice Co. v. Stewart*,[104] and *Kossick v. United Fruit Co.*[105] upheld the uniformity principle when state law was found to intrude.[106] The Court discovered that uniformity was the general rule of maritime law and that state law acting contrary to that subjective legal precept was suspect.

Not satisfied with only a general rule, the Court logically noted any exceptions to the general rule. In *Romero v. International Terminal Operating Co.*, the Court had announced that despite the requirement that state law "yield to the needs of a uniform federal maritime law," that limitation still "left the States a wide scope."[107] It reasoned that a uniformity requirement was not absolute.[108] Continuing its review of precedent, the *American Dredging* Court discovered that its admiralty case law focused primarily on protecting the uniformity of substantive maritime law, not federal procedural law.[109] Importantly, the holdings of these cases did not seem to expressly or implicitly forbid a state's rejection of forum non conveniens as a maritime defense, since it was procedurally oriented.[110] Therefore, the Court concluded that because of the

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102. *Id.* at 451, 1994 AMC at 919.

103. *See* The Lottawanna, 88 U.S. (21 Wall.) 558, 564, 1996 AMC 2372, 2381 (1874).

104. 253 U.S. 149 (1920).

105. 365 U.S. 731, 1961 AMC 833 (1961) (rejecting a state requirement that a maritime contract be in writing if admiralty law regards oral contracts as valid).

106. *See Am. Dredging*, 510 U.S. at 451-55, 1994 AMC at 919-22.

107. 358 U.S. 354, 373, 1959 AMC 832, 834 (1959) (footnotes omitted). In *Romero* itself, the Court considered the facts that state-created liens were enforced in admiralty, state remedies for wrongful death were appropriately applied to maritime causes of action, and state statutes providing for survival actions were "upheld when applied to maritime causes of action." *Id.*

108. *See id.*

109. *Am. Dredging*, 510 U.S. at 452-53, 1994 AMC at 920.

110. The Court answered the dissent's contention that a state's rejection of the doctrine would impede maritime commerce by stating that no Commerce Clause challenge was presented in the case. *Id.* at 452 n.3, 1994 AMC at 920 n.3. Furthermore, it characterized the dissent's equal protection argument as "misdirected" and not an issue in the case. *Id.*

doctrine's procedural nature, Louisiana's rejection of forum non conveniens was not fatal to uniformity in admiralty law.[111]

In an effort to clarify, the Court offered a comparison between forum non conveniens and venue. The Court concluded that forum non conveniens was simply a "supervening venue provision" that goes to process.[112] Furthermore, it logically reasoned that the uniformity admiralty law sought to achieve was not procedural uniformity, because admiralty law was "supposed to apply in all the courts of the world."[113] Rather, the true aim of the uniformity principle is *substantive* uniformity. Therefore, because forum non conveniens went to process rather than the substantive makeup of admiralty law,[114] the state courts' refusal to apply it was not harmful to federal forum non conveniens determinations.[115]

Simultaneously, the Court defended its argument through a brief discussion of the merits of procedural uniformity. Essentially, the Court admitted that the nature of forum non conveniens determinations made it impossible to create uniform and predictable outcomes.[116] Finally, the Court supported its conclusion with the fact that the doctrine's use of judicial discretion and the "multifariousness of the factors relevant to its application" combined to form ingredients of unpredictability.[117] As a result, the Court suggested that forum non conveniens was not reliable to determine where to sue. This logical succession of arguments demonstrates sound legal reasoning and is consistent with the decision-making model employed by almost every court.

The Court's sound legal reasoning continued when it sought the aid of existing legislation in further clarifying its rationale. Specifically, the Court agreed that the continuing perpetuation of "federal common lawmaking in admiralty" should be in harmony with congressional enactments.[118] Citing the Jones Act,[119] the Court walked through the layering of congressional enactments and the case law

111. *Id.* at 454 n.4, 1994 AMC at 921 n.4.
112. *Id.* at 453, 1994 AMC at 920-21.
113. *Id.*, 1994 AMC at 921.
114. *Id.* at 454, 1994 AMC at 921 (announcing that "[u]nlike burden of proof (which is a sort of default rule of liability) and affirmative defenses such as contributory negligence (which eliminates liability), *forum non conveniens* does not bear upon the substantive right to recover, and is not a rule upon which maritime actors rely in making decisions about primary conduct—how to manage their business and what precautions to take").
115. *Id.* at 454 n.4, 1994 AMC at 921 n.4.
116. *Id.* at 455, 1994 AMC at 922.
117. *Id.*
118. *Id.*
119. 46 U.S.C. app. § 688 (1994).

interpreting such enactments.[120] In essence, the Court's view was that "congressional enactments would have little meaning if [they] were to hold that, though *forum non conveniens* is a local matter for purposes of the Jones Act, it is nevertheless a matter of global concern requiring uniformity under general maritime law."[121] Stated differently, the Court seemed to agree that the doctrine was a "matter of judicial housekeeping ... prescribed only for the federal courts" and not applicable to state courts.[122] Thus, the Court concluded that the Louisiana Supreme Court was correct in upholding a Louisiana statute that rejected the doctrine of forum non conveniens in Jones Act cases brought in Louisiana state courts. This was a conclusion drawn, arguably, only through "reasoned judgment."

As mentioned previously, *American Dredging* was not without its critics. In Justice Kennedy's dissent, he expressed a valid concern that Louisiana courts were able to "keep maritime defendants, but not other types ... within its borders, no matter how inconvenient the forum."[123] Although Justice Kennedy applauded the Court's "careful and comprehensive history of *forum non conveniens*," he argued that it misread the very case upon which it relied.[124] Justice Kennedy argued that the issue was not as the Court framed it; instead, he contended that the issue was whether the doctrine was "an important feature of the uniformity and harmony to which admiralty aspires."[125] Specifically, Justice Kennedy balanced the interests of the state, shipowners and operators, and maritime defendants.[126] Additionally, he was concerned that the Court's ruling condoned forum shopping and created a lack of uniformity.[127] Finally, he argued that when the Court applied a procedural label to forum non conveniens, it did not cover up the very real effect Louisiana's law had on maritime law.

In support of his argument, Justice Kennedy inserted what is, by all accounts, a value judgment. Justice Kennedy's concern was primarily that the Court's decision ignored the identity of the litigants.[128] Specifically, he focused on the state interests versus those

120. *See Am. Dredging*, 510 U.S. at 455-56, 1994 AMC at 922-23 (noting that the Jones Act "establishes a uniform federal law that state as well as federal courts must apply to the determination of employer liability to seamen").

121. *Id.* at 456-57, 1994 AMC at 923.

122. *Id.* at 457, 1994 AMC at 924.

123. *Id.* at 463, 1994 AMC at 928 (Kennedy, J., dissenting).

124. *Id.* at 462, 1994 AMC at 928 (Kennedy, J., dissenting).

125. *Id.* at 462-66, 1994 AMC at 928-31 (Kennedy, J., dissenting).

126. *See id.* (Kennedy, J., dissenting).

127. *Id.* at 462, 1994 AMC at 928 (Kennedy, J., dissenting).

128. *Id.* at 469, 1994 AMC at 933 (Kennedy, J., dissenting).

of owners and operators.[129] In addition, Justice Kennedy alerted the Court to its decision's effect on commerce and foreign states.[130] Besides the effect on commerce, he pointed out the ripple effect of the Court's decision on federal district courts, which might be influenced by the fact that forum non conveniens motions may be brought in state courts if not granted in federal district courts.[131]

The competing interests announced by Justice Kennedy are undeniable. However, the majority found a balancing of competing interests unnecessary under the circumstances. The Court emphasized that forum non conveniens was still available to litigants in federal courts despite its denial as a defense in state courts.

In his dissent, Justice Kennedy was obviously not convinced that the Court struck the right balance between subjectivity and a concrete rule. Introduction of subjective values often corrupts an otherwise reasoned result. In other words, subjectivity is often the source of variable line drawing. Assuming arguendo that Justice Kennedy had convinced the Court to introduce a multifactored analysis based on the concerns he raised, the probability that a bright line would be drawn would have been correspondingly reduced. Stated differently, subjectivity is the antithesis of uniformity. Nevertheless, subjectivity can be introduced with favorable results. In *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Company*, the respondents urged the Court to introduce a multifactored test, correspondingly increasing the degree of subjectivity. [132] The Court aimed for a balance between subjectivity and a hard-and-fast rule. The *Grubart* Court seems to have struck a closer balance.

### *C.* Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.

In 1990, Great Lakes won a bid to replace protective wooden pilings, or dolphins, around the piers of several bridges on the Chicago River.[133] Great Lakes towed a crane-carrying barge to the piers so that it could pull out the old pilings and replace them with the new.[134] Great Lakes then secured the barge to the riverbed with long metal legs projecting down from the barge.[135] In 1991, Great Lakes allegedly used this process to replace the pilings around the Kinzie

129. *Id.* at 464, 1994 AMC at 929 (Kennedy, J., dissenting).
130. *Id.* at 464-65, 1994 AMC at 929-31 (Kennedy, J., dissenting).
131. *Id.* at 468, 1994 AMC at 932 (Kennedy, J., dissenting).
132. 513 U.S. 527, 1995 AMC 913 (1995).
133. *See id.* at 530, 1995 AMC at 914-15.
134. *Id.*
135. *Id.*, 1995 AMC at 915.

Street Bridge.[136] Roughly seven months later, a freight tunnel running under the river began to collapse.[137] Water flowed through the tunnel to flood buildings in "the Loop" in Chicago.[138] Victims of the flooding brought action in state court against Great Lakes and the City of Chicago.[139] Great Lakes, seeking the protection of the Limitation of Vessel Owner's Liability Act (Limitation Act), brought an action in federal court invoking federal admiralty jurisdiction.[140] In addition, Great Lakes sought indemnity and contribution from the City of Chicago for any resulting loss to Great Lakes.[141] The City, joined by Great Lakes, filed a motion to dismiss the suit for lack of jurisdiction.[142]

The Court was called to determine whether a federal admiralty court had jurisdiction over claims that Great Lakes' negligence in replacing the pilings caused the flood damage.[143] Unlike in *American Dredging*, the legal precepts guiding the Court's analysis were more easily understood. The basic legal principle guiding maritime jurisdictional analysis, the locality test, put forth a rather simple way of determining whether maritime law governed the dispute: if a tort occurred on navigable waters, then admiralty jurisdiction existed;[144] conversely, if it occurred other than on navigable waters, admiralty jurisdiction did not exist.[145]

Nevertheless, the Court argued that a universal algorithm that would generate a logical result under all circumstances was not available. For instance, a tort that did not occur "wholly" on navigable waters greatly complicated the analysis.[146] Reasoning through this gap in the jurisdictional determination, the Court highlighted a line of cases in which the tort occurred partly on land.[147] However, cases like *The*

136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.*
140. *See id.* at 530-31, 1995 AMC at 915. The Limitation of Liability Act would limit Great Lakes' tort liability to the value of the vessels involved "if the tort was committed 'without privity or knowledge' of the vessels' owner." *Id.* at 531, 1995 AMC at 915 (citing 46 U.S.C. app. § 183(a) (1994)).
141. *Id.* at 531, 1995 AMC at 915.
142. *Id.*
143. *Id.*, 1995 AMC at 916.
144. *Id.*
145. *Id.* at 531-32, 1995 AMC at 916.
146. *Id.* at 532, 1995 AMC at 916.
147. *Id.*

*Plymouth*[148] only confirmed the potential confusion arising from application of the locality test.

Consistent with established principles of judicial decision making, the Court sought statutory resolution. In its efforts, the Court looked to the Extension of Admiralty Jurisdiction Act,[149] which was designed to "end concern over the sometimes confusing line between land and water."[150] The Act seemed to close the logical gap in admiralty jurisdiction and "gather the odd case into admiralty" by extending admiralty jurisdiction to all cases, including those injuries occurring on land, where the ship or other vessel involved was located on navigable waters.[151]

However, even this modified situs rule overlooked the relationship between the activity and maritime commerce. As the Court pointed out, a mechanical application of the locality test, even with the modification, would have still allowed federal courts to adjudicate torts arising from the collision of two swimmers in navigable waters.[152] Clearly, such activity was not related to maritime commerce.

Notably, the Court's efforts illustrate the importance of logically working through the implications of a particular rule. In other words, "reasoned judgment" requires more than mechanical application of a basic legal principle. Today, the accelerated technological pace creates novel circumstances that keep courts scrambling to create brighter lines. It would be hard to imagine that early admiralty jurisprudence created a rule that contemplated the collision of airplanes and birds over navigable waters, or, in this instance, the flooding of an underwater tunnel.

The *Grubart* Court effectively chose to augment the applicable rule. In three previous decisions, the Court had realized the possible, if not absurd, outcomes of a purely mechanical application of the locality test.[153] Through "reasoned judgment," the Court attempted to

148. 70 U.S. (3 Wall.) 20, 34 (1866) (finding that the court did not have jurisdiction over a tort claim brought by the owner of a warehouse that was destroyed in a fire that started on a nearby ship).

149. 46 U.S.C. app. § 740 (1994).

150. *Grubart*, 513 U.S. at 532, 1995 AMC at 917. The Extension of Admiralty Jurisdiction Act provided for admiralty jurisdiction over cases whether they occurred on land or water as long as the ship or other vessel was located on navigable waters. *Id.* For example, in the case of *The Plymouth*, in which fire began on board a ship on navigable waters and spread to land, tort liability would extend to the injury on land.

151. *Id.*

152. *Id.* at 533, 1995 AMC at 917.

153. *See* Sisson v. Ruby, 497 U.S. 358, 363-67, 1990 AMC 1801, 1805-08 (1990); Foremost Ins. Co. v. Richardson, 457 U.S. 668, 674-77, 1982 AMC 2253, 2260-68 (1982);

accommodate the issue of jurisdiction arising under what was arguably an unusual circumstance. Like other courts in the face of unique circumstances, the Court chose to augment the basic test while remaining moored to fundamental admiralty principles.[154]

Not ruling out the applicability of the locality test, the Court applied it first. Systematically working through the locality test, the Court reasoned that it was satisfied because the barge, of which the crane was considered a part, was located in navigable waters during the piling replacement and was, for all purposes, a "vessel."[155] Therefore, using the basic rule and its statutory companion, the result favored exercising federal maritime jurisdiction over the flood claims.

After it had fully addressed the locality test, the court was free to consider the role played by *stare decisis* in its jurisdictional analysis. The Court favored the reasoning in *Sisson v. Ruby*,[156] which employed "maritime connection enquiries."[157] The *Sisson* test required that the Court first determine whether "the 'general features' of the incident were 'likely to disrupt commercial activity'" and "whether the general character of the activity giving rise to the incident show[ed] a substantial relationship to traditional maritime activity."[158] Armed with *Sisson*, the Court logically transitioned to an application of these principles to the flooding incident.

Applying the *Sisson* reasoning, the Court sought first to determine whether the flooding incident had the potential to disrupt maritime commerce. The Court derived what it called an "intermediate level of possible generality," eliminating extremes of possible generality, in order to effectively evaluate the incident.[159] Given the unusual circumstances of the incident, it appears that this was indeed a necessary step in the decision-making process. In his discussion of the use of levels of generality in judicial decision making, Professor Carl Auerbach writes:

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Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249, 260, 1973 AMC 1, 9-10 (1972).

154. *See Grubart*, 532 U.S. at 534, 1995 AMC at 918.

155. *Id.* at 535, 1995 AMC at 919. Even so, the Court addressed Great Lakes' and the City's argument to limit the application of the Admiralty Extension Act. *Id.* The Court carefully allowed the argument to develop, yet foreclosed it based simply on the Act's text and other courts' interpretations of that text. *Id.* at 535-37, 1995 AMC at 919-20. Essentially, the Court found "no need or justification ... for imposing an additional nonremoteness hurdle." *Id.* at 538, 1995 AMC at 921.

156. 497 U.S. at 367, 1990 AMC at 1808.

157. *Grubart*, 513 U.S. at 538-39, 1995 AMC at 921-22.

158. *Id.* (quoting *Sisson*, 497 U.S. at 363, 1990 AMC at 1805).

159. *See id.* at 538, 1995 AMC at 921.

> A rule of law is a statement of the specific factual conditions on which specific legal consequences depend. No court can meaningfully announce a rule of law, or state the issues in a case, without reference to these factual conditions, which are always susceptible of statement at different levels of generality. We cannot know, therefore, whether the rule "announced" by the precedent court is material to the issues raised by the dispute before the precedent court until we know at what level of generality to state the facts raising these issues. This is for the deciding court to determine and [Melvin] Eisenberg agrees that no "mechanical rules" can aid in this task.[160]

Indeed, I agree that a purely mechanical application of precedent might lead to an illogical result and that a deciding court should not itself impose a decisional constraint when applying precedent. Professor Auerbach continues, "[T]here is no reason why the deciding court should feel constrained by the level of generality adventitiously chosen by the precedent court when the adjudicative facts of the precedent case enable the deciding court to read the rule of the precedent at various levels of generality."[161]

Not overcome by this sort of constraint, the *Grubart* Court stated that the issue was not whether the "general features" of the incident were potentially disruptive of maritime commerce but whether the particular incident "could be seen within a class of incidents that posed more than a fanciful risk to commercial shipping."[162] In characterizing the flooding incident's "general features" to see where it fit in the range of generalization, the Court concluded that the damage was of an underwater structure by a vessel on navigable water.[163] Thus, the Court considered the incident to fall into a class that posed more than a fanciful risk to maritime commerce.[164] As a result, the Court found that the potential disruption satisfied the first prong of the *Sisson* test.

The Court approached the second prong of the *Sisson* test with nearly identical reasoning. As with the first prong, the Court attempted to refine a rather subjective determination. Here, the Court made a determination of "whether the general character of the activity giving rise to the incident show[ed] a substantial relationship to traditional maritime activity."[165] First, it narrowed the focus by

160. Carl A. Auerbach, *A Revival of Some Ancient Learning: A Critique of Eisenberg's* The Nature of Common Law, 75 MINN. L. REV. 539, 563 (1991) (footnote omitted) (citing Jerome Michael & Mortimer J. Adler, *The Trial of an Issue of Fact* (pt. 1), 34 COLUM. L. REV. 1224 (1934)).

161. *Id.* at 564.

162. *Grubart*, 513 U.S. at 539, 1995 AMC at 922.

163. *Id.*

164. *See id.*

165. *Id.*

determining a level of generality by which the activities of the alleged tortfeasor could be measured.[166] Second, it characterized the activity within those terms.[167] Finally, the Court determined whether this characterization fell within the range of activities related to traditional maritime activity. The product of this process was the Court's conclusion that there was no question that Great Lakes' activity was substantially related to traditional maritime activity.[168] Thus, the second prong of the maritime connection inquiry was satisfied.

As demonstrated, the Court meticulously walked through its analysis with sound legal reasoning to determine that the incident and activity satisfied both prongs of the *Sisson* test, respectively. Obviously, the critical step in its analysis was the determination of the levels of generality by which to characterize the incident and activity. Naturally, this step drew the most criticism.

Despite the Court's careful analysis, however, valid arguments exist that there remained "some play in the joints."[169] Indeed, the characterization level of the incident or the activity allowed a great degree of subjectivity. In other words, the degree of generality utilized in characterizing the incident or activity determined the course of the decision. Depending on the judicial philosophy of the decision maker, the characterization may fall victim to subjectivity favoring one side or the other. The City of Cleveland, for instance, argued that proper application of the *Sisson* second prong would have characterized its activities of operating and maintaining the underwater tunnel as not resembling traditional maritime activity.[170] Essentially, the City argued that it should have been characterized out from under federal maritime jurisdiction. As seen in this example, the maritime character of activity could have been completely eliminated by what the Court called a "hypergeneralization."[171] Nevertheless, the Court recognized the imprecision and answered that "hypergeneraliz[ing]" the maritime character of the activity of a given case frustrates the comparison between traditional maritime activity and the tortfeasor's activity.[172]

166. *See id.* at 539-40, 1995 AMC at 922-23.
167. *Id.* at 540, 1995 AMC at 923.
168. *Id.*
169. *Id.*, 1995 AMC at 924.
170. *See id.* at 541-42, 1995 AMC at 923-24.
171. *See id.* at 542, 1995 AMC at 924. The companion argument was that expanding *Sisson*'s reading (hypogeneralizing) would have allowed almost every activity involving a vessel on navigable waters to fall within the purview of traditional maritime activity. The Court answered that it was only following the lead of lower federal courts in "rejecting a location rule so rigid" as to produce whimsical results. *Id.* at 542, 1995 AMC at 925.
172. *Id.*

Interestingly, despite having decided that the activity satisfied both the locality and *Sisson* tests, and arguably having reached the end of its necessary inquiry, the Court addressed the petitioner's remaining arguments for additional factors in the analysis whereby the Court would have synchronized a jurisdictional inquiry with a test for determining the applicable substantive law.[173] Additional factors in the analysis would have purportedly improved the application of the *Sisson* test by "limiting the scope of admiralty jurisdiction more exactly to its rationale" and "minimi[zing], if not eliminat[ing], the awkward possibility that federal admiralty rules or procedures [would] govern a case, to the disadvantage of state law, when admiralty's purpose [did] not require it."[174]

The Court was not persuaded, however, and stated that the reasoning behind *Sisson* was guided by the same principle as a more expansive multifactored test.[175] In her concurrence, Justice O'Connor considered the introduction of land-based parties into the calculus of jurisdictional decision making to be without significant impact[176] since Congress itself had previously answered by modifying the basic location test through the Admiralty Extension Act.[177] Even Justice O'Connor's concurrence supported the majority's argument by illuminating the irrationality of creating a new rule for land-based parties.[178] The Court, in sum, apparently believed that any factors other than those already present in the *Sisson* test were unnecessary.

Notably, the Court responded to concerns that state law would be automatically displaced by implementation of the combined locality and connection tests. These concerns are similar to those expressed in *American Dredging*. However, the Court in *American Dredging* reiterated the notion that a "wide scope" remained for state courts'

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173. *Id.* at 546, 1995 AMC at 928. While foreclosing a factor analysis "where all the relevant entities [were] engaged in similar types of activit[ies]," *Sisson* left open whether a factor analysis was available to cases "where most of the victims, and one of the tortfeasors, [were] based on land." *Id.* at 544, 1995 AMC at 926.

174. *Id.*

175. *See id.* at 544-45, 1995 AMC at 926-27 (eliminating "admiralty jurisdiction where the rationale for the jurisdiction does not support it").

176. *Id.* at 548, 1995 AMC at 929 (O'Connor, J., concurring). Professor Kelso has postulated that Justice O'Connor has a "modern natural law approach" to statutory construction. *See supra* note 18 and accompanying text.

177. *See Grubart*, 513 U.S. at 545, 1995 AMC at 927 (noting that "Congress has already made the judgment . . . that a land-based victim may properly be subject to admiralty jurisdiction").

178. *See id.* at 548, 1995 AMC at 929-30 (O'Connor, J., concurring) (suggesting that if a federal court exercises admiralty jurisdiction over a "particular claim against a particular party," it does not follow that it must also "exercise admiralty jurisdiction over *all* the claims and parties").

jurisdiction despite a requirement that they must yield to federal maritime law under particular circumstances.[179] Here, the Court once again referenced the language in *Romero* recognizing that states have a "wide scope" in maritime law and putting aside fears that state court remedies would not be available to litigants.[180]

Perhaps from a practical standpoint, the Court avoided creating confusion in admiralty law jurisdiction. Objecting to additional factors, the Court raised a concern that augmenting the rule with additional factors would misguide admiralty lawyers by reshaping the admiralty jurisdiction.[181] To the Court, augmenting the basic legal principle with the connection test was enough. In other words, the Court implied that jurisdictional lines drawn by *Grubart*, although not firmly delineated, are the ones most familiar to the admiralty practice. The Court considered the maintenance of these somewhat familiar lines a "weighty" reason for not adopting additional factors.

On the other hand, Justice Thomas's arguably "formalist" approach found that even the factors added by the Court through *Sisson* were unnecessary.[182] Agreeing with the majority's reasoning only through the use of the locality test, Justice Thomas contended that any further analysis thwarted the bright-line rule already in existence and that the Court did "not owe *Sisson* the benefit of *stare decisis*."[183] His suggestion was that a multifactored test launched the Court into an unnecessary balancing test that wasted both the litigants' and judge's resources in redefining the line between federal admiralty jurisdiction and permissible state regulation.[184] As Justice Thomas saw it, even the ninth and tenth verse of Genesis created a brighter-line rule than that created by the majority.[185]

In essence, Justice Thomas contended that a locality rule that consisted of simply determining whether the tort occurred on a vessel on navigable waters guaranteed the same result without needless decisional meandering.[186] In fact, he contended that the situs

179. 510 U.S. 443, 452, 1994 AMC 913, 919 (1994).

180. *Grubart*, 513 U.S. at 546, 1995 AMC at 927.

181. *Id.* at 547, 1995 AMC at 929.

182. *See id.* at 553, 1995 AMC at 933 (Thomas, J., concurring) (arguing that "[s]uch a test also introduces undesirable uncertainty into the affairs of private actors").

183. *Id.* at 554, 1995 AMC at 934 (Thomas, J., concurring).

184. *Id.* at 555-56, 1995 AMC at 934-35 (Thomas, J., concurring).

185. *See id.* at 549-50, 1995 AMC at 930-31 (Thomas, J., concurring) ("And God said, Let the waters under the heaven be gathered together unto one place, and let the dry land appear: and it was so. And God called the dry land Earth; and the gathering together of the waters called [the] Seas: and God saw that it was good." (quoting *Genesis* 1:9-10)).

186. *See id.* at 553, 1995 AMC at 933 (Thomas, J., concurring) (criticizing the Court's use of "levels of generality"); *see also supra* note 164 and accompanying text.

requirement was easily satisfied here because the barge was in navigable waters, and even though the injury occurred on land, the Admiralty Extension Act brought the event within federal maritime jurisdiction.[187] He argued that continuing with further analysis only impeded progress toward "clarity and efficiency" in jurisdictional determinations in admiralty law.[188]

Indeed, Justice Thomas's concerns do raise eyebrows in light of his assertions that *Foremost-Sisson*-type tests had caused confusion in lower courts.[189] As mentioned previously, Justice Thomas added a concern that even private actors would be confused about whether their conduct fell under federal admiralty jurisdiction.[190] Nevertheless, he failed to persuade the majority that those concerns outweighed the benefit of adding a *Sisson*-type test. In fact, one legal commentator stated that the *Grubart* decision has "prompted uniformity in the circuits, and there does not appear to be any particular problem in applying the *Grubart* test."[191]

Both *American Dredging* and *Grubart* demonstrate that the product of a sound decision-making process is not necessarily a bright-line rule. Despite arguably maintaining a steadfast course of sound decision-making principles in an effort to more clearly draw discernable lines, the lines remain clouded.[192] In *American Dredging*, the declaration that forum non conveniens was nothing more than a supervening venue provision triggered ample criticism in an effort to preserve substantive maritime law. In *Grubart*, even the implementation of a factor analysis left the competing interests wondering whether a mechanical situs rule was not already enough. Indeed, even when a court reaches a logical conclusion, such criticism can be expected where multiple competing interests pull firmly at the threads of the issue.

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187. *Grubart*, 513 U.S. at 555, 1995 AMC at 935 (Thomas, J., concurring).

188. *Id.* (Thomas, J., concurring).

189. *See id.* at 552, 1995 AMC at 932-33 (Thomas, J., concurring).

190. *See id.* at 553, 1995 AMC at 933; *cf. supra* note 39 and accompanying text (discussing Chief Justice Rhenquist's "Holmesian" focus on settled expectations and reasonable reliance on precedent).

191. Dale Van Demark, Note, Grubart v. Great Lakes Dredge & Dock Company*: A Reasonable Conclusion to the Debate on Admiralty Tort Jurisdiction*, 17 PACE L. REV. 553, 586 (1997).

192. *See supra* note 3 and accompanying text. The Court steered clear of the broader issue of whether a discernable line existed between permissible or impermissible state regulation in admiralty jurisprudence or of whether such a line would even be entirely consistent with admiralty jurisprudence. *See* Am. Dredging Co. v. Miller, 513 U.S. 443, 452-53, 1994 AMC 913, 920 (1994). Arguably, such a decision might have resulted in a similarly divided court.

*D.* Yamaha Motor Corp., U.S.A., v. Calhoun

In *Yamaha Motor Corp., U.S.A., v. Calhoun*,[193] the Supreme Court was faced once more with the strong pull of competing interests. In *Yamaha*, the Court determined that state remedies were still available for nonseamen killed inside a state's three-mile territorial limit, despite the existence of a general maritime remedy at federal law.[194] Indeed, *Yamaha* has been criticized for giving short shrift to the importance of uniformity in maritime law.[195] Nonetheless, as discussed below, *Yamaha* employs traditional and established judicial decision-making principles in a manner not inconsistent with the process I have termed "reasoned judgment."

*Yamaha* involved the death of a twelve-year-old Pennsylvania girl who crashed her Yamaha "Wavejammer" jet ski into a vessel anchored at a beachfront resort in Puerto Rico.[196] The girl's parents sued Yamaha in federal court, grounding federal jurisdiction on both diversity of citizenship and admiralty.[197] Claiming that the jet ski their daughter had been riding was defective, the parents sued under Pennsylvania's wrongful-death statutes and sought damages for loss of future earnings, loss of society, loss of support and services, and funeral expenses, as well as punitive damages.[198] Yamaha, on the other hand, contended that because the girl died on navigable waters, admiralty jurisdiction mandated federal liability standards and federal remedies, to the exclusion of state law.[199] As such, Yamaha argued, the family should only be entitled to recover damages for the amount of the girl's funeral expenses.[200]

Affirming the decision of the United States Court of Appeals for the Third Circuit, the Supreme Court held that state law remedies have not been displaced by federal maritime law and, thus, remain applicable in cases such as this.[201] Accordingly, the family could recover damages under the correct state or territory's wrongful-death statute.[202] Writing for the unanimous Court, Justice Ginsburg

193. 516 U.S. 199, 1996 AMC 305 (1996).

194. *See id.* at 202, 1996 AMC at 306-07.

195. *See* Burrell, *Application of State Law to Maritime Claims*, *supra* note 3, at 74-77; B.J. Haeck, Yamaha Motor Corp. v. Calhoun: *An Examination of Jurisdiction, Choice-of-Laws, and Federal Interests in Maritime Law*, 72 WASH. L. REV. 181, 181 (1997); Robertson, *supra* note 3, at 97-102; David L. Lapp, *supra* note 3, at 678-79.

196. *Yamaha*, 516 U.S. at 202, 1996 AMC at 307.

197. *Id.*

198. *Id.*

199. *Id.* at 203, 1996 AMC at 307.

200. *Id.*

201. *See id.* at 202, 1996 AMC at 306-07.

202. *Id.* at 216 n.14, 1996 AMC at 318 n.14.

employed established legal precepts, i.e., jurisdictional analysis, statutory analysis, and precedent, in reaching a conclusion. Underlying the Court's analysis was traditional deference to congressional authority, including a rejection of the more subjective legal precept of the "need for uniformity" in maritime law as a determinative consideration.

First, the Court answered the threshold question of jurisdiction by looking to precedent; because this case involved "a watercraft collision on navigable waters," the Court concluded it fell within the ambit of admiralty jurisdiction.[203] Having resolved this issue, the Court sought to examine the central issue of the dispute: whether federal maritime law, and in particular whether the Court's previous decision in *Moragne v. States Marine Lines, Inc.*,[204] "terminate[s] recourse to state remedies when nonseafarers meet death in territorial waters."[205] In doing so, the Court traced the *precedential* history of maritime wrongful-death cases, beginning with its 1886 decision in *The Harrisburg*, which held that general maritime law did *not* afford a cause of action for wrongful death.[206] In later cases, however, the "[f]ederal admiralty courts tempered the harshness of *The Harrisburg*'s rule by allowing recovery under state wrongful-death statutes."[207]

As such, the Court acknowledged that "[s]tate wrongful-death statutes proved an adequate supplement to federal maritime law," until a series of the Court's decisions established strict liability recovery under the doctrine of unseaworthiness (rather than under ordinary negligence) as the primary basis for recovery when a seafarer was injured or killed.[208] Among those decisions creating a "disparity between the unseaworthiness doctrine's strict-liability standard and negligence based state wrongful death statutes" was the *Moragne* case.[209] Consequently, Yamaha's interpretation of *Moragne* became the heart of its argument: "[S]tate remedies can no longer supplant general maritime law . . . because *Moragne* launched a solitary federal scheme."[210]

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203. *Id.* at 206, 1996 AMC at 310.
204. 398 U.S. 375, 1970 AMC 967 (1970).
205. *Yamaha*, 516 U.S. at 210 n.8, 1996 AMC at 313 n.8.
206. 119 U.S. 199, 213 (1886), *overruled by* Moragne v. States Marine Lines, 398 U.S. 375, 1970 AMC 967 (1970).
207. *Yamaha*, 516 U.S. at 206-07, 1996 AMC at 311.
208. *Id.* at 207-08, 1996 AMC at 311.
209. *Id.* at 208, 1996 AMC at 311.
210. *Id.* at 209-10, 1996 AMC at 313.

In directly addressing Yamaha's argument, however, the Court went on to distinguish the precedential effect of *Moragne* and, indeed, to clarify its effect on circumstances such as those presented in the *Yamaha* case.[211] In particular, the Court differentiated the uniformity concerns present in *Moragne* from those argued by Yamaha.[212] The Court looked to the *purpose* of the uniformity principle decided in *Moragne* and concluded that it "was centered on the extension of relief," i.e., the availability of the unseaworthiness doctrine as a remedy.[213] The Court stated that it was *not* centered "on the contraction of remedies" as was argued by Yamaha.[214] In effect, the Court viewed *Moragne* as a floor (rather than a ceiling) on relief available for torts committed on navigable waterways.[215]

Finally, by employing statutory analysis, the Court found that Congress had "not prescribed remedies for the wrongful deaths of nonseafarers in territorial waters."[216] In fact, the Court went on to note that one federal statutory provision, section 7 of the Death on the High Seas Act (DOHSA), precluded the displacement of state law in territorial waters.[217] Therefore, the Court concluded that state remedies were not preempted by federal law in state territorial waters.[218]

In short, the *Yamaha* Court employed traditional legal precepts and deferred to congressional authority, while dismissing Yamaha's more subjective argument that the application of state remedies would damage the uniformity of maritime law. Accordingly, Justice Ginsburg's opinion represented a systematic and reasoned analysis of the Court's prior decisions, and the decisions of Congress.

### *E.* United States v. Locke

Last year in *United States v. Locke*, the Supreme Court held that federal statutes and regulations relating to the maritime industry preempted the State of Washington's attempt to regulate oil tanker shipping.[219] Writing for a unanimous Court, Justice Kennedy relied

211. *See id.* at 211-14, 1996 AMC at 314-16.
212. *See id.*
213. *Id.* at 213, 1996 AMC at 316.
214. *Id.*
215. *Id.* The Court further supported its conclusion with *analogous precedent* involving remedies available under state workers' compensation laws in the shadow of a federal law concerning longshore and harbor workers. *Id.* at 214-15, 1996 AMC at 316.
216. *Id.* at 215, 1996 AMC at 317.
217. *See id.* at 215-16, 1996 AMC at 317-18 (citing 46 U.S.C. app. § 767 (1994)).
218. *See id.*
219. 529 U.S. 89, 94, 2000 AMC at 913, 915 (2000).

primarily upon *Ray v. Atlantic Richfield Co.*[220] and a statutory analysis of a series of congressional statutes pertaining to maritime tanker transports in reaching his conclusion. Further buttressing the result was a resurrection of the more subjective recognition of the importance of uniformity in this one particular area of maritime law.[221]

In 1989, the largest oil spill in U.S. history occurred when the supertanker EXXON VALDEZ ran aground in Prince William Sound, Alaska, spilling its cargo of more than fifty-three million gallons of crude oil.[222] In response, Congress enacted the Oil Pollution Act of 1990 (OPA) and, in turn, the State of Washington created a new regulatory agency and directed it to establish standards to provide the "Best Available Protection" (BAP) from damages caused by the discharge of oil.[223] Accordingly, the state agency promulgated rules regarding tanker design and operating requirements.[224] An international trade association of tanker owners and operators (Intertanko) brought suit seeking declaratory and injunctive relief against the state and local officials whose responsibility it was to enforce the state's new tanker regulations.[225]

In resolving the issue, Justice Kennedy highlighted a variety of historical precedents, including citations to the *Federalist Papers*, to the Congressional Acts of 1789 and 1871, and to three nineteenth-century Supreme Court cases granting Congress authority to regulate interstate navigation.[226] Moreover, Justice Kennedy detailed no less than three federal statutes, the Tank Vessel Act of 1936, the Ports and Waterways Safety Act of 1972, and OPA, which provided a basis for the Court's conclusion that federal statutory structure preempted the state regulations.[227]

Further, in a straightforward application of *stare decisis*, the Court cited to its decision in *Ray*, which at that time held that an established federal and regulatory scheme preempted Washington's then-existing regulations limiting tanker size, design, and construction, and thus "explains why federal pre-emption analysis applies to the

220. 435 U.S. 151, 1978 AMC 527 (1978).

221. *See Locke*, 529 U.S. at 116-17, 2000 AMC at 931.

222. *See id.* at 94, 2000 AMC at 914.

223. *See id.* at 97, 2000 AMC at 916.

224. *See id.* at 94-97, 2000 AMC at 915-17.

225. *See id.* at 97, 2000 AMC at 917. Environmental preservation groups intervened on behalf of the state. *Id.*

226. *See id.* at 99-100, 2000 AMC at 918-19.

227. *See id.* at 100-02, 2000 AMC at 919-20. The Court also recognized, but found it unnecessary to resolve, the possibility that a "significant and intricate complex of international treaties and maritime agreements" could be of binding, preemptive force. *Id.* at 102, 2000 AMC at 920-21.

[current] challenged regulations."[228] The State argued, however, that the "savings provisions" of OPA, which was enacted after *Ray*, eviscerated that holding.[229] Again, the Court engaged in straightforward statutory construction analysis and concluded that the courts below had "placed more weight on the saving clauses than those provisions can bear, either from a textual standpoint or from a consideration of the whole federal regulatory scheme."[230] As such, the Court concluded that the savings provisions had no effect upon the holding in *Ray* and affirmed its previous decision.[231]

The Court then undertook a textual review of three of the four Washington regulations at issue, crew training requirements, English language proficiency, and navigation watch rules, and found each of them in conflict with at least one other federal regulation or statute on the same subject.[232] Upon considering the fourth regulation, casualty reporting requirements, the Court looked again to precedent, as well as to federal statutes granting power to the Coast Guard to prescribe casualty reporting requirements, and rejected the State's argument that the regulation was not preempted because it is "similar to" federal requirements.[233] The Court buttressed its conclusion regarding the casualty reporting regulation with a more subjective nod to policy implications, suggesting that "[t]he State's reporting requirement is a significant burden in terms of cost and the risk of innocent noncompliance."[234]

Before concluding, however, the Court also took note of the "destructive power" of an oil spill on the environment.[235] Consequently, it resurrected the more subjective, indeed topical, consideration of the need for uniformity.[236] This time, it appears that the need for uniformity is exhorted only in the narrower context of regulation for environmental marine protection, rather than in any broader context of uniformity of maritime law in general. As

228. *Id.* at 104, 2000 AMC at 922.

229. *See id.* at 104-05, 2000 AMC at 921-23.

230. *Id.* at 105, 2000 AMC at 922.

231. *See id.* at 105-06, 2000 AMC at 923-24.

232. *Id.* at 112-17, 2000 AMC at 928-32. The Court also noted that several other parts of the state regulatory scheme could be addressed upon remand "so their validity may be assessed in light of the considerable federal interest at stake and in conformity with the principles we now discuss," and since "[r]esolution of these cases would benefit from the development of a full record by all interested parties." *Id.* at 94, 117, 2000 AMC at 915, 931.

233. *Id.* at 114-15, 2000 AMC at 929-30 (citing Sinnot v. Davenport, 63 U.S. (22 How.) 227 (1859)).

234. *Id.* at 116, 2000 AMC at 930-31.

235. *Id.* at 117, 2000 AMC at 931.

236. *Id.*

suggested by one commentator, "*Locke* may represent an initial retreat from the Court's recent, strident 'states-rights' perspective," or possibly, even more so, it may "revive[] the Court's willingness to counterbalance both federal and state concerns more evenly."[237] Indeed, the Court's reliance on established precedent and cogent analysis of the federal regulatory scheme in reaching its conclusion is significant, perhaps not because it signals any major shift in the Court's federalism bias, but rather because it rejects the argument that the Court has an over prevailing interest in applying state law in admiralty actions. It seems that, where appropriate, the Court will uphold the notion of uniformity in admiralty law, if such subjective rationale is supported by "reasoned judgment."[238]

*F.* Lewis v. Lewis & Clark Marine, Inc.

Importantly, the Court consistently makes no assumptions regarding the origins or nature of federal admiralty jurisdiction as it analyzes each case. Instead, the court diligently draws out the basic legal precepts that guide it through its analysis. Stated differently, the law is never presumed but rather explained in detail in each case.

In the Court's most recent case involving maritime law, *Lewis v. Lewis & Clark Marine, Inc.*, the Court once again engaged in this type of principled resolution based on precedent and analysis.[239] Justice O'Connor, delivering the opinion for a unanimous Court, addressed the question of whether a federal district court abused its discretion when it dissolved an injunction against state court action.[240] In *Lewis & Clark*, a deckhand tripped on a wire aboard a vessel and hurt his back.[241] He sued the owner of the vessel in state court for negligence under the Jones Act, unseaworthiness, and maintenance and cure.[242] As in *Grubart*, the owners of the vessel filed a complaint in federal district court seeking a limitation of liability under the Limitation of Liability Act.[243]

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237. Timothy E. McCarthy, Casenote, United States v. Locke, *120 S. Ct. 1135 (2000)*, 10 SETON HALL CONST. L.J. 1209, 1231 (2000).

238. On remand for consideration of the remaining state regulations, the United States Court of Appeals for the Ninth Circuit noted that the State had filed a notice to revoke the regulations at issue and, indeed, had suspended enforcement of them. *See* Int'l Ass'n of Indep. Tanker Owners v. Locke, 216 F.3d 880, 880-81 (9th Cir. 2000). Accordingly, the Ninth Circuit stayed any further proceedings pending the repeal of the regulations.

239. 121 S. Ct. 993, 998-99 (2001).

240. *Id.* at 996-97.

241. *Id.* at 997.

242. *Id.*

243. *Id.* (citing 46 U.S.C. app. §§ 181-195 (1994)).

Applying Supplemental Rule F of the Federal Rules of Civil Procedure for a limitation claim, the district court initially restrained the deckhand from proceeding in state court.[244] However, the district court later dissolved the restraining order and permitted the state court to adjudicate personal injury claims under exceptions to exclusive federal jurisdiction, while the district court retained jurisdiction over the limitation action.[245] The United State Court of Appeals for the Eighth Circuit reversed the district court's dissolution of the injunction and reasoned that the vessel owner had a right to pursue exoneration from liability and not just the limitation claim in federal court.[246] The Supreme Court reversed after concluding that the Eighth Circuit had misapprehended the Court's prior decisions.[247]

Here, the Court again embarked on a careful explanation of the history of the Saving to Suitors Clause, the history of the Limitation of Liability Act, and the intent of the legislature. The Court's analysis confirmed a consistency in its approach to maritime preemption cases. In the absence of clear congressional line-drawing between federal and state regulation of maritime law, the Court engaged in a principled resolution based on precedent and analysis.

For instance, while engaging in a thorough review of the basic legal precepts, the Court observed that the Limitation of Liability Act was "not a model of clarity."[248] Without judicial interpretation, the Court argued, the Limitation Act was almost impossible to apply.[249] Therefore, the Court had, over time, designed Supplemental Rule F consistent with congressional intent.[250] The federal district court followed the procedure laid out in this rule. Therefore, the Court was satisfied that the federal district court's dissolution of the restraining order against proceeding in state court was justified.

Furthermore, the Court recognized the tension between the Saving to Suitors Clause and the Limitation Act. The Saving to Suitors Clause provided suitors with "the right to a choice of remedies," while the Limitation Act provided owners with the right to seek limited liability in federal court.[251] Notably, the Court carefully examined precedent in its analysis of the Limitation Act and its history to measure the boundaries of permissible state court adjudication of

244. *Id.*
245. *Id.* at 997-98.
246. *Id.* at 998.
247. *Id.* at 1002-05.
248. *Id.* at 1000.
249. *Id.*
250. *Id.* at 1000-01.
251. *Id.* at 1000, 1002.

maritime claims.[252] The Court concluded that the Limitation Act did not bar recovery, but was instead a limitation on liability.[253]

Here, it was obvious that the Court had already established a template for legal reasoning when confronted with a limitation action.[254] Again, by deliberately tracing the path of its reasoning through history and analysis, it was able to sift through flawed premises to determine the proper outcome.[255] Additionally, the Court conscientiously dealt with the federal interests in protecting the vessel owner's right to seek limited liability in federal court through the Limitation Act.[256] Not discounting those interests, the Court balanced them against the rights of suitors and refused to make personal injury involving vessels "a matter of exclusive federal jurisdiction except where the claimant happens to seek a jury trial."[257] Instead, the Court made clear that state courts were permitted to adjudicate claims against vessel owners "so long as the vessel owner's right to seek limitation of liability is protected."[258]

In sum, this recent case highlights the Court's ability to arrive at a principled resolution. Through historical and logical analysis of the Saving to Suitors Clause, the Limitation Act, and Supplemental Rule F, the Court derived the modern application in maritime preemption cases. Once derived, the Court carefully applied its analysis to the owner's claim for limitation. Not discounting the tension between the Saving to Suitors Clause and substantive maritime law, it reasoned that state courts were permitted to adjudicate the deckhand's personal injury claims conditioned on the limitations set forth by Congress in the Limitation Act.

## IV. CONCLUSION

The recent United States Supreme Court maritime federalism cases discussed above demonstrate a definite tendency to allow state law to prevail except where clearly preempted by federal law. Despite the frustration with the alleged lack of uniformity in the outcome of these cases, practitioners should find some solace in the consistency and predictability with which established legal precepts have been

252. *Id.* at 1001-02.
253. *Id.* at 1003.
254. Perhaps this is a preemptive defensive measure whereby the Court makes its reasoning clear in case Congress disagrees.
255. *Id.* at 1002-05.
256. *Id.* at 1003-04.
257. *Id.* at 1005.
258. *Id.*

employed in reaching these conclusions.[259] Never discounting the tension between the Saving to Suitors Clause and maritime substantive law, the Court meticulously reviews each case to reach a principled resolution based on precedent and analysis.

Nevertheless, competing maritime interests still sense that the Court is ambivalent to the importance of uniformity in maritime law. This ambivalence should not preclude practitioners from continuing to propound the benefits of uniformity, however. This is particularly true in an era when maritime commerce continues to increase, certainly on a scale far greater than contemplated by the nineteenth- and early twentieth-century cases upon which the modern Court has so steadfastly relied. The Court reminds us in *Lewis & Clark*, however, that it is asked to interpret statutes and apply law that may not be a "model of clarity."[260] Because reasoned judgment would counsel a responsible court against wholesale abandonment of judicial precedent, perhaps the more appropriate (and surely less controversial) means to achieving the uniformity in the maritime law that many seek should be left to Congress.

259. *See* Van Demark, *supra* note 191, at 588-89.
260. *See* 121 S. Ct. at 1000.