ADMIRALTY JURISDICTION: EXECUTIVE JET IN HISTORICAL PERSPECTIVE

I. INTRODUCTION

A. *Constitutional and Legislative Grants of Jurisdiction*

Article III, section 2 of the Constitution extends the judicial power of the United States "to all cases of admiralty and maritime jurisdiction." This section also extends the federal judicial power "to all cases in law and equity arising under the Constitution" and "to controversies . . . between citizens of different states." Despite the apparent parallel position of these clauses in the Constitution, the grant of admiralty jurisdiction is significantly different. Federal question jurisdiction is generally regarded as limited to the interpretation and application of the Constitution, federal legislative enactments and treaties, and it is the conventional wisdom that within this precise grant of jurisdiction the federal courts do not have the law making ability characteristic of state courts. Under the doctrine of *Swift v. Tyson*[1] the federal courts exercised common law rule making powers in diversity of citizenship cases, on the assumption that this power was inherent in the jurisdictional grant. *Erie R.R. v. Tompkins*,[2] however, brought an end to this practice. The applicable law for these controversies is exclusively that of the state. For federal question and diversity cases, then, federal courts have subject matter jurisdiction, but the source of the controlling law is external to the court.

By contrast, federal courts have long exercised substantive rule making powers on the basis of the jurisdictional grant derived from the "admiralty and maritime" clause. *Moragne v. States Marine Lines, Inc.*[3] is a recent example of the exercise of this power. Moragne, a seaman, was killed while working aboard a vessel on navigable waters within Florida's territorial jurisdiction. The Florida supreme court, under a state provision for certified questions, had held the Florida wrongful death statute inapplicable to cases in which the fatality was due to the unseaworthiness of a vessel.[4] The United States Supreme Court examined existing admiralty doctrine for a basis of recovery and found it unhelpful. Rather than deny relief, the Court revised the general maritime law to encompass a remedy for wrongful death within state territorial waters.

The constitutional grant of admiralty jurisdiction and the "necessary and proper" clause[5] together have been construed as constitutionally pre-

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[1] 41 U.S. 1 (1842).

[2] 304 U.S. 64 (1938).

[3] 398 U.S. 375 (1970).

[4] Moragne v. State Marine Lines, Inc., 211 So. 2d 161 Fla. (1968).

[5] U.S. CONST. art. I, § 8.

empting the area of admiralty law. *Southern Pacific v. Jensen*[6] held that the constitutional grant of admiralty jurisdiction gave Congress "paramount power to fix and determine the maritime law which shall prevail throughout the country. . . . And further, that in the absence of some controlling statute, the general maritime law developed by the federal courts constitutes part of the national law applicable to matters within admiralty and maritime jurisdiction."[7] Moreover, the Court has held that 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."[8]

While admiralty jurisdiction may be preemptive of the common law, this is so only to the extent that Congress has conferred jurisdiction. In an early Supreme Court decision, *Martin v. Hunter's Lessee*,[9] Justice Story argued that the language of article III, section 2 obligated Congress to vest in the federal courts the whole judicial power contemplated by the Constitution. In 1845, however, it was explicitly held that the judicial power of the United States, except in cases of original jurisdiction of the Supreme Court,

> is . . . dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating tribunals (inferior to the Supreme Court) for the exercise of judicial power, and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good.[10]

The Supreme Court has continued to adhere to this position.[11] Thus, in the context of admiralty jurisdiction thus developed, the state courts could theoretically administer the common law to settle disputes arising upon the high seas or other navigable waters, if Congress has not extended the admiralty jurisdiction to include such disputes. The basis of a suit would be the common law transitory cause of action which may be enforced wherever personal jurisdiction of the parties can be obtained.

B. *Savings to Suitors Clause*

Section 9 of the Judiciary Act of 1789 originally granted to the district courts "exclusive original cognizance of all civil causes of admiralty and

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[6] 244 U.S. 205 (1916).

[7] *Id.* at 215.

[8] Knickerbocker Ice Co. v. Stewart, 253 U.S. 149, 160 (102).

[9] 14 U.S. 304, 330 (1816).

[10] Cary v. Curtis, 44 U.S. 236, 245 (1845).

[11] *E.g.*, Glidden Co. v. Zdanok, 370 U.S. 530 (1962); Lockerty v. Phillips, 319 U.S. 182 (1943); Federal Power Comm'n v. Pacific Power & Light Co., 307 U.S. 156 (1939).

maritime jurisdiction . . . saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it."[12] The "saving clause" is the only exception to the exclusiveness of the grant of substantive admiralty jurisdiction to the district courts. This exception in no way restricts jurisdiction of the admiralty courts, but rather allows, to a limited extent, application of the common law. The saving clause recognizes that some maritime matters had been administered by the common law courts of the colonies[13] and insures that this capability will continue.[14]

The exercise of admiralty jurisdiction under the saving-to-suitors clause, by both state courts and federal law courts with diversity jurisdiction, is unique. The maritime tort would be treated as a common law transitory cause of action, and the ascertainment of plaintiff's right to recover would be governed by the common law. But there is an important limitation—the doctrine of federal supremacy and national uniformity as articulated in *Jensen*.[15] Thus when a cause of action arises within a maritime context, common law rules can not be applied to deny plaintiff's recovery. For example, contributory negligence, a doctrine not recognized in admiralty, could not be asserted as a defense,[16] and a state allocation of the burden of persuasion, which would directly affect plaintiff's ability to recover, would be inapplicable if a contrary admiralty rule exists.[17] On the other hand, the rationale of *Jensen* may serve to limit a plaintiff's recovery. In *Chelentis v. Luckenbach S.S.Co.*,[18] an injured seaman sued at common law for full indemnity, but the Court held his cause of action to be maritime, and, unless some other liability had been imposed upon the defendants, recovery was limited to that which admiralty would give—wages and maintenance and cure.

However, once a right to relief has been determined, the full range of common law remedies is available. Legislatively created remedies are also available in cases in which the relief is equivalent to the type that the common law would provide. Particularly significant is the use of state wrongful death statutes.

Another factor relevant to the relationship between common law and admiralty is that traditionally the common law courts were limited in admiralty matters to actions in personam, that is, actions against specific per-

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12 1 Stat. 76-77 (now 28 U.S.C. § 1333 (1970)).

13 Romero v. International Terminal Operating Co., 358 U.S. 354, 362 (1959), *rehearing denied*, 359 U.S. 962 (1959).

14 New Jersey Steam Navigation Co. v. Merchants' Bank, 47 U.S. 343, 390 (1848).

15 244 U.S. 205, 215 (1916).

16 Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953).

17 Garrett v. Moore-McCormack Co., 317 U.S. 239 (1942). In a state court action for personal injuries brought by a seaman, a ship owner, who sets up the seaman's release as a defense, has his burden of persuasion determined according to admiralty law.

18 247 U.S. 372, 382 (1918). The impact of this specific decision may have been ameliorated by the Merchant Marine Act of 1920, § 33 (The Jones Act), 46 U.S.C. § 688 (1970).

sons such as the owner or master of a ship. An in rem proceeding directly against a vessel was beyond the power of the common law court.[19] While this general rule continues today, the common law is capable of reaching vessels under certain conditions. In *Knapp, Stout & Co. v. McCaffrey*,[20] the Court upheld a bill in equity in a state court to foreclose a common law lien upon a raft for towing services. The suit was considered to be in personam with an auxiliary attachment and thus within the common law and the saving to suitors clause.

Admiralty law need not be applied when no benefit to the maritime industry is promoted by an exclusive federal rule. In such cases, the state may be allowed to create a remedy even though it conflicts with the substantive law establishing a similar federal admiralty remedy. In *Madruga v. Superior Court*,[21] for example, the plaintiff sought the sale of a vessel and partition of funds according to a state statute. The defendant, an owner of a minority interest, objected on the grounds that a partition in admiralty was required and that admiralty requires that the parties have equal interests. The Supreme Court found that the dispute was against a co-owner, not the vessel; consequently the proceeding was not one in rem. Additionally, the court noted the absence of a need for an exclusive national law to govern quarreling shipowners.

II. THE DEVELOPMENT OF ADMIRALTY JURISDICTION

A. *Admiralty, the Common Law and the States*

Professor Kent refers to the English history of conflict between admiralty and the common law:

> There has existed a very contested question, and of ancient standing, touching the proper division or boundary line between the jurisdiction of the courts of common law and the courts of admiralty. The admiralty jurisdiction in England originally extended to all crimes and offences committed upon the sea, and in all ports, rivers, and arms, of the sea, as far as the tide ebbed and flowed. Lord Coke's doctrine was, that the sea did not include any navigable waters within the body of a county; and Sir Matthew Hale supposed, that prior to the statute of 35 Edw. III., the common law and the admiralty exercised jurisdiction concurrently in the narrow seas, and in ports and havens within the ebb and flow of the tide. Under the statutes of 13 R. II. c. 5. and 15 R. II. c. 3., excluding the admiralty jurisdiction in cases arising upon land or water within the body of a county, except in cases of murder and mayhem, there have been long and vexatious contentions between the admiralty and the common law courts. On the sea shore, the common law jurisdiction is bounded by low water mark; and between high and low water mark, where the sea ebbs and flows, the common law and the admiralty have a divided or alternate jurisdiction.

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[19] The Hine v. Trevor, 71 U.S. 555 (1867).

[20] 177 U.S. 638 (1900).

[21] Madruga v. Superior Ct., 346 U.S. 556 (1954).

> With respect to the admiralty jurisdiction over arms of the sea, and bays and navigable rivers, where the tide ebbs and flows, there has been great difference of opinion, and great litigation, in the progress of the English jurisprudence. On the part of the admiralty, it has been insisted, that the admiralty continued to possess jurisdiction in all ports, havens and navigable rivers, where the sea ebbs and flows below the first bridges. . . . On the part of the common law courts, it has been contended, that the bodies of counties comprehended all navigable rivers, creeks, ports, harbours, and arms of the sea, which are so narrow as to permit a person to discern, and attest upon oath, any thing done on the other shore, and so as to enable an inquisition of facts to be taken.[22]

The jurisdictional struggle between common law and admiralty was carried over to the United States with the added complexity that the Constitution granted admiralty jurisdiction to the federal courts and left the state courts of general jurisdiction essentially untouched as the great repositories of the common law. Thus every conflict between the jurisdiction of admiralty and the jurisdiction of common law becomes a conflict between the federal and state power to determine the substantive law. This is further complicated by the territorial overlap caused by each coastal state making claim to its own territorial waters.[23]

The first federal case to consider the question of the grant of federal admiralty jurisdiction and its relationship to state common law jurisdiction was *Delovio v. Boit*.[24] *De Lovio* was a case in which the issue was the extent of admiralty jurisdiction over a contract of marine insurance. The case was heard by Justice Story while on circuit, and in his opinion he gave a great deal of attention to the history of the struggle between the courts of admiralty and common law. He argued that Lord Coke was mistaken in his attempts to confine the ancient jurisdiction of the admiralty to the high seas, and in attempting to exclude it from the narrow tidewaters and from ports and havens. In Story's opinion the delegation of cognizance of "all civil cases of admiralty and maritime jurisdiction" to the courts of the United States "comprehends all maritime contracts, torts, and injuries [and] [t]he latter branch is necessarily bounded by locality; the former extends over all contracts . . . which relate to the navigation, business or commerce of the sea."[25] The specific holding that the contract was in admiralty did not receive immediate acceptance, but the bifurcation of admiralty jurisdiction into contract and tort, and the dictum that established locality as the test of admiralty tort jurisdiction have generated a large body of supporting precedent. After *De Lovio*, contracts that concerned the subject matter of commerce on the seas, without regard to the place of the

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[22] J. KENT, COMMENTARIES ON AMERICAN LAW 342-43 (1826). (footnotes omitted).

[23] 43 U.S.C. § 1312 (1970), a part of title II of the Submerged Lands Act of 1953, insures each state a minimum seaward boundary of three geographical miles.

[24] 7 F. Cas. 418 (No. 3776) (C.C.D. Mass. 1815).

[25] *Id.* at 444.

making of the contract, and all torts which were consummated on the seas within the ebb and the flow of the tide were within the jurisdiction of admiralty.

Story's conclusion in *De Lovio* had the effect of excluding the legislative jurisdiction of the coastal states' governments from the seaward strip of tide water which they had reserved to themselves as territorial waters.[26] It also subordinated the substantive law of the states to the general law of admiralty within this band of water, except where there is jurisdiction based on the saving clause.

B. *The Locality Test*

The *De Lovio* opinion was followed by *Thomas v. Lane*,[27] another opinion by Justice Story. In *Thomas*, a seaman brought an action against the master and mate of the ship on which he was a crew member, charging assault and battery, and imprisonment in the port of Havana. Story raised the issue of whether the confinement had occurred on land, for it was his understanding that the extent of the court's power over torts depended upon the locality of the act; in other words, whether the tort was "committed on the high seas, or on waters within the ebb and flow of the tide."[28] There is no further elaboration of this line of demarcation between things occurring "on the high seas, or on the waters" and those on land, but the *Thomas* opinion does indicate that the admiralty courts of the United States would have no jurisdiction over a tort occurring wholly on shore at a foreign port.

Whether Justice Story intended to establish the constitutional limits of admiralty tort jurisdiction, such that the water's edge would be a dividing point, is open to debate. It is probable that Story's primary concern was not to find the limits of admiralty jurisdiction, but to conclusively establish that such jurisdiction extends to all tort actions arising upon waters within ports. This interpretation is supported by his comment in *Thomas* that "at least as to torts upon tide waters in foreign countries, the jurisdiction of the admiralty attached, seeing that it was its ancient right, and not within the prohibitions of the statutes of Rich. II."[29] Had Story been advocating a broader basis for tort jurisdiction, he could have used language comparable to that employed in *De Lovio* for establishing jurisdiction over contracts. He did not, and it is evident that he viewed locality as at least the primary test. Story's expansive purpose, however, suggested that other

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[26] *But see* Cooley v. Board of Wardens, 53 U.S. 299 (1851). In an opinion decided wholly on the issue of whether the commerce power called for federal preemption of the power to regulate commerce, the Court permitted Pennsylvania to require the use of harbor pilots in the port of Philadelphia.

[27] 23 F. Cas. 957 (No. 13,902) (C.C.D. Me. 1813).

[28] *Id.* at 960.

[29] *Id.*

courts relying on *De Lovio* as authority for the constitutional limits of admiralty jurisdiction should have done so with caution.

Nevertheless, subsequent courts elevated the "locality" and the "water's edge" tests to seeming constitutional status. For instance in *The Plymouth*,[30] the propeller Falcon had been moored to a wharf owned by the libelants. Through negligence on the part of the crew, the ship caught fire, and sparks from the blaze ignited and destroyed the wharf. A libel in rem was brought against the Plymouth, a sister ship of the Falcon, but the trial court dismissed the action for want of admiralty jurisdiction. Before the Supreme Court, the libelants argued that general maritime law should depend on the transaction and "therefore [extend] to all cases of service, contract, tort, or accident, 'relating to ships, shipping and marine commerce' " (as was the practice in Continental admiralty courts)[31] or, in the alternative, that locality should be given a broad construction.[32] Without reference to the "transaction" argument and, after a brief reference to the locality test set forth in *Thomas v. Lane*, the Court affirmed the lower court's dismissal of the tort claim: "[T]he wrong and injury complained of must have been committed wholly upon the high seas or navigable waters, or, at least, the substance and consummation of the same must have taken place upon these waters to be within the admiralty jurisdiction."[33]

Justice Story's locality test thus became the touchstone for determining admiralty jurisdiction for over a century and a half. The basic simplicity of the test may be one reason for its longevity and, for the bulk of maritime tort litigations, the test has been quite satisfactory in screening the parties and the issues.[34] Nevertheless, the convenience and simplicity of the test may in themselves produce problems for the courts in certain exceptional instances.

Employing the locality test requires that the court determine the "locus of the tort," which is often a metaphysical problem. In *The Plymouth*, the Court put itself into the position of deciding whether wharf damage caused by the ship's burning was a tort upon the ebb and the flow of the tide. The problem is further exemplified by two classic cases, *Smith & Sons v. Taylor*[35] and *Minnie v. Port Huron Terminal Co.*[36] In *Taylor*, a longshoreman was knocked from a pier into the water, that is, from a nonmaritime locality to a maritime locality. Conversely, in *Minnie*, a long-

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[30] 70 U.S. 20 (1865).

[31] *Id.* at 26.

[32] *Id.* at 28-31.

[33] *Id.* at 35.

[34] *See* Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249, 254 (1972), and G. GILMORE AND C. BLACK, THE LAW OF ADMIRALTY 24 n.88 (1957) [hereinafter cited as GILMORE AND BLACK].

[35] 276 U.S. 179 (1928).

[36] 295 U.S. 647 (1935).

shoreman was knocked from the ship onto the pier. Admiralty jurisdiction was denied in *Taylor*, but upheld in *Minnie*. In each opinion the Court used the locality test to justify its holding. Similarly, in *Gutierrez v. Waterman Steamship Corp.*[37] the Supreme Court was faced with determining whether a tort occasioned in the unloading of a ship was within admiralty jurisdiction. The Court found that an injury to the longshoreman caused by the improper packaging of coffee beans "while or before the ship [was] unloaded," was a tort which merely took effect on shore, but, for purposes of jurisdiction, had occurred in a maritime locality.[38]

C. *Legislative and Judicial Expansion of the Locality Covered by Admiralty*

While Story's locality concept has retained its vitality as the fundamental test of admiralty jurisdiction, his limitation of the locality to acts occurring upon the "ebb and flow of the tides" has been abandoned. Eighty-three years after *The Plymouth*, Congress passed the Extension of Admiralty Jurisdiction Act: "The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land."[39] The Extension Act was intended to reverse the holding of *The Plymouth* by conclusively establishing the maritime locality of certain torts which resulted in damage to land based facilities.

The constitutionality of the Extension Act was tested in *Fematt v. City of Los Angeles*,[40] a case in which a shorebased linesman suffered personal injuries occasioned by a break of the forward spring line of the ship which he was servicing. The Court noted that the Senate Report on the Extension Act read:

> Adoption of the bill will not create new causes of action. It merely specifically directs the court to exercise the admiralty and maritime jurisdiction of the United States already conferred by article III, section 2 of the Constitution and already authorized by the Judiciary Act.[41]

The Court disagreed, on the basis of *The Plymouth*, that jurisdiction over ship-to-shore torts had previously been authorized by the Judiciary Act, finding such a view to be "inconsistent with every case which had theretofore dealt with ship-to-shore torts. The Admiralty Extension Act must surely be interpreted to broaden the scope of the Judiciary Acts with re-

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[37] 373 U.S. 206 (1963).
[38] *Id.* at 210.
[39] 46 U.S.C. § 740 (1970).
[40] 196 F. Supp. 89 (S.D. Cal. 1961).
[41] *Id.* at 91.

spect to these torts as much as the constitutional grant will permit."[42] Critical analysis of the wording in *De Lovio* may support this view of *The Plymouth*. In stating his locality limitation, Justice Story referred to the "delegation of cognizance of 'all civil cases of admiralty.' "[43] This language should be compared with the 1789 Judiciary Act which grants "cognizance of all civil cases of admiralty"[44] and the Constitutional extension of the judicial power "to all cases of admiralty."[45] Story's word choice suggests that he was interpreting only the Judiciary Act. This is further reflected in his statements in a portion of the opinion immediately preceding the above quotation:

> [T]here is no solid reason for construing the terms of the constitution in narrow or limited sense . . . . [N]ational policy, as well as juridical logic, require the clause of the constitution to be so construed as to embrace all maritime contracts, torts and injuries, or, in other words, to embrace all those causes, which originally and inherently belonged to the admiralty, before any statutable restriction.[46]

Moreover, there are often instances in which Congress has prompted an expansion of the territorial scope of admiralty jurisdiction. In 1845 Congress passed an act extending the jurisdiction of the district courts to certain cases arising upon the lakes and navigable waters of the United States.

> [T]he district courts of the United States shall have, possess, and exercise, the same jurisdiction in matters of contract and tort, arising in, upon, or concerning, steamboats and other vessels of twenty tons burden and upwards, enrolled and licensed for the coasting trade, and at the time employed in business of commerce and navigation between ports and places in different States and Territories upon the lakes and navigable waters connecting said lakes, as is now possessed and exercised by the said courts in cases of the like steamboats and other vessels employed in navigation and commerce upon the high seas, or tide waters, within the admiralty and maritime jurisdiction of the United States.[47]

This jurisdictional extension was challenged as being beyond the constitutional limits of admiralty jurisdiction. In *The Propeller Genesee Chief v. Fitzhugh*,[48] the Court noted that "[t]he language and decision of this court, whenever a question of admiralty jurisdiction had come before it, seemed to imply that under the Constitution of the United States, the jurisdiction was confined to tide-waters."[49] But giving high respect to the opinion of

[42] *Id., but see* United States v. Matson Nav. Co., 201 F.2d 610 (9th Cir. 1953). Damage caused by vessel to dike extending from shore was within admiralty jurisdiction prior to passage of Extension Act.

[43] De Lovio v. Boit, 7 F. Cas. 418, 444 (No. 3776) (C.C.D. Mass. 1815).

[44] Judiciary Act of 1789, § 9, 1 Stat. 76-77 (now 28 U.S.C. § 1333 (1970)).

[45] U.S. CONST. art. III, § 2.

[46] De Lovio v. Boit, 7 F. Cas. 418, 443 (No. 3776) (C.C.D. Mass. 1815).

[47] Act of February 26, 1845, ch. 20, 5 Stat. 726-27 (now 28 U.S.C § 1873 (1970)).

[48] 53 U.S. 443 (1851).

[49] *Id.* at 451.

Congress in passing the Act, the Court rejected all prior decisions as "erroneous" and accepted the view that admiralty was, since 1789, "made to depend upon the navigable character of the water, and not upon the ebb and flow of the tide. If the water was navigable it was deemed to be public; and if public, was regarded as within the legitimate scope of the admiralty jurisdiction conferred by the Constitution."[50]

The effect of *The Genessee Chief* was to make the Act of 1845 unnecessary. At the prompting of Congress, the Court had expanded its interpretation of the constitutional grant of jurisdiction to include all navigable waters. In *The Eagle*,[51] an opinion subsequent to *The Genessee Chief*, the Court pointed out that the 1845 Extension Act had become inoperative, with the exception of the clause which grants the right to a jury trial to either party.[52]

Another act of Congress which later had the effect of extending admiralty jurisdiction was the Death on the High Seas Act (DHSA).[53] The DHSA was enacted in 1920 to remedy the absence of an action for wrongful death in substantive admiralty law. The Act provides that the personal representative of any person killed more than a marine league (three miles) from the shore may maintain a suit for damages in admiralty against the vessel or against the person liable for the injury. The Act excludes this remedy from the seaward band of waters around the states one marine league wide and also from state territorial waters where those waters extend more than a marine league from the shore.[54]

At the time of the passage of the DHSA, transoceanic flight was virtually unknown. Indeed Lindbergh did not cross the Atlantic until seven years later, and it is difficult to believe that Congress had any activity in mind other than shipping on the high seas. In 1941, however, the Act was found to be applicable to deaths resulting when an airplane crashed on the high seas. In *Choy v. Pan-American Airways Co.*,[55] a seaplane vanished during an overseas flight. The personal representative of one of

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[50] *Id.* at 457.

[51] 75 U.S. 15, 25 (1868).

[52] This right to jury trial is continued in the present statute, 28 U.S.C. § 1873 (1970).

[53] The Death on the High Seas Act, 46 U.S.C. §§ 761-68 (1970). Section 761 reads:

> Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.

[54] 46 U.S.C. § 767 (1970).

> The provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this chapter. Nor shall this chapter apply to the Great Lakes or to any waters within the territorial limits of any State, or to any navigable waters in the Panama Canal Zone.

[55] 1941 Am. Mar. Cas. 483 (S.D.N.Y. 1941).

the passengers brought a civil action in a federal district court based on the DHSA. Finding that the purpose of the DHSA was "to give a right to damages for wrongful death where no state surely could give it but where only the Federal Government could claim to extend its power,"[56] the court concluded that the decedent's representative had a right of action in admiralty based on the DHSA.

The *Choy* decision has been the basis for extending admiralty jurisdiction far beyond the DHSA. For example, in *Notarian v. Trans World Airlines, Inc.*,[57] the libelant was injured when she was jolted about as she left the restroom of an airplane on a transatlantic flight. Relying on cases which apply the DHSA to deaths in plane crashes, the court held that an airplane flying over the high seas is within the purview of admiralty because of the maritime locality. Consequently, admiralty has jurisdiction over all torts occurring above the high seas whether resulting in death or not.

Maritime locality, since *De Lovio v. Boit*, has extended over the ebb and the flow of the tide, as well as the high seas. The logical extension of *Notarian*, therefore, is that airplane torts occurring above the sea or crashes into the seas less than a marine league from the shore are within admiralty jurisdiction. This extension was made explicit in the decision of *Weinstein v. Eastern Airlines, Inc.*[58] In that case a Lockheed Electra aircraft crashed into Boston Harbor only minutes after take off on a flight from Boston to Philadelphia. The district court dismissed for want of jurisdiction, holding that in the absence of a statute, maritime locality *plus* maritime connection was required for admiralty jurisdiction.[59] The Third Circuit reversed: "[T]he weight of authority is clearly to the effect that locality alone determines whether or not a tort claim is within the admiralty jurisdiction."[60]

The remarkable flexibility that admiralty tort jurisdiction has demonstrated may lead one to ask if there really are constitutional limits to it. The grant of admiralty and maritime jurisdiction, like other grants of jurisdiction, is controlled by the enumerated powers of Congress "[t]o constitute tribunals inferior to the Supreme Court" and "to make all laws which shall be necessary and proper."[61] What is surprising is that admiralty's flexibility has usually been made to fit within the concept of "locality." At the prompting of Congress, the Court in *The Genesee Chief* found that the navigable waters of the Great Lakes had always been within admiralty, and the *Fematt* Court concluded that all previous decisions

[56] *Id.* at 484.
[57] 244 F. Supp. 874 (W.D. Pa. 1965).
[58] 316 F.2d 758 (3d Cir. 1963).
[59] 203 F. Supp. 430, 433-34 (E.D. Pa. 1962).
[60] 316 F.2d 758, 763 (3d Cir. 1963).
[61] U.S. CONST., art. I, § 8.

thought to be interpreting the Constitution were only interpreting the Judicary Act of 1789.

The latest Supreme Court decision on admiralty matters, *Executive Jet Aviation, Inc. v. City of Cleveland*,[62] has apparently sacrificed some of the constitutional purity of decisions like *The Genesee Chief*, *Weinstein* and *Notarian* in order to put admiralty jurisdiction on a new footing. *Executive Jet*, though not the *Erie Railroad* of admiralty, promises to be a most important admiralty jurisdiction opinion.

III. THE EXECUTIVE JET DECISION

In *Executive Jet*, the Supreme Court was confronted with the question whether locality was suitable as the only criterion of admiralty tort jurisdiction. The case arose as a libel brought by the owners of a chartered plane which crashed into the navigable waters of Lake Erie immediately after takeoff from Burke Lakefront Airport, an airport owned and operated by the City of Cleveland. The airplane, on a flight plan from Cleveland, Ohio, to Portland, Maine, and then to White Plains, New York, encountered a flock of seagulls immediately after lifting off the runway. The birds were sucked into the jet engine, the plane veered, struck the airport perimeter fence and sank into Lake Erie just off the end of the runway. The plane's impact on the water and the subsequent sinking inflicted most of the damages.

In the claim for relief, the libelant asserted that because the damages were due to the craft's immersion in navigable waters, a maritime locality was established and admiralty jurisdiction was proper. Respondents countered that the tortious act, assuming there was one, occurred over land when the aircraft struck the birds, thus precluding admiralty cognizance.[63] The district court, in an unreported decision, held: (1) that there was no maritime locality involved in the tort; and (2) that a maritime nexus was not present.[64] The district court's holding was based on the Sixth Circuit precedent of *Chapman v. City of Grosse Pointe Farms*,[65] a case which denied admiralty jurisdiction to a claim brought by a swimmer for injuries sustained while diving from a pier into shallow water. Rather than wrestle with a locus of the tort determination, the Supreme Court assumed maritime locality, turned to the maritime nexus argument and concluded:

> [T]he mere fact that the alleged wrong "occurs" or "is located" on or over navigable waters . . . is not of itself sufficient to turn an airplane negligence case into a "maritime tort." It is far more consistent with the history and purpose of the admiralty to require also that the wrong bear a sig-

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[62] 409 U.S. 249 (1972).

[63] *Id.* at 266-67.

[64] *Id.* at 251.

[65] 385 F.2d 962 (6th Cir. 1967).

> nificant relationship to traditional maritime activity. We hold that unless such a relationship exists, claims arising from airplane accidents are not cognizable in admiralty in the absence of legislation to the contrary.[66]

The holding of *Executive Jet*, construed narrowly, is that (1) for an aviation tort to fall within the constitutional grant of admiralty jurisdiction, the wrong complained of must bear a "significant relationship" to traditional maritime activity, and (2) land based aircraft on flights between points within the continental United States are not engaged in an activity which bears a significant enough relationship to bring them within the purview of admiralty.

The impact of the decision cannot, however, be held within such narrow bounds. The scope of the state's jurisdictional competence is an inverse function of the scope of federal jurisdiction. It is unquestionable that *Executive Jet* has sub silentio overruled *Weinstein*. The facts of *Weinstein* were exactly parallel to those of the principal case, yet the *Executive Jet* Court held: "[T]he Ohio courts could plainly exercise jurisdiction over the suit, and could plainly apply familiar concepts of Ohio tort law without any effect on maritime endeavors."[67]

Just how far *Executive Jet* has gone in affirming the exclusive legislative jurisdiction of the states over aviation torts requires close analysis. The legislative jurisdiction of a sovereign state, as distinct from the common law powers of its courts, extends no farther than its territorial claim. In the case of Ohio and other Great Lakes states, the territorial limit is the international boundary between the United States and Canada.[68] For coastal states, the limit is one marine league from the coast. Within this band of state territorial waters, *Executive Jet* is clear in its holding that any transaction or occurrence which does not have the required nexus to maritime affairs is a matter of state concern only. Thus, after *Executive Jet* the territorial applicability of state wrongful death statutes dovetails with the DHSA, which does not apply to claims arising within state waters.[69]

Under the locality-only test of *De Lovio v. Boit*,[70] the admiralty courts exercised preemptive substantive jurisdiction over the territorial waters of coastal states. The requirement of a maritime nexus brings this approach to an end and affirms the states' legislative jurisdiction to the full extent of their respective territories.

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[66] 409 U.S. 249, 268 (1972).

[67] *Id.* at 273.

[68] 43 U.S.C. § 1312 (1970).

[69] The judicially created admiralty cause of action for wrongful death, set forth by the Court in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), will still be applicable for claims arising within state waters to the extent that admiralty jurisdiction can be established.

[70] 7 F. Cas. 418 (No. 3776) (C.C.D. Mass. 1815).

But the impact of *Executive Jet* is still greater. Though its holding is directly related to the states' territorial waters, its logic should have a substantial spill-over effect upon problems arising in federal and international waters. The holding that land-based aircraft flying between points within the United States do not meet the required nexus prompts the question of whether any aircraft has sufficient nexus with maritime matters to invoke admiralty jurisdiction. The Court raised this question but declined to give an answer[71] because the issue was not before it. However, the Court did hint at the answer it would give:

> One area in which locality as the exclusive test of admiralty tort jurisdiction has given rise to serious problems in application is that of aviation. For the reasons discussed, we have concluded that maritime locality alone is not sufficient predicate for admiralty jurisdiction in aviation tort cases.[72]

Furthermore, referring to travel by ship and by air, the Court noted that "the differences between the two modes of transportation are far greater in terms of their basic qualities and traditions and consequently in terms of the conceptual expertise of the law to be applied."[73] Finally, the Court observed:

> The matters with which admiralty is basically concerned have no conceivable bearing on the operation of aircraft, whether over land or water. Indeed, in contexts other than tort, Congress and the courts have recognized that, because of these differences, aircraft are not subject to maritime law.[74]

Hence if a maritime nexus is required to bring torts within admiralty jurisdiction, even when those torts occur outside the territorial waters of a state, the *Notarian* and the *Choy* decisions would appear to be wrong. That is, both the application of the DHSA to crashes of aircraft and the extension of admiralty jurisdiction to torts in the air are questionable. Paradoxically, three times in its opinion the Court reaffirmed the decision in *Choy*, holding the DHSA applicable to airplane crashes on the high seas beyond a marine league from the shore. Yet the Court discredited the *Notarian* decision by an aside about federal courts which "have been persuaded in aviation cases to extend their admiralty jurisdictions beyond statutory coverage of the Death on the High Seas Act."[75]

The *Executive Jet* Court seems to have said that it does not favor the use of admiralty law in the field of aviation. It would prefer to keep admiralty as the law of a specialized industry, but, recognizing that if federal law were not applicable to plane crashes on the high seas, recovery would depend upon a confusing consideration of what substantive law to apply,

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[71] 409 U.S. at 264 n.15.
[72] *Id.* at 261.
[73] *Id.* at 269.
[74] *Id.* at 270.
[75] *Id.* at 264.

the Court declined to overrule *Choy*. The Court appears to have instructed the lower courts to restrict the use of admiralty jurisdiction, even on the high seas, to matters having a sufficient maritime nexus, absent a clear legislative expression to the contrary. Implicit in the *Executive Jet* opinion is a recommendation from the Court to Congress that legislation be enacted to overrule *Choy* and establish federal aviation law on an independent footing:

> If federal uniformity is the desired goal with respect to claims arising from aviation accidents, Congress is free under the Commerce Clause to enact legislation applicable to all such accidents, whether occurring on land or water, and adapted to the specific characteristics of air commerce.[76]

IV. The Nexus Standard

Executive Jet did not specifically articulate how future courts should determine whether a particular wrong bears a "significant relationship to traditional maritime activities." Like due process, state action, and the other abstract tests employed by the courts, the maritime nexus test defies resolution into a simple yet comprehensive definition. The answer to this jurisdictional question may best be achieved through a set of choice-influencing considerations, properly drawn and balanced against one another. Four factors, which should be employed in choosing to exercise admiralty jurisdiction, are readily identifiable: (1) locality; (2) state governmental interest; (3) national governmental interest; and (4) the integrity of admiralty law.

A. *Locality*

The *Executive Jet* opinion clearly held that merely being on or over the waters is not sufficient to bring an incident into admiralty. It could be assumed that *Executive Jet* created a "locality plus" test, such that maritime locality must be established before nexus becomes an issue; however, that would be an unnecessarily narrow reading of the entire opinion. Cases in which the traditional locality is absent, exemplified by *O'Donnell v. Great Lakes Dredge & Dock Co.*[77] and *Gutierrez v. Waterman Steamship Corp.*,[78] indicate that locality is not a constitutional prerequisite. Locality is only one consideration, albeit an important one, but, if all other indications point to exercise of admiralty jurisdiction, then notwithstanding absence of maritime locality, admiralty jurisdiction should be found.

Treating locality as a jurisdictional factor relates to its role in establishing boundaries of admiralty. Maritime locality establishes a line of demarcation between the jurisdiction of the common law and of admi-

[76] *Id.* at 274.

[77] 318 U.S. 36 (1943) (seaman injured on shore in the course of his duties).

[78] 373 U.S. 206 (1963).

ralty. This line represents a working balance of interests between the state and federal governments.[79] As a limiting device, locality serves two purposes. It establishes a landward restriction on admiralty jurisdiction, as employed by Justice Story in *Thomas v. Lane*,[80] and sets a seaward limit on state territorial jurisdiction at the outward boundary of the state's territorial waters.[81]

The specific holding of the Court that locality is not enough, coupled with the Court's comment that state law could be used to resolve the immediate dispute, firmly establishes the jurisdiction of the states over navigable waters within their territorial boundaries and makes that jurisdiction exclusive where the nexus test is not satisfied. Such jurisdiction is significantly different from the deference shown the common law by the saving-to-suitors clause since state law may now be applied of its own force to determine the rights of the parties.

B. *State Governmental Interests*

State interests center on the desire of the state for resolution of causes of action according to principles of local law. Such an interest is present when citizens of the state are involved or when the cause of action arises within the state's territorial boundaries. The state interest exists even though the particular dispute relates to maritime activities. While admiralty can preempt the local law in an appropriate case, a critical question arises as to how far the national law should go. The justification for admiralty's displacing state law is the federal interest in the shipping industry; however the concerns of the industry reach a multitude of activities in which the national interest may be quite remote.[82] When the state interest begins to outweigh the national, it becomes increasingly difficult to justify application of federal law. Typical of this problem is *Victory Carriers, Inc. v. Law*,[83] in which the Court refused to extend admiralty jurisdiction to a claim for relief brought by a longshoreman injured on the dock by the stevedore's equipment. The Court noted that such injuries were traditionally governed by state law, and, even though the libelant had been involved in handling goods for eventual loading aboard a ship, his relationship to maritime activities was too "attentuated" to exercise admiralty jurisdiction.[84]

C. *National Governmental Interest*

The national interest to be considered has two aspects. First, the fed-

[79] *See* Victory Carriers, Inc. v. Law, 404 U.S. 202, 212 (1971).

[80] 23 F. Cas. 957 (No. 13,902) (C.C.D. Me. 1813).

[81] While some coastal states may claim offshore jurisdiction beyond three miles, this fact is recognized by the DHSA and probably is consistent with the rationale of *Executive Jet*.

[82] *See* GILMORE AND BLACK, *supra* note 34, at 26-27.

[83] 404 U.S. 202 (1971).

[84] *Id.* at 213.

eral admiralty system was created to foster the maritime industry and to promote commerce between the states and between this country and foreign nations. These goals were to be served through a uniform body of both substantive and procedural law designed to meet the needs of shipping and related activities. The desired uniformity was intended to preclude local discriminatory practices and to provide a national system of law upon which foreign traders could rely.[85] Thus the federal interest in the business of the sea extends to all navigable waters within the United States as well as the high seas.

The second interest of the national government concerns the resolution of disputes arising beyond state territorial boundaries, that is, within "federal" waters. Just as the state is desirous of assuring relief for wrongs occurring within its territory, the federal government has an interest in correcting wrongs arising on the high seas. A countervailing state interest develops, however, when a state's citizens are involved in torts occurring beyond the state territorial boundaries. Discussion of the state's interest in these actions is not academic; common law personal causes of action are transitory, and thus a state court theoretically could serve as a forum for hearing such disputes on the basis of common law. However, once beyond state territorial waters, the state's interests generally will be diminished to the point that even a slight showing of national interest will be sufficient to justify the exercise of federal admiralty jurisdiction.

Applying the same balancing procedure developed above to resolve conflicting state and federal interests in disputes arising within state territorial waters, it may be constitutionally proper for the federal government to refrain from exercising jurisdiction when the federal interest is minimal. When, however, specific federal legislation is found, courts ought to accept this as evidencing a permissible congressional desire to federalize the particular class of cases. This judicial attitude was exemplified by the *Executive Jet* Court's willingness to allow aviation torts in admiralty under the DHSA, despite the fact that Congress may not have foreseen such an application of the Act.

D. *Integrity of Admiralty Law*

The integrity of admiralty law concerns the development of both substantive and procedural rules to serve the maritime industry. Application of admiralty law to a non-admiralty problem may not only produce an unsatisfactory result in the immediate dispute, but may also cause a general perturbation of the principles of admiralty. The Court in *Executive Jet*

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[85] *See* Southern Pacific v. Jensen, 244 U.S. 205 (1916); The Genesee Chief v. Fitzhugh, 53 U.S. 443 (1851); McGuire v. City of New York, 192 F. Supp. 866, 871 (S.D.N.Y. 1961); GILMORE AND BLACK, *supra* note 34, at 10-11 and Black, *Admiralty Jurisdiction: Critique and Suggestions*, 50 COLUM. L. REV. 250, 260-61 (1950).

intimated this problem when it noted the present inability of the admiralty to deal with aviation torts.[86]

E. *Application of the Choice-Influencing Considerations*

The operation of the balancing system detailed above can be demonstrated through a few examples of unresolved conflicts between state law and admiralty. The first example concerns water pollution and involves two problems. The first relates to shore-based industrial plants dumping chemical waste into navigable waters within the state. The locality consideration immediately presents a problem, as it did when it was employed as the sole test of jurisdiction. While the water, a traditional maritime locality, is being polluted, the source is on the shore, and the tortious act arguably occurs there. The state interest in local resolution is particularly strong since the act is occurring within its territory and is threatening the health and prosperity of its citizens. The presence of a federal interest in fostering maritime services is minimal. While water serves as the medium for carrying commercial vessels, pollutants may have no deleterious effect unless concentrated to the point of endangering health or restricting steerage. Furthermore, the suitability of substantive admiralty law to handle such a situation is highly questionable. Since the common law could provide adequate relief, admiralty jurisdiction should not be asserted.

The second problem concerns the dumping of untreated waste from freighters into the waters of a state. Maritime locality is clear, and substantive admiralty law presumably is fashioned to handle such tortious acts by operators of vessels. While the state again has an interest in halting pollution, the federal interest is substantial. The vessel is engaged in commerce, and there is a national interest in preventing excessive penalties which could create an undue burden upon commerce and in establishing standards for the processing equipment such vessels would be required to employ to avoid future violations. Because the national interest, the substantive sufficiency of admiralty, and traditional maritime locality all militate in its favor, admiralty jurisdiction should be exercised.[87]

When pleasure boats are the source of pollution, however, the balancing of considerations may produce a different result. The federal interest has been identified with the commercial shipping industry, not with private pleasure boating. Traditional maritime locality and sufficiency of the admiralty law remain unchanged, but the extent of the federal government's legitimate interest in such non-commercial activities is less. When private boaters cause pollution within state navigable waters, the strong state interest in local resolution, coupled with the availability of effective

[86] 409 U.S. 249, 270-71 (1972).

[87] *But see* Askew v. American Waterways Operators, Inc., —— U.S. ——, 93 S. Ct. 1590 (1973).

state remedies, suggests that admiralty jurisdiction ought not be asserted. The need for uniformity of law is not as critical as it is for commercial shipping. There may be some national interest in establishing standards for onboard waste processing equipment, such that interstate travel might not be impinged by varying state requirements, but the federal government should be little concerned with varying state penalties or forfeiture laws in relation to non-commercial sea traffic. On the other hand, when pleasure craft are guilty of pollution on the high seas, the federal interest in dispute resolution and the federal responsibility to other nations which ply the world's waters may tip the balance to admiralty in the face of a diminished state interest. A further consideration is the questionable responsiveness of state courts to their potential jurisdiction over offenses occurring on the high seas.[88]

Similar considerations should carry over into other aspects of pleasure boating. Since admiralty has traditionally related to commercial activities, it has only a remote interest in these private pursuits. On non-navigable waters (those waters which do not support commercial transport of goods), the state courts have exclusively decided the rights and duties of those involved in pleasure boating. When the tortious act occurs on *navigable* waters within the state, there seems little reason for admirality to perfunctorily assume jurisdiction over disputes arising from the operation of pleasure boats.[89] However, there is a most significant consideration that both private and commercial vessels operate upon the same medium; hence a uniform set of rules of the road is virtually required to regulate operations. To this extent federal rules should be controlling. Also, when a pleasure boat becomes directly involved with a commercial vessel, typically through a collision, the federal interest would encompass both vessels, and admiralty jurisdiction should be exercised. Finally, for torts upon the high seas the diminished state interest, balanced against the federal interest in resolution of disputes and the positive value of having a federal forum available for the resolution of controversies, indicates that such an act should be within the constitutional grant of admiralty jurisdiction.[90]

V. CONCLUSION

After *Executive Jet* the balancing of considerations to be performed under the maritime nexus test promises the most meaningful and realistic determinations of admiralty jurisdiction. Correct application of the rele-

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[88] For further consideration of the pollution problem see Askew v. American Waterways Operators, Inc., —— U.S. ——, 93 S. Ct. 1590 (1973); Lake Carriers' Assn. v. MacMullan, 406 U.S. 498 (1972); Swan, *Challenges to Federalism: State Legislation Concerning Marine Oil Pollution*, 2 ECOL. L. REV. 437 (1972).

[89] *Cf.* Adams v. Montana Power Co., 354 F. Supp. 1111 (D. Mont. 1973).

[90] For further consideration of the pleasure boating problem see Stolz, *Pleasure Boating and Admiralty:* Erie *at Sea*, 51 CALIF. L. REV. 661 (1963).

vant factors will allow the courts of admiralty to take jurisdiction over all tort claims in which the federal government can legitimately assert an interest. In consonance with this potential broadening of the scope of admiralty is a denial of jurisdiction when no significant national interest is present. The legislatures and the common law courts of the states will thus be permitted to exercise their jurisdiction to a fuller extent.

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