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FOREMOST INSURANCE CO. v. RICHARDSON: IF THIS IS WATER, IT MUST BE ADMIRALTY

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I. INTRODUCTION

A sleepy, moss-draped Louisiana bayou, on which two families enjoyed Sunday afternoon leisure, hardly seems the stuff of which federal cases, let alone Supreme Court decisions, are made. Nonetheless, the Supreme Court recently used precisely that setting as a springboard for attempting, once again, to delineate the parameters of admiralty tort jurisdiction.

Foremost Insurance Co. v. Richardson[1] involved what would be, in a land context, a routine vehicular collision. One vehicle was a small boat used for noncommercial fishing; the other, equally small, was pulling a water skier on a zip sled. The two collided.[2] Because the collision occurred on water, the Supreme Court decided that the issues of tort liability arising from the collision should be litigated in federal district court.[3]

In so deciding, the Court extended admiralty jurisdiction to "the edge of absurdity."[4] The decision creates an unnecessary burden on the federal court system, ignores the states' interest in litigating the issues of local torts in their own courts, and, most importantly, fails to react to long-

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On August 26, 1983, President Reagan signed into law Pub. L. No. 98-89, the title 46 codification bill. This bill repealed and replaced all the marine safety statutes administered by the Coast Guard with the exception of loadline measurement provisions, and enacted as positive law subtitle II of title 46 of the United States Code. All references in this article to affected sections of title 46 are cited to the recodified version. Because this recodification was not in effect at the time of the *Richardson* decision, references to the section numbers in effect at that time are also included in every citation. No session law citation is currently available for Pub. L. No. 98-89. Citations in this article are based on the version appearing in H.R. REP. No. 338, 98th Cong., 1st Sess. (1983) (copy on file with the *Washington Law Review*).

1. 457 U.S. 668 (1982).

2. *Id.* at 669–70 (citing Richardson v. Foremost Ins. Co., 470 F. Supp. 699, 700 (M.D. La. 1979)).

3. 457 U.S. at 677.

4. *Id.* at 678 (Powell, J., dissenting).

standing congressional signals concerning the underpinnings and extent of admiralty jurisdiction. The net result is continued confusion and irrationality in the area of admiralty tort jurisdiction, a result compelled neither by the case itself nor by the tools with which the Court might have worked.

This article will examine the two decisional approaches that the *Richardson* Court considered in support of the proposition that admiralty jurisdiction should not apply to the facts of the case before it, and will explore the shortcomings of each in an attempt to understand why the majority ultimately felt compelled to reject both.[5] The article will then focus on the five specific arguments thought to mandate that rejection, demonstrating that the conclusion the Court reached is not logically supportable.[6] Finally, a new approach to the issue will be forwarded, one that provides the basis for a more rational approach to the broad issue of admiralty tort jurisdiction.[7]

II. THE COURT'S DECISIONAL DILEMMA

The *Richardson* Court found itself presented with two alternative decisional approaches which could have led to a finding that admiralty jurisdiction does not apply to a case involving the collision of two vessels used exclusively for pleasure. The first of these alternatives may be described as a historical precedential approach, the second as a factual approach.[8] Each places a heavy emphasis on the commercial underpinnings of federal admiralty jurisdiction. Neither of these suggested approaches, however, provides a pragmatic scheme for defining admiralty tort jurisdiction in the context of a given set of facts. The Court, while explicitly acknowledging the commercial basis for federal jurisdiction in maritime matters, felt constrained to opt for a simple solution which would bring certainty to jurisdictional determinations. Yet, the unsatisfying result completely removes vessel usage from consideration as a factor in jurisdictional determinations.

A. The Historical Approach

Many commentators have suggested that the historical origins of admiralty jurisdiction do not accord with the exercise of that jurisdiction over

5. *See infra* Parts IIA & IIB.
6. *See infra* Part III.
7. *See infra* Part IV.
8. *See* 457 U.S. at 672–74.

pleasure vessels.[9] The thrust of this historical argument, eloquently expressed in the *Richardson* dissent, is that admiralty jurisdiction is commercially based.[10] This commercial nexus gives rise to a federal interest. Absent the nexus, the federal interest disappears, and, the argument goes, the exercise of admiralty jurisdiction becomes an inappropriate invasion into matters reserved to the states.[11]

The proponents of the historical approach cite to a line of cases,[12] most decided in the last century, to demonstrate a consistent judicial recognition of the commercial basis of admiralty jurisdiction. The *Richardson* majority acknowledged the historical background[13] by stating that waterborne commerce is the interest which justifies federal involvement in maritime affairs, but then went on to assert that something as tenuous as a "potential disruptive impact" constitutes a sufficient basis for that involvement.[14]

The majority's refusal to accept early cases as the final word on the federal interest giving rise to admiralty jurisidiction is quite reasonable. The fact that early cases reflect a definite commercial tone does not compel the conclusion that admiralty jurisdiction must be restricted purely to matters arising from maritime commerce. Rather, these cases are more likely the result of the nonexistence of significant recreational boating activity at the time the cases were decided.[15] The cases, then, neither support nor deny a federal interest in noncommercial watercraft.

The *Richardson* majority, in fact, insisted that such a federal interest does exist, in the form of concern for uniform conduct on our waterways.[16] The analysis of the majority is superficially valid. If the protection of maritime commerce gives rise to a federal interest in pleasure craft collisions, and if that interest can be vindicated only by application of admiralty jurisdiction, then the application of that jurisdiction is justified.[17] The Court, apparently daunted by the grave difficulties it saw in

9. *See, e.g.*, 7A J. MOORE & A. PELAEZ, MOORE'S FEDERAL PRACTICE, ¶ .325[5] (2d ed. 1982); Black, *Admiralty Jurisdiction: Critique and Suggestions*, 50 COLUM. L. REV. 259, 280 (1950); Stolz, *Pleasure Boating and Admiralty:* Erie *at Sea*, 51 CALIF. L. REV. 661, 666 (1963); Swaim, *Yes, Virginia, There is an Admiralty: The* Rodrigue *Case*, 16 LOY. L. REV. 43, 45 (1969–70); Note, *Admiralty Jurisdiction and the FMLA: The Maritime Lien on Houseboats*, 14 U.S.F.L. REV. 641, 642 (1980).

10. 457 U.S. at 679–81 (Powell, J., dissenting).

11. *Id.* at 685–86; Stolz, *supra* note 9, at 663.

12. *See generally* cases discussed in Stolz, *supra* note 9, at 675–88.

13. 457 U.S. at 673–74.

14. *Id.* at 675.

15. *See* Stolz, *supra* note 9, at 661.

16. 457 U.S. at 675.

17. A conclusion that maritime commerce can be protected only by invoking federal admiralty jurisdiction is especially questionable in light of the Court's decision in Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310 (1955), discussed *infra* at note 76.

defining "commercialness" for the benefit of the lower courts, saw no means of protecting maritime commerce short of encompassing pleasure vessel collisions within admiralty jurisdiction. This article will demonstrate, however, that such federal interest as exists in collisions of pleasure craft need not be vindicated in admiralty jurisdiction, and that the *Richardson* decision is therefore incorrect.

B. The Factual Approach

In *Executive Jet Aviation, Inc. v. City of Cleveland,*[18] the Court opened the door to a case-by-case analysis of the admiralty jurisdiction issue.[19] Departing from the traditional "locality" test, which attached admiralty jurisdiction to virtually any tort occurring on a navigable waterway,[20] the Court announced, without fully defining, the "traditional maritime activity" test.[21]

Executive Jet left to the lower courts the task of determining what constitutes a traditional maritime activity, with the apparent hope that this rather vague concept would provide sufficient guidance for evolutionary refinement and clarification of the tort jurisdiction issue. Under *Executive Jet,* it is clear that the crash of a domestic commercial flight into navigable waters shortly after takeoff from an airport is not a traditional maritime activity.[22] This is all that is clear under *Executive Jet.* Among the remaining questions is whether *any* waterborne activities involving vessel navigation are excluded from admiralty jurisdiction. This question is the essence of *Richardson.*

The *Richardson* case confronted the Court with the factual quagmire to which *Executive Jet* can lead. Thus, the *Richardson* Court grappled with issues as extreme as the applicability of admiralty jurisdiction to a pirogue used by a small boy to harvest crawfish.[23] As will be discussed below, the Court saw that the possible permutations of factual settings are infinite, and that subsequent case law refinement of the *Executive Jet* guideline could prove problematic. Coping with these permutations would require the lower courts either to make a completely ad hoc decision in each case, or to resort to the historical approach to determine what constitutes traditional maritime activity. Ad hoc decisionmaking, however, has little to

18. 409 U.S. 249 (1972).

19. *See generally* Note, *The Other Half of* Executive Jet: *The New Rationality in Admiralty Jurisdiction,* 57 TEX L. REV 977 (1979) (describing case as beginning of movement toward a single factual test for all admiralty jurisdiction issues).

20. *Id.* at 977.

21. 409 U.S. at 268.

22. *Id.* at 261.

23. 457 U.S. at 684 (Powell, J., dissenting, citing Tr. of Oral Arg. at 24).

recommend it. The historical approach, as outlined above, is equally useless because it requires that some commercial flavor be present before admiralty jurisdiction attaches, without providing useful guidelines as to the extent of that flavor. As a result, the factual approach ends in a vicious circle. The Court attempted to avoid this vicious circle by adopting a new, all-inclusive "potential impact" approach to the issue of admiralty tort jurisdiction. This "potential impact" approach, in turn, allowed the Court to maintain that its overbroad formulation of admiralty jurisdiction is fully supported by solicitude for maritime commercial activities.

C. Summary

The Court's apparent dilemma was that neither of the approaches outlined above appears to provide a workable method for deciding future cases under new factual settings. The historical approach begs the question of the extent of the federal interest in maritime affairs. Under the factual approach, on the other hand, courts would either engage in ad hoc decisionmaking, which would result in chaotic confusion, or would be led back to the historical approach. The Court was not willing to condone the potential chaos of ad hoc decisionmaking, or to permit the lower courts to rely on the historical approach to determine the boundaries of the federal interest. Consequently, the Court provided instead what it apparently considered to be a definitive statement of the extent of that interest.[24] The Court thus declined to extend the logic of *Executive Jet* beyond its facts.[25] In failing to clarify the amorphous concept of traditional maritime activity, the Court reversed the evolutionary trend foreshadowed by *Executive Jet*,[26] and, for lack of a more effective way to focus on the federal interest in waterborne commerce, espoused the simplistic rule that collisions of any watercraft on legally navigable waterways are the proper subject of admiralty jurisdiction.[27] The Court thus changed the *Executive Jet* locality plus traditional maritime activity test to a test of locality plus navigation.

This article will demonstrate that it was not necessary for the Court to reach this undesirable result in order to avoid the decisional dilemma with which it was concerned.

24. 457 U.S. at 674–77.
25. *Id.*
26. *See generally* Note, *supra* note 19.
27. 457 U.S. at 677.

III. THE COURT'S ARGUMENTS

The *Richardson* Court, ostensibly recognizing that the primary focus of admiralty jurisdiction is the protection of maritime commerce,[28] saw only two possible avenues for fostering that protection: extending admiralty jurisdiction to all vessel collisions on navigable waterways, or determining cases by relying on one of the two error-prone approaches discussed above. The Court opted for the former,[29] and justified its choice with a number of arguments. First, admiralty jurisdiction is necessary to ensure the application of uniform rules of conduct on the nation's waterways.[30] Second, collisions of any watercraft potentially disrupt commerce.[31] Third, limiting admiralty jurisdiction to commercial vessels creates difficult fact determinations.[32] Fourth, noncommercial vessel owners under such a scheme would be uncertain as to their duties and obligations.[33] Finally, attaching admiralty jurisdiction to pleasure vessel collisions is consistent with federal statutes.[34]

A. Uniform Rules of Conduct

The Court's first premise is a perceived need for uniform rules to govern conduct on navigable waterways.[35] The Court reached the untenable conclusion that uniform rules of conduct require uniform admiralty jurisdiction.[36] Justice Powell, in his *Richardson* dissent, ably demonstrated the fallacy of this reasoning.[37] "Congress has provided some rules governing water traffic, just as it has done for some land traffic. See 23 U.S.C. § 154 (55 m.p.h. speed limit). Yet no one suggests that federal jurisdiction is needed to prevent chaos in automobile traffic, or that only federal courts are qualified to try accident cases."[38]

Examples of nationally uniform conduct not thought to require federal court jurisdiction abound. All automobiles in this country drive on the right-hand side of the road; the federal courts do not enforce this practice.

28. *Id.* at 674.
29. *Id.* at 677.
30. *Id.* at 675.
31. *Id.*
32. *Id.* at 675–76.
33. *Id.* at 676.
34. *Id.* at 676–77.
35. *Id.* at 675.
36. *Id.*
37. *Id.* at 682 (Powell, J., dissenting).
38. *Id.*

All states require motorists to observe reduced speeds in school zones; the federal courts do not enforce this.[39]

The lack of a need for simplistic uniformity in admiralty matters is also revealed by the fact that not all federal enactments concerning vessel safety and conduct apply to all vessels. The requirement for federal inspection of vessels is an example. The enactment setting forth requirements for vessel inspection is limited in applicability according to vessel employment, propulsion, size, locus of operation, or some combination thereof.[40] The inspection requirements generally do not apply to pleasure craft, other than those measuring 300 gross tons or over[41] or those propelled by steam and measuring over forty feet in length.[42] The requirement that vessels coming into United States waters from foreign ports make entry with the United States Customs Service does not apply to pleasure craft owned by United States citizens.[43] In short, the federal interest in watercraft and in conduct on the waterways does not extend to all vessels for all purposes. In particular, it extends to pleasure craft for jurisdictional purposes only when necessary to foster the federal interest in uniform conduct on the waterways. The *Richardson* opinion fails to demonstrate such a necessity.

The essential weakness in the Court's position is that it does not recognize the supremacy of federal law when applicable and the obligation and ability of state courts to apply that law.[44] Justice Powell again ably discussed this point: "The Court does not suggest that state courts lack competency to apply federal . . . law to this type of water traffic. And this Court stands ready, if necessary, to review state decisions to ensure that important issues of federal law are resolved correctly."[45]

A need for uniform rules of conduct on the waterways simply does not mandate the conclusion that federal jurisdiction must apply to all vessels subject to those rules.[46]

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39. 46 U.S.C. § 8501 (Aug. 26, 1983) (formerly 46 U.S.C. § 211 (1976)) represents a compelling example of congressional deference to the states in a matter affecting waterway safety. That legislation adopts as federal law state enactments regulating the conduct of vessel pilots.

40. 46 U.S.C. § 3301 (Aug. 26, 1983) (requiring inspection of ten classes of vessels); the classes are defined in 46 U.S.C. § 2101 (Aug. 26, 1983). Former inspection requirements appeared in widely scattered portions of title 46. *See, e.g.*, 46 U.S.C. §§ 367, 390a, 395, 404, 405 (1976 & Supp. V 1981).

41. 46 U.S.C. § 3301(7) (Aug. 26, 1983) (formerly 46 U.S.C. § 367 (Supp. V 1981)).

42. 46 U.S.C. § 3301(9) (Aug. 26, 1983) (formerly 46 U.S.C. § 404 (Supp. V 1981)).

43. 19 U.S.C. § 1441 (1976).

44. U.S. CONST. art. VI, § 2; 102 S. Ct. at 2662 (Powell, J., dissenting); Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310, 314 (1955) (dictum) ("And States can no more override [admiralty] judicial rules validly fashioned than they can override Acts of Congress.").

45. 457 U.S. at 682 (Powell, J., dissenting).

46. The Court admitted as much in *Executive Jet*. There, proponents of admiralty jurisdiction

B. Disruption of Maritime Commerce

The second reason forwarded by the Court is that a vessel catastrophe occurring on a navigable waterway is of federal concern because of its potential to disrupt commerce.[47] The federal interest generated by this potential is reflected in a number of federal activities. Search and rescue missions on navigable waters, for example, are conducted by a federal agency, the United States Coast Guard.[48] Major marine casualties are investigated by that same agency.[49] The existence of these federal activities does not mean, however, that federal court jurisdiction over waterway catastrophes is always necessary.

In this regard, the Court is hoist on its own precedent. As Justice Powell astutely observed in his dissenting opinion,[50] what can be more disruptive to commerce than the crash of a commercial airliner, or, more significantly, a crash such as that of Air Florida Flight 90, which disrupted airborne, waterborne, and highway traffic?[51] Yet *Executive Jet* explicitly disavows admiralty jurisdiction over such events.[52]

In short, the Court's concern with disruption of maritime commerce ignores the factual setting of its own precedent, and, again, does not support a conclusion that admiralty jurisdiction is necessary in the case of pleasure vessel collisions. The argument fails to recognize that there is a common sense point at which potential disruption of maritime commerce is so speculative as to render application of admiralty jurisdiction "absurd."[53] The Court's apparent inability to analogize facts of prior cases to its present argument is symptomatic of the next concern which the Court expressed.

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argued that aviation tort cases should be governed by uniform substantive and procedural laws; therefore, such actions should be heard in the federal courts. 409 U.S. at 273. The Court responded:

> [F]or this Court to uphold federal admiralty jurisdiction . . . would be a most quixotic way of approaching that goal. 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.

Id. at 273–74.

47. 457 U.S. at 675.
48. 14 U.S.C. § 88 (1976).
49. 46 U.S.C. § 6301 (Aug. 26, 1983) (formerly 46 U.S.C. § 239 (1976)).
50. 457 U.S. at 682–83 (Powell, J., dissenting).
51. *Id.*; *see also id.* at 683 n.7.
52. 409 U.S. at 261.
53. 457 U.S. at 678 (Powell, J., dissenting).

C. *Factual Difficulties*

A concern with difficult fact determinations[54] probably represents the key to the Court's refusal to adopt what it termed the "strict commercial rule."[55] Here the majority adverted to grave difficulties leading to inconsistent findings or denials of admiralty jurisdiction, depending on the factors weighed by a given court in a particular case.[56] According to the majority's understanding of the commercial rule, "fortuitous circumstances" would come into play, making it virtually impossible for any judicial body to make reasoned distinctions between vessels on the basis of usage.[57] These circumstances could relate to the prior usage of the vessel, considering, for example, whether it had ever been rented or used for commercial fishing.[58]

The underlying problem here is that counsel for the petitioner failed to provide the Court with a cogent test for determining when the requisite "commercialness" exists in order for admiralty jurisdiction to attach. The test proposed by the petitioner consisted of a two-tiered sliding-scale inquiry.[59] The first tier involves an examination of the locale to determine the type and amount of commercial traffic present.[60] If such activity is prevalent on the waters where the mishap occurred, little or no inquiry would be made as to whether the conduct of the parties had a commercial flavor.[61] If the waters where the mishap occurred are not noted for carrying commercial traffic, the second tier of the test would come into play, inquiring into the conduct of the parties to determine whether their activity was sufficiently commercial to support the assertion of admiralty jurisdiction.[62] Needless to say, the interplay between these two factors supports a potentially infinite number of variations. This proposed test would be an attorney's delight, but the majority apparently found this sliding-scale approach so complex that it would be conducive to outrageously inconsistent results.[63] For that reason, the Court declined to adopt it, refusing "to inject the uncertainty inherent in such line-drawing into maritime transportation."[64]

54. *Id.* at 675–76.
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. Brief of Petitioners at 18, Foremost Ins. Co. v. Richardson, 457 U.S. 668 (1982).
60. *Id.*
61. *See id.* at 18–20.
62. *Id.* at 18.
63. 457 U.S. at 675–76.
64. *Id.* at 676.

D. Uncertainty of Vessel Operators

The fourth argument advanced by the majority, best characterized as a makeweight, cites the potential uncertainty of noncommercial vessel operators concerning their duties and liabilities while traversing navigable waters flowing through more than one state.[65] The Court, agreeing with the court of appeals, glibly observed that "[a]dopting the strict commercial rule would frustrate the goal of promoting the smooth flow of maritime commerce"[66] because noncommercial navigators traversing navigable waters flowing through more than one state would be subject to varying laws " 'depending upon their precise location within the territorial jurisdiction of one state or another.' "[67] The logic of asserting that this potential adverse effect on noncommercial vessel operators will disrupt maritime commerce is questionable. Further, the argument is casuistic. The duties to which the majority referred are no more than the responsibility to observe uniform rules of conduct on navigable waterways, already shown to be enforceable without resort to admiralty jurisdiction. The liabilities, on the other hand, have only the most tenuous relationship to the ongoing flow of maritime commerce. Rather, they relate to substantive legal rules such as comparative negligence,[68] to be applied during litigation following a mishap.

The dissenters objected to this spurious reasoning as an affront to federalism, contending that this was the major issue of the case.[69] The basis of their complaint is that "expansions of federal admiralty jurisdiction are accompanied by application of substantive—and *pre-empting*—federal admiralty law."[70] The dissenters felt that this preemption of state legislative activity blocks experimentation by various localities, thus undercutting one of the chief strengths of the federal system.[71] Under this view, the net effect of asserting admiralty jurisdiction in matters of local concern is to disenfranchise state legislatures by precluding them from dealing with matters for which they are thought to be particularly well suited.[72] This view, in sharp contrast to the approach taken by the majority, is consistent with longstanding expressions of the Court's view of federalism.[73]

65. *Id.*
66. *Id.*
67. *Id.* (quoting Richardson v. Foremost Ins. Co., 641 F.2d 314, 316 (5th Cir. 1981)).
68. Pope & Talbot v. Hawn, 346 U.S. 406 (1953) (contributory negligence in admiralty only reduces recovery, whereas at common law it precludes recovery).
69. 457 U.S. at 685 (Powell, J., dissenting).
70. *Id.* (citations omitted).
71. *Id.*
72. *Id.*; *see* Stolz, *supra* note 9, at 664.
73. *See* Executive Jet Aviation, Inc., v. City of Cleveland, 409 U.S. 249 (1972).

The majority's argument on this point again fails to recognize the competence and obligations of state courts. These courts routinely handle conflict-of-law issues involving large commercial carriers such as airplanes,[74] as well as noncommercial vehicles such as private automobiles.[75] Yet no one would suggest that the needs of commerce compel a removal of these cases from state jurisdiction, or that vehicle owners (and their insurers) are unduly hindered by potential subjection to varying legal regimes.[76] The due process clause[77] serves to ensure that party litigants are accorded fair treatment, regardless of the legal regime to which they are subject.[78] Providing this guarantee is the function of that clause, not the function of admiralty jurisdiction.[79]

E. Consistency with Federal Enactments

The *Richardson* majority buttressed its opinion by claiming that the decision comports with federal enactments.[80] The Court cited four statu-

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> The power reserved to the states, under the Constitution, to provide for the determination of controversies in their courts may be restricted only by the action of Congress in conformity to the judiciary sections of the Constitution. . . . Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which [a federal] statute has defined.

Id. at 272–73 (quoting Victory Carriers, Inc. v. Law, 404 U.S. 202, 212 (1971), in turn quoting Healy v. Ratta, 292 U.S. 263, 270 (1934)).

74. *See, e.g.*, Griffith v. United Airlines, Inc., 416 Pa. 1, 203 A.2d 796 (1964).

75. *See, e.g.*, Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

76. The Supreme Court has, in fact, specifically disclaimed any concern with supplying a uniform legal regime to vessel insurers. In Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310 (1955), the Court held that regulation of marine insurance is purely the province of state law. *Id.* at 321. Justice Frankfurter, concurring, questioned whether the majority opinion had the effect of subjecting the insurer of the Queen Mary to the varying insurance laws of New York, Louisiana, and Texas when, on a single voyage, the vessel travels from New York City to New Orleans and Galveston. *Id.* at 323 (Frankfurter, J., concurring). Frankfurter would have limited the holding to the facts of the case, that is, insurance covering an undocumented vessel used in local waters. *Id.* at 322 (Frankfurter, J., concurring).

In fact, the Court's general treatment of jurisdictional issues arising out of contract disputes has reflected a less than compelling interest in protection of maritime commerce through exercise of admiralty jurisdiction. *See, e.g.*, Madruga v. Superior Court, 346 U.S. 556, 563–64 (1954) (rules for partition and sale of vessel established by state law); Red Cross Line v. Atlantic Fruit Co., 264 U.S. 109, 121 (1924) (state law governs specific performance of arbitration agreement); Thames Towboat Co. v. The Schooner Francis McDonald, 254 U.S. 242, 243 (1920) (contract for construction of vessel not within admiralty jurisdiction).

77. U.S. CONST. amend. XIV, § 1, cl. 2.

78. *See* Allstate Ins. Co. v. Hague, 449 U.S. 302, 308 (1981).

79. The requirement to apply the proper law is also imposed on the federal courts by Erie R.R. v. Tompkins, 304 U.S. 64 (1938). *Erie* requires federal courts to apply substantive state law to cases implicating no strong federal interest.

80. 457 U.S. at 676.

tory schemes as examples of congressional expression of federal interest, and found its decision consistent with those statutes.[81]

The first of these is a rule of construction established by Congress, defining the term "vessel" to include "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water."[82] The Court read this language as a congressional signal that the constitutional grant of admiralty jurisdiction extends to all vessels for all purposes.[83]

The Court's reliance on this statutory language is a result of circular logic. The constitutional grant of admiralty jurisdiction does not mention the word "vessel."[84] Rather, it confers jurisdiction over "all Cases of admiralty and maritime Jurisdiction."[85] To conclude that this rule of construction grants jurisdiction over all vessels, the Court must first conclude that all vessels are encompassed within the term "maritime." The Court reaches that conclusion because Congress has said that all waterborne contrivances are vessels.

The Court's argument is further erroneous in that it reads a rule of construction as a grant of jurisdiction. The Court thus assumes that a statute which performs such pedestrian tasks as explaining that the word "he" is not to be construed as gender-denotive,[86] and that the term "county" includes parish, borough, and other subdivisional equivalents,[87] at the same time stands as a congressional declaration that the federal courts, under article III of the Constitution, are to exercise jurisdiction over all collisions occurring on navigable waterways.

The Court's second statutory reference was to federal "Rules of the Road" which govern the flow and behavior of traffic on navigable waterways.[88] These same enactments formed the basis of the Court's argument that federal jurisdiction is compelled by the need for uniform conduct.[89] The argument fails here as it did there. A federal interest in uniform conduct does not per se require federal enforcement. The Court's argument on this point is no answer;[90] rather, it misses the obvious: All courts, both federal and state, must enforce federal navigation laws.

81. *Id.* at 676–77; 102 S. Ct. 2654, 2659–60 (1982). The Court's discussion of the Motor Boat Act of 1940 was deleted from the official U.S. Reports version of the opinion. *See supra* notes 91–95 and accompanying text.

82. 1 U.S.C. § 3 (1982).

83. 457 U.S. at 676.

84. *See* U.S. CONST art. III, § 2, cl. 1.

85. *Id.*

86. 1 U.S.C. § 1 (1982).

87. *Id.* § 2.

88. 457 U.S. at 676 (citing 33 U.S.C. §§ 2001–73 (Supp. V 1981)).

89. *See supra* Part IIIA.

90. 457 U.S. at 676 n.6.

The Court's third and most inexplicable reference was to the Motor Boat Act of 1940 ("MBA").[91] The Court's statement that the safety and operational standards of that Act apply to all vessels without regard to their commercial or noncommercial nature[92] is in error. A 1971 amendment to the MBA[93] explicitly excludes from the MBA's coverage "boats" as defined in and subject to the Federal Boat Safety Act of 1971 ("FBSA").[94] "Boat" as defined in the FBSA means "any vessel . . . manufactured or used primarily for noncommercial use,"[95] thus encompassing the very vessels involved in *Richardson*.

The Court's final statutory reference was to the Extension of Admiralty Jurisdiction Act.[96] The Act extends admiralty jurisdiction to tort claims arising out of damage to shore structures caused by vessels.[97] The Court's reliance on this statute to support its delineation of admiralty tort jurisdiction is disingenuous at best.

The Extension of Admiralty Jurisdiction Act was passed to eliminate an inequity resulting from strict application of the locality test.[98] The inequity is illustrated by the common occurrence of a ship colliding with the movable span of a drawbridge, where both parties are at fault. The ship can bring an action in personam in admiralty against the bridge owner and recoup its damages. The damage to the bridge, on the other hand, was not a maritime tort under the locality test. The bridge owner was therefore relegated to state court for recoupment. There the bridge

91. 102 S. Ct. 2654, 2659 (1982) (citing 46 U.S.C. §§ 526–526u (1976 & Supp. V 1981), recodified in scattered sections of 46 U.S.C. (Aug. 26, 1983)). The reference to the MBA appears in the opinion as printed in the advance sheet of the Supreme Court Reporter. This reference, however, was deleted without comment from the official U.S. Reports version of the opinion appearing in the U.S. Reports advance sheet.

92. 102 S. Ct. at 2659–60.

93. Federal Boat Safety Act of 1971, Pub. L. 92-75, § 41(b), 85 Stat. 213, 228 (1971) (initially codified at 46 U.S.C. § 526u (1976); now codified at 46 U.S.C. § 4101 (Aug. 26, 1983) in substantially reworded form). The amendment does continue the applicability of §§ 12 and 18–19 of the Motor Boat Act to pleasure vessels. Those sections are, however, irrelevant to the Court's argument. Section 12 merely exempted a motorboat from any requirement to carry copies of the pilot rules. 46 U.S.C. § 526k (1976) (repealed in recodification of Aug. 26, 1983). Section 18 was repealed by Act of Oct. 6, 1980, Pub. L. 96-378, § 11(d), 94 Stat. 1513, 1519 (1980). Section 19 reiterates that vessels subject to inspection under 46 U.S.C. § 391(a) (now codified at 46 U.S.C. § 3301(10) (Aug. 26, 1983)) (vessels carrying hazardous cargo) and under 46 U.S.C. § 367 (now codified at 46 U.S.C. § 3301(7) (Aug. 26, 1983)) (seagoing vessels of at least 300 gross tons propelled by internal combustion engines) continue to be so subject. *See supra* notes 40–42.

94. 46 U.S.C. §§ 1451–89 (1976 & Supp. V 1981). The provisions of the FBSA are now codified in scattered sections of 46 U.S.C. (Aug. 26, 1983).

95. 46 U.S.C. § 1452(1) (1976 & Supp. V 1981) (recodified at 46 U.S.C. § 2101(25) (Aug. 26, 1983) with substantially different wording).

96. 457 U.S. at 676–77 (citing 46 U.S.C. § 740 (1976)).

97. 46 U.S.C. § 740 (1976).

98. *See* N. HEALY & D. SHARPE, ADMIRALTY 153–54 (2d ed. 1974).

owner risked being barred from suit because of contributory negligence.[99] The Act did not, as the Court implies, extend admiralty jurisdiction to all vessels, but merely put the owners of shoreside facilities on an equal footing with the owners of vessels which damage those facilities.

F. Summary

A summary analysis of the arguments used by the majority in support of its extension of admiralty jurisdiction in the *Richardson* case reveals that only the third argument has logical merit. The first argument, citing the need for uniform rules to govern conduct on navigable waters, results in a non sequitur; the need for uniform rules does not require admiralty jurisdiction to ensure their uniform enforcement. The second, which focuses on the potential disruption of maritime commerce, is contrary to the Court's own precedent in *Executive Jet*. The fourth argument, that noncommercial vessel owners would be uncertain as to their duties and liabilities, is not, as the majority asserts, logically related to the "ongoing flow of commerce." It also denigrates the ability of state courts to make conflict-of-law analyses; such analyses are routinely made in cases involving the interstate travel of both commercial and noncommercial carriers. The fifth argument, that a finding of admiralty jurisdiction on the facts of the *Richardson* case is consistent with federal enactments in maritime matters, does not withstand close scrutiny because the majority's analysis of those statutes overstates the significance of the expressions of federal interest which they contain.

Because these arguments are not effective, the third argument, that any attempt to restrict admiralty jurisdiction strictly on the basis of commercial activity leads to difficult factual determinations, represents the gravamen of the Court's opinion. Further, it is the only one of the five arguments which is logically supportable. The underlying difficulty of characterizing the "commercialness" of a vessel's activity reduces itself to a problem in judicial line-drawing. The majority did not adopt the strict "commercial rule" because it saw an examination of a vessel's activity on a given day as the only means available for drawing such lines. As will be demonstrated below, this view is too limited.

IV. A MODEST PROPOSAL

In analyzing the travails of the *Richardson* Court in searching for a rational means of delimiting the extent of admiralty jurisdiction, one be-

99. *Id.*

gins to suspect that the manner in which the parties defined the issue of the case may have had a great deal to do with the seemingly insurmountable problems which confronted the Court. The issue was framed by the proponent of the commercial rule in terms of "[w]hether the admiralty jurisdiction of the Federal Court should be extended to accidents occurring between purely recreational boats in which there is absolutely no commercial or traditional maritime activity involved."[100] This phraseology cast the question presented by the facts of the case in terms of previous conceptualizations. Had the issue in the case been refined slightly to focus on the question of whether any federal enactment exists which reflects a congressional intent to preempt state activities with respect to vessels and at the same time provides a mechanism for the line-drawing from which the Court shied, the line-drawing problem cited by the majority would have proven susceptible to a resolution. The problem is, in fact, surmountable, without resort to the difficult fact determinations the Court envisioned.

A. Criteria

Once the issue in *Richardson* is refined, three criteria emerge as critical for the formulation of a viable solution. First, the approach should be based upon and, ideally, coextensive with a clear statement of congressional intent to preempt state activity. Second, it should avoid conflict with and, if possible, build upon the concept of "traditional maritime activity" to avoid unnecessary conflict with the precedent established by the Court's decision in *Executive Jet*. Finally, it should avoid the

100. Brief of Petitioners at ii, Foremost Ins. Co. v. Richardson, 457 U.S. 668 (1982).

A more telling point, not raised in either the briefs of counsel or in oral argument, is that the attachment of admiralty jurisdiction may result in the disenfranchisement of at least one of the parties by blocking that party's right to a jury trial. Fitzgerald v. United States Lines, 374 U.S. 16, 20 (1963). This feature of admiralty law is derived from its early connection with the law merchant. Where merely commercial interests are concerned, the swift resolution of disputes is paramount. Before the unification of admiralty with the rest of federal civil jurisdiction, cases involving disputes sounding in admiralty were tried to a separate "side" of the federal district courts under a separate docketing system. The judges hearing these cases usually possessed some special expertise in admiralty matters. Parties to this type of litigation were not interested in protracted litigation before a jury with no special expertise so much as they were interested in the speedy resolution of their dispute so that business could resume its normal course.

When noncommercial parties are involved, the interest in an expedited trial is subsumed to that of obtaining a full and fair hearing conducted before a group of peers. As there is no ongoing business to act as a spur for an expedient settlement, the focus of the parties shifts to a desire to obtain compensatory and punitive damages to atone for personal wrongs suffered. The special expertise of a judge attuned to the needs of the maritime industry becomes irrelevant under these circumstances, and it follows that another of the reasons for maritime jurisdiction evaporates as well. The fact that this issue was neither argued by the parties nor raised sua sponte by the Court represents an inexcusable oversight which would almost certainly have placed the case in an entirely different light.

shortcomings of the strict historical approach to admiralty tort jurisdiction by providing a simple and logical method of prospectively deciding the applicability of that jurisdiction in the context of concrete fact situations. To the extent that any method devised meets these criteria, it is at once credible, constructive, and utilitarian. A close examination of the federal law relating to vessel documentation and licensing, the Vessel Documentation Act,[101] reveals that such a method may be derived by relying on its provisions.

B. The Vessel Documentation Act

The Vessel Documentation Act ("VDA" or "Act") was enacted in 1980[102] as a simultaneous recodification of existing documentation law and streamlining of the procedures for vessel documentation.[103] Because the Act retains the purposes and objectives of vessel documentation and related substantive policies,[104] it represents a restatement of longstanding congressional expressions of federal interest with respect to vessels. That interest extends only to vessels owned by United States citizens and measuring at least five net tons.[105] Documentation is, in fact, a system of national vessel registration which establishes a special relationship between the vessel and the United States, as evidenced by the maritime flag which the vessel is authorized to assert.[106] This relationship serves to identify the vessels to which the United States will afford sovereign protection in international contexts,[107] and the vessels to which it will accord preferential treatment in the area of domestic commerce.[108]

Documentation is mandatory for vessels measuring five net tons or

101. 46 U.S.C. §§ 12,101–22 (Aug. 26, 1983) (formerly 46 U.S.C. §§ 65–65w (Supp. V 1981)).

102. Pub. L. 96-594, 94 Stat. 3453 (1980) (codified at 46 U.S.C. §§ 12,101–22 (Aug. 26, 1983)) (formerly codified at 46 U.S.C. §§ 65–65w (Supp. V 1981)).

103. H.R. REP NO 428, 96th Cong., 2d Sess. 4 (1980), *reprinted in* 1980 U.S. CODE CONG & AD NEWS 7162, 7165. *See generally* Drzal & Carnilla, *Documentation of Vessels: The Fog Lifts*, 13 J. MAR L. & COM 261 (1982) (discussing the procedural simplifications made possible by the passage of the Act).

104. H.R. REP NO 428, *supra* note 103, at 4, *reprinted in* 1980 U.S. CODE CONG & AD NEWS 7162, 7165.

105. 46 U.S.C. § 12,102 (Aug. 26, 1983) (formerly 46 U.S.C. § 65b (Supp. V 1981)).

A vessel ton, in the context of the documentation laws, is not a measure of weight but of capacity, 100 cubic feet equaling one ton. The term is derived from the old English word "tun" meaning a barrel with an approximate capacity of 252 gallons. For a detailed discussion of tonnage calculations for documentation purposes, see 46 C.F.R. pt. 69 (1982).

106. *See infra* notes 133–42 and accompanying text.

107. *See* 47 Fed. Reg. 27,490, 27,490 (1982).

108. *See id.*

more which engage in the coastwise trade[109] or the American fisheries.[110] Documentation is available, but not mandatory, for vessels meeting this size requirement which are owned by United States citizens and which engage only in pleasure travel, commercial activities not constituting coastwise trade or fishing, or foreign trade.[111] Vessels excluded from federal documentation include vessels measuring less than five net tons, and vessels not operated on the navigable waters of the United States,[112] although vessels falling in the latter category may be documented as long as they measure at least five net tons and are wholly owned by United States citizens.[113] Non-self-propelled vessels qualified to engage in the coastwise trade are exempt from documentation when used in that trade within harbors, in whole or in part on rivers or inland lakes, or on the internal waterways or canals of any state.[114]

C. *The Proposed Nexus*

As noted above, the Vessel Documentation Act is quite specific with respect to the vessels to which it does not apply, those to which it applies mandatorily, and those to which it applies permissively. Because of this specificity, a jurisdictional system which closely parallels the provisions of the Act would resolve the Court's perceived difficulty in defining "commercialness" by overcoming the line-drawing problems that prompted the *Richardson* decision.

Applying the VDA, maritime tort jurisdiction would arise in the following cases: (a) vessel casualties involving at least one vessel which is

109. 46 U.S.C. §§ 12,106–07 (Aug. 26, 1983) (formerly 46 U.S.C. §§ 65i–65j (Supp. V 1981)).

The term "coastwise trade" is generally defined as the transportation of passengers and/or merchandise between points in the United States. *See* 19 C.F.R. § 4.80 (1982); *see also* Gillentine v. McKeand, 426 F.2d 717, 720–21 (1st Cir. 1970). As used in this article, the term coastwise trade includes Great Lakes trade. The inclusion is not precisely accurate. Great Lakes trade encompasses both domestic trade and foreign trade with Canada; coastwise trade encompasses only domestic trade. Drzal & Carnilla, *supra* note 103, at 263 n.16. The term coastwise trade is interpreted here to include Great Lakes trade because the citizenship and construction qualifications for each are the same. *Id.*

110. 46 U.S.C. § 12,108 (Aug. 26, 1983) (formerly 46 U.S.C § 65k (Supp. V 1981)). The term "fishing" is defined as "the planting, cultivation, or taking of fish, shell fish, marine animals, pearls, shells, or marine vegetation, or the transportation of any of those marine products to the United States by the taking vessel or another vessel under the complete control and management of a common owner or bareboat charterer." 19 C.F.R. § 4.96 (1982). The term includes the conduct of these activities within the fishery conservation zone. 46 U.S.C. § 2101(11) (Aug. 26, 1983) (formerly 46 U.S.C. § 65 (Supp. V 1981)).

111. 46 U.S.C. § 12,102 (Aug. 26, 1983) (formerly 46 U.S.C. § 65b (Supp. V 1981)); 46 C.F.R. § 67.01-9 (1982).

112. 46 C.F.R. § 67.01-7 (1982).

113. *Id.*

114. *Id.*

documented under a commercial license;[115] (b) vessel casualties involving at least one foreign-flag vessel; and (c) vessel casualties involving an undocumented vessel in which the proponent of admiralty jurisdiction proves that an involved vessel was, at the time of the casualty, eligible for documentation and engaged in an activity encompassed within a commercial documentation license.

Certain consequences necessarily flow from such a scheme. Collisions involving only vessels of under five net tons would be excluded from admiralty tort jurisdiction. The *Richardson* vessels, and hence that collision, would fall within this exclusion, as would the pirogue with which the *Richardson* majority was concerned. This exclusion would apply regardless of whether the vessels had ever been used for commercial fishing or any other activity which might colorably be described as commercial.

This result is desirable for several reasons. First, it leaves the states with jurisdiction over watercraft which are registered by the states[116] rather than the federal government and which, as a general proposition, implicate no federal interest. Second, it brings manageable, logical, and easily discernible boundaries to admiralty jurisdiction. Third, it excludes small-scale commercial activity in which purely local concerns outweigh any federal interest for lack of any substantial interstate or international implications. Fourth, it agrees with the reasonable expectations of the owners of small or noncommercial vessels. These owners would no doubt be as surprised as were the *Richardson* defendants to learn that the recreational activities of their boats could subject them to admiralty jurisdiction.

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115. A vessel's documentation consists of a Certificate of Documentation which may be variously endorsed to permit the vessel to engage in various employments or trades. *Id.* § 67.17-1. The possible endorsements are: (1) registry, issued to vessels which engage in foreign trade; (2) coastwise license, *see supra* note 109; (3) Great Lakes license, *see supra* note 109; (4) fishery license, *see supra* note 110; and (5) pleasure license, issued to vessels used exclusively for pleasure. 46 C.F.R. subpt. 67.17 (1982). The term "commercial license" as used herein includes all these endorsements except the pleasure license. While pleasure vessels of at least five net tons are eligible for documentation, this fact is not germane to the Court's problem of defining the "commercialness" of vessels.

116. *See* Federal Boat Safety Act of 1971, formerly 46 U.S.C. §§ 1451–89 (1976 & Supp. V 1981) (now codified in scattered sections of 46 U.S.C. (Aug. 26, 1983)). Under this Act, any vessel which is undocumented and which is equipped with propulsion machinery of any type must have a number issued by the proper issuing authority of the state in which the vessel is principally used. 46 U.S.C. § 12,301 (Aug. 26, 1983) (formerly 46 U.S.C. § 1466 (1976)). A state is the proper issuing authority if it institutes a numbering system which complies with regulations promulgated by the Coast Guard and which is approved by that agency. 46 U.S.C. § 12,302(a)–(b) (Aug. 26, 1983) (formerly 46 U.S.C. § 1467 (1976)). Absent a complying and approved system, the Coast Guard acts as the issuing authority. 46 U.S.C. § 12,302(b) (Aug. 26, 1983) (formerly 46 U.S.C. § 1467 (1976)). All but three of the states have established conforming systems. Significantly, the stated purpose of the Federal Boat Safety Act was to provide a financial incentive for the states to become more involved in boating regulations, especially in safety areas. S. REP. NO. 248, 92d Cong., 2d Sess. 2 (1971), *reprinted in* 1971 U.S. CODE CONG & AD. NEWS 1333, 1334.

And finally, it eliminates the troublesome factual distinctions which so concerned the Court.[117]

The second obvious exclusion is for casualties involving only vessels exceeding five net tons which are either registered with a state,[118] or which possess Certificates of Documentation bearing only pleasure license endorsements.[119] Again, this is a desirable exclusion. The *Richardson* Court itself conceded that the underpinnings of admiralty jurisdicion are commercial in nature.[120] The Court brought the *Richardson* recreational craft into that jurisdiction, not because of a belief that pleasure craft, per se, belong there, but because it saw no other way to protect the commercial interests which are admiralty's special province. This proposal, then, would permit the Court to foster the federal interest in commercial water traffic without reaching the extreme and overly simplistic results of *Richardson*.

Certain automatic inclusions also become obvious. Any casualty involving a vessel that possesses a Certificate of Documentation bearing a commercial license endorsement[121] would be the subject of admiralty jurisdiction. This accords with the result sought by the *Richardson* Court: protection of maritime commerce by use of admiralty jurisdiction. Again, the proposal eliminates troublesome line-drawing; commercial documentation would establish an irrebuttable presumption that the vessel is sufficiently commercial to merit the invocation of admiralty jurisdiction. No further judicial inquiry would be required.

Another automatic inclusion, arising from other sources of law, is for casualties involving foreign-flag vessels. For reasons of international law and comity,[122] such casualties are litigated in a federal forum. The inclusion, though not derived from the VDA, achieves the same result: the elimination of needless factual inquiry and judicial line-drawing.

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117. In addition to eliminating the line-drawing problems the majority cites with respect to reliance on actual vessel usage as the determining factor in the application of the "commercial rule," the proposal also eliminates the need to make a jurisdictional finding that the incident occurred on navigable waters before federal admiralty jurisdiction can attach. This result logically follows because the proposal more sharply focuses upon the real basis for the federal interest in particular vessel casualties. Thus, the majority's speculation as to what impact the collision of the *Richardson* vessels would have had on maritime commerce had the collision occurred on the St. Lawrence Seaway, 457 U.S. at 675, would be unnecessary in attempting to validate the assertion of admiralty jurisdiction, because lack of federal interest in the vessels is a foregone conclusion once the current proposal is adopted.

118. *See supra* note 116.

119. *See supra* note 115.

120. 457 U.S. at 674.

121. *See supra* note 115.

122. *See generally* N. Singh, Maritime Flag and International Law 49–53 (1978) (discussing specific incidents of sovereignty which mandate national rather than state involvement in multinational conflicts) (copy on file with the *Washington Law Review*).

Still another automatic inclusion is for casualties which involve a commercial vessel and a noncommercial vessel. In this instance, a further balancing of federal and state interests is necessary. While a given state undoubtedly holds a stronger interest in the noncommercial vessel than does the federal government, the federal interest in the commercial vessel, that is, in maritime commerce, must be regarded as paramount because of an actual impact on maritime commerce. Unlike the *Richardson* majority's reliance on a speculative, potential impact on maritime commerce (an impact found to be too tenuous in *Executive Jet*), this result is dictated by concrete fact.

Finally, the proposal brings into admiralty jurisdiction casualties in which the proponent of admiralty jurisdiction proves (1) that an involved vessel meets the eligibility criteria of the VDA for documentation (including the size requirement), and (2) the existence, at the time of the casualty, of activity analogous to that which would be encompassed within federal commercial documentation. This aspect of the proposal results in potential inclusion of commercial vessels which measure five net tons or more but which are exempt from the documentation requirement.[123] Admittedly, the exercise of admiralty jurisdiction in this context will require some judicial factfinding; the extent of that factfinding is, however, far more limited than that envisioned by the *Richardson* Court. Again excluded by the proposal are vessels of less than five net tons. Included are only those vessels of requisite size which were demonstrably "commercial" at the time of the incident under litigation.[124] Thus the proposal agrees with the Court's recognition of the commercial underpinnings of admiralty jurisdiction.

D. Credibility

The Vessel Documentation Act serves as a more credible basis than the statutes cited by the majority for systematically determining the vessels which do, and do not, fall within federal admiralty jurisdiction. The Act constitutes a clear expression of congressional interest in the vessels falling within its scope.[125]

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123. *See supra* text accompanying notes 112–14.

124. As a practical matter, most of these vessels will be documented, notwithstanding their exemption. Vessels used in foreign trade will be documented to acquire the privileges and protections of nationality. *See supra* text accompanying note 106; *infra* notes 133–42 and accompanying text. These same vessels, as well as other exempt vessels, may be documented to secure financing; most lenders will insist on security based on the terms of the Ship Mortgage Act. *See infra* notes 143–50 and accompanying text.

125. H.R. REP NO 428, 96th Cong., 2d Sess. 8–11 (1980), *reprinted in* 1980 U.S. CODE CONG & AD NEWS 7162, 7168.

While the specific objective of the Act was to "revise and improve" the laws related to the documentation of vessels,[126] its heritage reflects a consistent congressional concern with certain vessels and vessel activities spanning nearly two hundred years.[127] The depth of that concern may be measured by examining the policy uses which have been made of vessel documentation, as well as the legal and other consequences which flow from it.

Perhaps the main policy use made of documentation is that of cabotage: the reservation of domestic waterborne commerce to vessels built in the United States and owned by United States citizens. The cabotage principle is retained in the Vessel Documentation Act under which vessels employed in the coastwise trade or the American fisheries must meet the documentation criteria.[128] Similarly, provisions of the Fishery Conservation and Management Act[129] key to vessel documentation and afford to documented vessels privileged access to the resources of the Fishery Conservation and Management Zone.[130]

In the context of domestic commercial activity, the existence of a federal system of registration and licensing serves to preempt state numbering and licensing schemes so that a vessel operated under a federal license (for example, a Certificate of Documentation endorsed with a coastwise license) is ensured access to state waters for various commercial activities.[131] Indeed, the documentation statutes which preceded the Vessel Documentation Act were a direct manifestation of congressional dissatisfaction with state-created impediments to commerce which existed during the earliest years of the republic.[132]

Another primary purpose of vessel documentation is to establish the

126. H.R. REP. No. 428, 96th Cong., 2d Sess. 2 (1980), *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 7162, 7162.

127. Drzal & Carnilla, *supra* note 103, at 261.

The United States Coast Guard is the agency charged with administration of the vessel documentation program. The agency employs 138 individuals at 15 field offices and one headquarters office to perform the documentation function. The program costs the Coast Guard approximately $5,844,000 annually. Letter from Phyllis D. Carnilla to Steve Dickinson (August 8, 1983) (copy on file with the *Washington Law Review*).

128. 46 U.S.C. §§ 12,102, 12,106, 12,108 (Aug. 26, 1983) (formerly 46 U.S.C. §§ 65b, 65i, 65k (Supp. V 1981)); 46 C.F.R. subpt. 67.03 & § 67.17-5(b)(1), -9(b)(1) (1982).

129. 16 U.S.C. §§ 1801–82 (1976 & Supp. V 1981).

130. *Id.* § 1802(27).

131. Douglas v. Seacoast Prods., Inc., 431 U.S. 265, 278–81 (1977) (federal license to engage in the mackerel fishery implies not only grant of right to navigate in state waters but also authority to carry on fishery there in same manner as state residents); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 93–95 (1824) (federal license to engage in coasting trade not only establishes nationality of vessel but also authority to carry and land passengers in given state).

132. Notice of Proposed Rulemaking, 46 Fed. Reg. 56,318, 56,335 (proposed Nov. 16, 1981).

vessel's nationality for international purposes.[133] Vessel registration is imbued with considerable international legal significance.[134] Documentation confers the privileges, protection, and immunities contemplated by longstanding international law and custom. International law views national registration of vessels as the administrative procedure which imparts national character to a vessel[135] and establishes the right to assert the maritime flag of a given country.[136] Vessel registration, at least in the context of merchant shipping tonnage, is considered the function and responsibility of the sovereign.[137] Proper registration and flagging are essential to the orderly conduct of international commerce. The flag asserted by a vessel is an identifying mark which aids in preserving law on the high seas.[138] The flag is also considered an aid in fixing responsibility

133. 46 U.S.C. § 12,104 (Aug. 26, 1983) (formerly 46 U.S.C. § 65g (Supp. V 1981)).

134. Convention on the High Seas, April 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82; *see generally* McDougal, Burke & Vlasic, *Maintenance of Public Order at Sea and the Nationality of Ships*, 54 AM. J. INT'L L. 25 (1960).

135. The Mohawk, 70 U.S. (3 Wall.) 566, 571 (1866) ("The purpose of a register is to declare the nationality of a vessel . . . and to enable her to assert that nationality wherever found.") The 1958 Convention on the High Seas, *supra* note 134. Article 5 of the Convention specifically requires that each state establish an administrative procedure for the grant of nationality to its vessels:

> 1. Each State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship; in particular, the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.
>
> 2. Each State shall issue to ships to which it has granted the right to fly its flag documents to that effect.

Id. art. 5.

Article 6 of the Convention places restraints on the ability of a vessel to assert a flag:

> 1. Ships shall sail under the flag of one State only and . . . shall be subject to its exclusive jurisdiction on the high seas. A ship may not change its flag during a voyage or while in a port of call, save in the case of a real transfer of ownership or change of registry.
>
> 2. A ship which sails under the flags of two or more States, using them according to convenience, may not claim any of the nationalities in question with respect to any other State, and may be assimilated to a ship without nationality.

Id. art. 6.

136. Convention on the High Seas, *supra* note 134, art. 5; *see* N. Singh, *supra* note 122, chs. 1–2.

> Each State determines for itself what ships it will regard as its own, but it cannot, of course, impinge upon the prior rights of other States. If a vessel already has a nationality, another State is not free to impose its nationality upon it. . . . Beyond this, a State is free to encourage application for its nationality by maintaining liberal rules. No matter how lenient or harsh its conditions may be, once a State has denoted that these conditions have been met to its satisfaction through the medium of an official document, the nationality is impressed upon the vessel.

R. RIENOW, THE TEST OF THE NATIONALITY OF A MERCHANT VESSEL 218–19 (1937) (footnotes omitted).

137. Convention on the High Seas, *supra* note 134, art. 5.

138. N. Singh, *supra* note 122, at 1.

in cases of maritime tort.[139] The registration of a vessel determines the national laws, including crewing and inspection laws, to which it is subject,[140] the country responsible for its actions,[141] and how and where legal rights may be enforced against it.[142]

In addition to the results directly intended by the documentation laws, Congress has elected to employ these same laws to define eligibility for other federal benefits. Perhaps the most important example of these is the Ship Mortgage Act of 1920.[143] The Ship Mortgage Act performs two functions with respect to documented vessels. First, it provides a mechanism for establishing constructive notice of conveyances and encumbrances affecting vessels.[144] Second, it provides for federal recordation and access to a federal judicial forum for enforcement of vessel mortgages.[145] These functions relate only to documented vessels.[146] Parties seeking establishment of notice, recordation, or enforcement with respect to other vessels must resort to a state forum.[147]

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139. *Id.*; McCulloch v. Sociedad Nacional de Marineros, 372 U.S. 10 (1963) (law of flag is starting point for choice-of-law analysis in maritime cases); Romero v. International Terminal Operating Co., 358 U.S. 354 (1959) (Jones Act not applicable to maritime tort involving foreign parties on foreign vessel in United States port); Lauritzen v. Larsen, 345 U.S. 571 (1953) (flag outweighs most other factors in choice-of-law analyses). *But see* Hellenic Lines Ltd. v. Rhoditis, 398 U.S. 306 (1970) (law of base of operations held to prevail over law of flag); Evangelinos v. Andreavapor Cia. Nav., S.A., 291 F.2d 624 (2d Cir. 1961) (nominal registry not determinative of applicable law in cases involving liability of owner to crew).

140. Convention on the High Seas, *supra* note 134, art. 10. Other areas of sovereign control under this article include the use of signals, communications, prevention of collisions, labor conditions, equipment, and seaworthiness.

141. Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, 1960 I.C.J. 150 (Advisory Opinion of June 8) (flag and registration are deciding factors in determining state responsibility for compliance with international conventions). See Convention on the High Seas, *supra* note 134, arts. 12–13, for specific examples of state responsibility concerning requirements to render assistance at sea and prevention of transport of slaves on flagged vessels.

142. N. Singh, *supra* note 122, at 30.

143. 46 U.S.C. §§ 911–84 (1976 & Supp. V 1981).

144. *Id.* § 921.

145. *Id.* §§ 922, 951. The Coast Guard estimates that in calender year 1981 it recorded preferred mortgages with a total face value of $27 billion. Letter from Phyllis D. Carnilla to Steve Dickinson (August 8, 1983) (copy on file with the *Washington Law Review*).

146. 46 U.S.C. §§ 911, 922 (1976 & Supp. V 1981).

147. The Thomas Barlum, 293 U.S. 21, 42 (1934) ("if the mortgage is not within the Act, there can be no suit for foreclosure in the admiralty"); McCorkle v. First Pa. Banking & Trust Co., 459 F.2d 243, 248 (4th Cir. 1972) (no jurisdiction in admiralty over disputes arising under U.C.C. purchase money security interest in vessel; criticizing but declining to change rule); Richard Bertram & Co. v. The Yacht, Wanda, 447 F.2d 966, 967 (5th Cir. 1971) (no admiralty jurisdiction over mortgages not within the Act); The Susana, 2 F.2d 410, 414 (4th Cir. 1924) (recordation under Act of mortgage on undocumented vessel does not constitute constructive notice); Hirsch v. The San Pablo, 81 F. Supp. 292, 293 (S.D. Fla. 1948) (no admiralty jurisdiction over mortgage not within Act); Commercial Banking Corp. v. One Approximately 30-Foot Motor Boat, 86 F. Supp. 618, 624

The provisions of the Ship Mortgage Act have in turn been extended to define the parameters of a federal benefit. Under the provisions of the Merchant Marine Act of 1936,[148] the Secretary of Commerce is authorized to guarantee loans made for the purpose of financing vessel construction, reconstruction, or reconditioning.[149] The guarantees are restricted to loans to vessels which are or will be documented by the United States Coast Guard.[150]

Another manifestation of the unique relationship established between the sovereign and the documented vessel is the restriction contained in the Shipping Act of 1916.[151] That restriction prohibits the sale, charter, mortgage, or other transfer of an interest in a documented vessel to a noncitizen without the approval of the Secretary of Commerce.[152] This provision illustrates that along with the various benefits conferred directly by or in conjunction with documentation come certain obligations designed to ensure the continued viability of our merchant fleet.

Congress has also used documentation as a method for identifying vessels to which special tax benefits will be accorded. Thus, for example, a documented vessel is exempt from the payment of tonnage taxes upon arrival in the United States.[153] Similarly, a vessel which is documented and operated in the foreign or domestic commerce of the United States is considered depreciable property for purposes of the Internal Revenue Code.[154]

The various provisions discussed above serve to illustrate a continuing and well-defined federal interest in the vessels encompassed within the documentation laws. That interest obviously does not extend to all vessels. Congress' longstanding statements regarding the types of vessels to be documented, and its reliance on those same characterizations to define other federal benefits and obligations, demonstrate that the vessel documentation laws represent an appropriate framework for delineating the parameters of admiralty jurisdiction.

(D.N.J. 1948) (same); Brock v. Angeron, 16 So. 2d 93, 96 (La. Ct. App. 1943) (state vested with jurisdiction over mortgage not within the Act).

148. 46 U.S.C. §§ 1101–1294 (1976 & Supp. V 1981). For a detailed discussion of financing under this enactment, see Cook, *Government Assistance in Financing: Title XI Federal Guarantee*, 47 TUL. L. REV 653 (1973).

149. *See* 46 U.S.C. § 1274(a)(1) (Supp. V 1981).

150. *See id.* § 1271(b); Cook, *supra* note 148, at 669.

151. 46 U.S.C. §§ 801–42 (1976 & Supp. V 1981).

152. *Id.* § 808 (Supp. V 1981).

153. *Id.* § 122 (1976).

154. I.R.C. § 48 (1976 & Supp. V 1981).

V. CONCLUSION

The *Richardson* Court set forth five arguments in support of its decision, four of which were not directly counter to the Court's own precedent in *Executive Jet*. The criteria for admiralty jurisdiction proposed above amply address those four concerns to the extent that the concerns are valid.

The first concern was with uniform conduct on our waterways. The proposal directly answers this concern. By the very act of documenting a vessel, the owner consents to the application of the law of the United States.[155] "This proposition has seemed so self-evident that it appears never to have been questioned."[156] That law, of course, includes those federal statutes and regulations which govern conduct on the nation's waterways.

The Court's next concern was with difficult fact determinations. As discussed, the proposal removes the need for factual determinations by establishing a conclusive presumption of "commercialness" in all but a handful of cases.

A further concern was with the uncertainty of noncommercial vessel owners as to the legal regime to which they may be subject. Here the majority was not concerned so much with the question of whether state or federal law would apply to a given casualty involving pleasure vessels, but rather with the question of which state's law would apply as a pleasure vessel moves through waters under various state jurisdictions. As analyzed above, this argument is a makeweight that is not really related to the majority's ostensible rationale of protecting the ongoing flow of commerce. Another observation which might be made at this juncture is that, absent an inappropriate exercise of federal jurisdiction, this situation is no different from that which confronts motorists as they drive their vehicles through varying state jurisdictions. State courts deal with such issues on a routine and recurring basis in the context of choice-of-law determinations. The proposal recognizes this reality and, rather than attempting to pursue what may fairly be characterized as a red herring, treats the owners of pleasure vessels no differently on the water than they are treated on land. In short, under the proposal, owners of vessels are treated no differently than any other tortfeasors, who select neither their victims nor the situs of their negligence. The Court's spurious concerns notwithstanding, there is no federal reason for them to be treated differently.

The argument focusing on consistency with federal enactments is much

155. G. GILMORE & C. BLACK, JR., THE LAW OF ADMIRALTY § 6-64, at 477 (2d ed. 1975).
156. *Id.*

better served by the proposal's linkage with the Vessel Documentation Act for all of the reasons given in the discussion of credibility.

The remaining concern, that of potential impact on waterborne commerce, points out the sharp contrast between *Richardson* and the Court's own holding in *Executive Jet*. *Executive Jet,* by its use of the traditional maritime activity test, held out the promise that the Court was departing from a rigid and often irrational application of the strict locality rule. While *Richardson* does not return to a strict locality test, it nonetheless trivializes the traditional maritime activity test by its sweeping conclusion that any navigation is a "traditional maritime activity". Based on that conclusion, it distinguished a commercial airliner from a pleasure boat. That distinction is neither factually nor logically supportable from the standpoint of ability to disrupt maritime commerce. Yet the Court, having eschewed jurisdiction over the aircraft, encompassed the pleasure boat in admiralty jurisdiction. This result is in itself distressing.

More significantly, the *Richardson* decision could well lead the Court back to the "slippery slope" it struggled so hard to avoid. If potential disruption of maritime commerce is to be the touchstone of federal admiralty jurisdiction, how will the lower courts distinguish among a water skier, a zip sledder, a swimmer, a small boat, an ocean liner, or a noncommercial aircraft in determining when admiralty jurisdiction applies? The critical issue of admiralty jurisdiction requires a more rational foundation than that provided by *Richardson*. The proposal set forth in this article should provide that foundation.