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## **YAMAHA MOTOR CORP. V. CALHOUN: AN EXAMINATION OF JURISDICTION, CHOICE-OF-LAWS, AND FEDERAL INTERESTS IN MARITIME LAW**

B.J. Haeck

*Abstract:* In *Yamaha Motor Corp. v. Calhoun*, the U.S. Supreme Court determined that state remedies were still available for non-seamen killed inside of a state's three-mile territorial sea, despite the existence of a general maritime remedy at federal law. This Note argues that the Court failed to consider its traditional tests when confronted with this choice between state and federal maritime law. In so doing, it erred in finding that state law was applicable. The Court's decision also created a conflict between the traditional standard of significant federal interest required in order to confer federal admiralty jurisdiction to tort plaintiffs and the *Yamaha* Court's rationale that there was not enough of a federal interest to mandate a system of uniform federal remedies. In response to this problem, this Note argues that federal courts' maritime tort jurisdiction be narrowed to assure that when a case is heard at admiralty the requisite federal interests exist.

The United States is one of the most active commercial nations in the world. In 1994, \$517 billion worth of goods were transported to and from the United States via waterborne shipping.<sup>1</sup> This figure represents almost half the value of all U.S. exports and imports that year.<sup>2</sup> If one measures the transactions by gross tonnage, the percentage of U.S. goods that travels by boat leaps to over ninety-eight percent.<sup>3</sup> The United States has been successful in establishing itself as a maritime nation largely because U.S. admiralty law has followed traditional maritime law principles accepted around the world.<sup>4</sup> Therefore, when a foreign company chooses to ship its goods to the United States, it knows the legal standards it will be expected to meet if an accident occurs. This principle of uniformity has been the motivating factor behind admiralty law since the States ratified the U.S. Constitution.<sup>5</sup> In 1996, however, the U.S. Supreme Court cast doubt on this longstanding concept. In *Yamaha Motor Corp. v. Calhoun*,<sup>6</sup> the Court held that a state's interest in having its laws enforced may supersede the principle of uniformity of maritime law.

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1. 1995 *Statistical Abstract of the United States* 662.

2. *Id.*

3. *Id.*

4. 1 Steven F. Friedell, *Benedict on Admiralty* § 105 (7th ed. rev. 1996).

5. See *infra* notes 16–17 and accompanying text.

6. 116 S. Ct. 619, 628–29 (1996).

In maritime tort, seamen injured or killed due to an employer's negligence anywhere on navigable waters may recover damages under the Jones Act.<sup>7</sup> Non-seamen<sup>8</sup> injured on the high seas<sup>9</sup> have a negligence cause of action under the Death on the High Seas Act (DOHSA).<sup>10</sup> Before 1970, however, the families of non-seamen killed within a state's territorial seas could recover only under that state's wrongful death statute.<sup>11</sup> Because many of the state statutes precluded some of the causes of action recognizable in admiralty law, including the strict liability recovery allowed for injuries due to the unseaworthiness of a ship, many non-seamen were left without recoveries.<sup>12</sup> In the 1970 landmark case, *Moragne v. States Marine Lines, Inc.*,<sup>13</sup> the U.S. Supreme Court recognized this gap and created a general maritime law wrongful death action for non-seamen killed in state waters.<sup>14</sup>

In *Yamaha Motor Corp. v. Calhoun*,<sup>15</sup> however, the Court held that, although *Moragne* created a federal wrongful death cause of action, state remedies are still available to supplement a federal recovery for non-seamen. By doing so, the Court created extensive doubt and conflict within its own jurisprudence. The *Yamaha* decision damages the uniformity of admiralty law that the Court has emphasized in its past decisions and ignores prior holdings that properly established the supremacy of federal remedies in admiralty law. As a consequence, maritime commerce could suffer through the added uncertainty injected into shipowners' calculations of the allocation of their resources. Accordingly, the *Yamaha* opinion should be construed as narrowly as possible by lower courts who interpret it.

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7. 46 U.S.C. § 688 (1995).

8. Non-seamen are defined, for the purposes of this Note, as individuals who do not qualify for coverage under the Jones Act. The Jones Act provides a cause of action to individuals who further the purpose of a boat or a fleet of boats for injuries caused due to the negligence of the seaman's employer. § 688. Thus, passengers and recreational boaters, among others, are defined as non-seamen. Cf. *Barrett v. Chevron, U.S.A., Inc.*, 781 F.2d 1067, 1070 (5th Cir. 1986); *Braniff v. Jackson Ave.-Gretna Ferry, Inc.*, 280 F.2d 523, 528 (5th Cir. 1960).

9. The "high seas" is defined as the area outside each state's three-mile territorial seas. 46 U.S.C. § 761 (1995).

10. 46 U.S.C. ch. 21 (1995). Because the Jones Act only covers negligence, seamen injured on the high seas because of a ship's unseaworthiness or product defects may recover through DOHSA. 46 U.S.C. § 688.

11. See *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 393 (1970).

12. See *id.* at 395.

13. 398 U.S. 375.

14. *Id.* at 409.

15. 116 S. Ct. 619 (1996).

Part I of this Note discusses the general background regarding the establishment of federal maritime law and admiralty wrongful death actions. Part II examines the facts and procedural history of *Yamaha Motor Corp. v. Calhoun*. Part III sets forth some of the admiralty choice-of-law factors that usually are examined to determine whether federal or state law applies in a maritime tort action. It then asserts that the *Yamaha* Court's decision ignores these factors. Part IV argues that the Court failed to recognize the reasoning behind granting federal maritime jurisdiction—the uniformity of federal maritime laws—when it allowed state remedies to supplement federal law recoveries. It also examines future problems that courts may face as a result of the decision unless *Yamaha* is limited to its facts. Finally, part IV proposes that a new factor be added to the jurisdictional test providing that admiralty jurisdiction is inappropriate if state substantive law is to be applied.

I. BACKGROUND OF MARITIME TORT JURISDICTION AND THE CREATION OF THE GENERAL MARITIME LAW WRONGFUL DEATH ACTION

A. *Brief History of U.S. Admiralty Law*

When the Framers wrote the U.S. Constitution, they realized that the complex nature of federalism would make maritime commerce transactions difficult.<sup>16</sup> In an effort to encourage maritime commerce, the government wanted to establish a uniform set of maritime laws.<sup>17</sup>

The U.S. Constitution and the Judiciary Act of 1789 established federal jurisdiction over maritime torts in order to provide a uniform set of rules for those who wished to conduct maritime commerce.<sup>18</sup> The jurisdictional test for torts was originally based on a location test only, one that inquired whether the actions that led to the tort occurred on a navigable body of water.<sup>19</sup> Thus, if an accident occurred on the oceans or

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16. See 1 Friedell, *supra* note 4, § 105 (1996). The Framers' concern was that the several states' laws would differ in many respects and confuse foreign shippers. *Id.*; see also *The St. Lawrence*, 66 U.S. 522, 526–27 (1853).

17. *The St. Lawrence*, 66 U.S. at 526–27; see also *The Lottawanna*, 88 U.S. 558, 572–73 (1874).

18. See U.S. Const. art. III, § 2 (stating that federal judiciary will have power to hear “all Cases of admiralty and maritime jurisdiction”); 1 Stat. 76 (1789).

19. Thomas Schoenbaum, *Admiralty and Maritime Law* 56–60 (1987); see *De Lovio v. Boit*, 7 F. Cas. 418 (C.C.D. Mass. 1815) (No. 3776); see also *The Thomas Jefferson*, 23 U.S. 428, 429 (1825). Navigability in this context refers to the ebb and flow of tides. Later, jurisdiction was expanded to include all navigable lakes and rivers, meaning all lakes and rivers able to be used for maritime commerce. See 5 Stat. 726 (1845).

on any river affected by the tide, the federal courts had admiralty jurisdiction. The courts adopted these English traditions because the people and the courts of the United States were familiar with the British legal system and, therefore, often adopted wholesale British substantive and procedural maritime law.<sup>20</sup>

U.S. law began to develop its own character, however, early in the nineteenth century as American judges expanded the bases for admiralty jurisdiction.<sup>21</sup> Although most early courts recognized the limitation of the "locality rule," courts and Congress gradually expanded maritime jurisdiction past its earlier limitations.<sup>22</sup> In 1845, in *The Propeller Genesee Chief v. Fitzhugh*,<sup>23</sup> the U.S. Supreme Court upheld Congress's extension of admiralty jurisdiction to the Great Lakes. The Court held that the reach of admiralty jurisdiction was not constitutional in nature, and, therefore, admiralty jurisdiction could be regulated by Congress.<sup>24</sup> Eventually, jurisdiction was extended to all torts occurring on interstate waters able to carry maritime commerce, regardless of whether these waters were affected by the tides.<sup>25</sup>

### B. *Maritime Wrongful Death Actions*

While maritime jurisdiction was being expanded, so too was the law regarding what damages could be recovered through a personal injury or wrongful death action at admiralty. Despite their designation as wards of the courts,<sup>26</sup> seamen, like non-seamen, originally had no admiralty action for wrongful death. In *The Harrisburg*,<sup>27</sup> the U.S. Supreme Court held

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20. See generally Schoenbaum, *supra* note 19, at 16–17.

21. *Id.* at 57.

22. See *De Lovio*, 7 F. Cas. 418. This opinion, written by the scholarly Judge Story, is considered the seminal statement of the early expansion of U.S. admiralty law. He made clear that the United States would not be bound by English law, but would alter this traditional law as the courts and Congress found necessary. In *De Lovio*, Story expanded maritime contract jurisdiction past traditional British limitations requiring that the contract be formed at sea, to a new standard requiring only that the contract pertain to maritime commerce. See also 5 Stat. 726 (extending admiralty jurisdiction to vessels employed in commerce on Great Lakes and their connecting waters).

23. 53 U.S. 443, 457 (1851).

24. *Id.* at 452–53.

25. *Fretz v. Bull*, 53 U.S. 466, 468 (1851) (stating that "admiralty was not limited by tide-water, but was extended to the lakes and navigable rivers of the United States").

26. *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 387 (1970). Seamen are considered wards of the court because they continuously face the dangers of the sea and, traditionally, have been viewed paternally due to their supposed susceptibility to unsavory interests. For an excellent explanation of this principle, see *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 246–47 (1942).

27. 119 U.S. 199, 213–14 (1886).

that, because most states had no wrongful death statutes, federal courts should not create one at admiralty. By the early 1900s, however, most states had adopted wrongful death statutes.<sup>28</sup> Following their lead, the federal government decided that it too should create a cause of action for wrongful death at admiralty.<sup>29</sup> In doing so, Congress also wanted to take into account the special place of the seaman in the courts' jurisprudence.<sup>30</sup> In 1920, therefore, Congress adopted the Jones Act.<sup>31</sup> This statute recognized a federal wrongful death cause of action for seamen who died in the course of their employment as a result of a shipowner's negligence either on state territorial waters or on the high seas.<sup>32</sup>

That same year Congress also passed the Death on the High Seas Act,<sup>33</sup> which created a wrongful death cause of action for the families of non-seamen killed on the high seas.<sup>34</sup> At the time, Congress did not want to displace the laws of those states who applied their own wrongful death statutes within their territorial seas.<sup>35</sup> To preserve these causes of action, Congress included section 7 of DOHSA.<sup>36</sup>

After 1920, seamen injured or killed anywhere on the navigable waters of the world could pursue a tort action through the Jones Act. The families of non-seamen killed at sea had a tort action under DOHSA, as long as the death occurred outside a state's three-mile territorial sea. Alternatively, non-seamen who were injured could recover through a negligence action available at general maritime law.<sup>37</sup> Despite these laws, however, a few situations remained where seamen and non-seamen alike were without remedy. First, the estates of non-seamen killed inside the territorial seas of states that did not have wrongful death statutes had no

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28. See Stuart J. Speiser, *Recovery for Wrongful Death* 29, app. A (2d ed. 1975).

29. See *Moragne*, 398 U.S. at 408-09.

30. Martin J. Norris, *The Law of Maritime Personal Injuries* § 6:2 (4th ed. 1990).

31. Pub. L. No. 66-261, 41 Stat. 1007 (1920) (codified as amended at 46 U.S.C. § 688 (1995)).

32. § 688.

33. Pub. L. No. 66-165, 41 Stat. 537 (1920) (codified as amended at 46 U.S.C. ch. 21 (1995)).

34. The "high seas" means the ocean outside a states' three-mile territorial seas or in foreign territorial seas. See *Moragne, Inc.*, 398 U.S. at 397-98.

35. See *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 224-25 (1986) (finding Congress intended section 7 of DOHSA to preserve state jurisdiction of wrongful death actions within territorial waters).

36. 46 U.S.C. § 767 (1995). This section states that DOHSA was not meant to displace state causes of action available in the territorial seas.

37. General maritime law is a body of federal common law created by admiralty courts in a variety of situations. David W. Robertson, *Displacement of State Law by Federal Maritime Law*, 26 J. Mar. L. & Com. 325, 329 n.24 (1995).

common law or statutory method to recover damages. Second, the U.S. Supreme Court recognized a strict liability standard for certain federal maritime wrongful death actions.<sup>38</sup> Because most state wrongful death statutes did not recognize strict liability, many seamen and non-seamen killed within one of those states' territorial waters were denied a recovery otherwise available under federal law.<sup>39</sup>

The Court did little to address the gap in maritime law until 1970, when it decided *Moragne v. States Marine Lines, Inc.*<sup>40</sup> In that decision, the Court recognized that the reasoning of *The Harrisburg* was no longer appropriate because most states had adopted wrongful death statutes.<sup>41</sup> The Court, therefore, created a general maritime law wrongful death action applicable to non-seamen killed within a state's territorial seas.<sup>42</sup> Many scholars had thought that the *Moragne* cause of action had supplanted the application of state law to wrongful deaths inside a state's territorial seas.<sup>43</sup> The U.S. Supreme Court surprised them when it decided otherwise in *Yamaha Motor Corp. v. Calhoun*.<sup>44</sup>

## II. YAMAHA MOTOR CORP. V. CALHOUN

*Yamaha* began when Natalie Calhoun, a twelve-year-old girl who was on vacation with her parents in Puerto Rico, slammed her rented jet-ski into the side of a boat anchored off the beach in shallow waters.<sup>45</sup> She died instantly.<sup>46</sup>

The Calhouns brought an action in federal court in the Eastern District of Pennsylvania claiming that the jet-ski Natalie was riding was defective.<sup>47</sup> They asserted both diversity and admiralty jurisdiction. Although their claim was maritime in nature, which normally calls for the application of federal admiralty law, they sought to supplement the

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38. See *Mahnich v. Southern S.S. Co.*, 321 U.S. 96, 100-01 (1944). Although an unseaworthiness recovery is still governed by strict liability, it has since been limited to seamen. See *Giboney v. Wright*, 517 F.2d 1054, 1059 (5th Cir. 1975); see also *Mahnich*, 321 U.S. at 101.

39. See *Moragne*, 398 U.S. at 395.

40. *Id.*

41. *Id.* at 388 (citing *The Harrisburg*, 119 U.S. 199, 208 (1886)).

42. *Id.* at 408.

43. See, e.g., Robertson, *supra* note 37 (predicting that U.S. Supreme Court would reverse appeals court and find state law pre-empted in *Yamaha*).

44. 116 S. Ct. 619 (1996).

45. *Id.* at 622.

46. *Id.*

47. *Id.*

usual admiralty remedies with state wrongful death damages, including loss of society and other non-pecuniary measures.<sup>48</sup> Most courts had not recognized these damages for a general maritime wrongful death action.<sup>49</sup>

The Yamaha Corporation (Yamaha) argued that admiralty jurisdiction mandated federal liability standards and exclusively federal remedies.<sup>50</sup> According to Yamaha, the general maritime wrongful death action brought by the Calhouns was defined in *Moragne v. State Marine Lines, Inc.*,<sup>51</sup> which limited the Calhouns to only pecuniary losses.<sup>52</sup> The district court, ruling on a motion for partial summary judgment, held that application of state damage measures was inappropriate in light of *Moragne*.<sup>53</sup> However, contrary to the established law in several circuits,<sup>54</sup> the district court held that *Moragne* allowed the decedent's family to recover for their loss of society, support, and services.<sup>55</sup> Both parties appealed to the Third Circuit.<sup>56</sup>

The Court of Appeals determined that the district court had erred in concluding that federal law pre-empted state remedies and reversed on that basis.<sup>57</sup> After evaluating *Moragne* and its preceding cases, the Third Circuit held that *Moragne* represented an extension of remedies, not a reduction, because it created a remedy that had not previously existed.<sup>58</sup> They held, therefore, that it would run counter to the spirit of *Moragne* to find that general maritime wrongful death actions exclude more generous state remedies.<sup>59</sup> Yamaha appealed.<sup>60</sup>

The U.S. Supreme Court agreed with the Third Circuit and held that the Calhouns could recover damages allowed by Pennsylvania's

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48. *Id.*

49. *See infra* note 130 and accompanying text.

50. *Yamaha*, 116 S. Ct. at 622.

51. 398 U.S. 375 (1970).

52. *Yamaha*, 116 S. Ct. at 622. Pecuniary losses are those that are directly compensatory in nature. These include loss of future earnings, loss of nurture for children, funeral and hospital expenses, pre-death pain and suffering, and, in a narrowing number of jurisdictions, loss of inheritance. Non-pecuniary damages are repayments for losses that are more difficult to measure, such as loss of society, loss of consortium, and, increasingly, loss of inheritance. Speiser, *supra* note 28, at 113–15.

53. *Yamaha*, 116 S. Ct. at 622.

54. *See infra* note 123 and accompanying text.

55. *Yamaha*, 116 S. Ct. at 622.

56. *Id.*

57. *Yamaha Motor Corp. v. Calhoun*, 40 F.3d 622, 625 (1994), *aff'd*, 116 S. Ct. 619 (1996).

58. *Id.* at 642.

59. *Id.*

60. *Yamaha*, 116 S. Ct. at 623.



wrongful death statute to supplement federal remedies available under admiralty law.<sup>61</sup> The Court first determined that there was federal maritime jurisdiction because the case involved a watercraft collision on navigable waters.<sup>62</sup> Then, after tracing the history of maritime wrongful death actions in the Court's jurisprudence, a unanimous Court held that the plaintiffs were still allowed to pursue state wrongful death remedies if such remedies were available.<sup>63</sup>

In reaching this conclusion, the Court examined the uniformity concerns that had informed its decisions in several other cases, including *Moragne*. The Court determined that these cases concerned the availability of a maritime remedy, not the type of remedy available for non-seamen.<sup>64</sup> The Court thus dismissed Yamaha's argument that the damage to the uniformity of maritime law caused by the application of state remedies to a general maritime wrongful death action should be the deciding factor in the case.<sup>65</sup>

Having determined that a desire for uniformity would not direct their decision about whether state remedies would be available to supplement federal remedies for torts occurring in state waters, the Court then considered whether state remedies were pre-empted by federal law.<sup>66</sup> It reasoned that the *Moragne* Court had not prescribed a comprehensive tort recovery scheme like Congress had with the Jones Act and DOHSA. Therefore, *Moragne* did not pre-empt the procedure of tacking state damage calculations onto federal ones in state territorial waters.<sup>67</sup> Additionally, the Court held that *Moragne* was an extension of maritime remedies, not a restriction; thus, it decided it would be against the spirit of *Moragne* to use that holding to restrict the remedies available to the plaintiff.<sup>68</sup> For these reasons, the Court concluded that state remedies were available to supplement federal remedies if a plaintiff chose to pursue them.<sup>69</sup>

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61. *Id.* at 629.

62. *Id.* at 623.

63. *Id.* at 629.

64. *Id.* at 627-28.

65. *Id.* at 626.

66. *Id.* at 628.

67. *Id.*

68. *Id.* at 627.

69. *Id.* at 629.

## III. CHOICE-OF-LAW ANALYSIS—STATE OR FEDERAL LAW?

The *Yamaha* Court erred in determining both that *Moragne* was not intended as the sole basis for tort recovery for the families of non-seamen killed in a state's territorial waters and that plaintiffs may look to state remedies to supplement admiralty damage measures. If the Court had more thoroughly examined the modes of analyses federal courts have employed to resolve choice-of-law questions, it would have found that state law was pre-empted by federal law. This section examines several traditional factors in choice-of-law analysis and applies them to the facts in *Yamaha* to demonstrate that the Court erred in finding that state wrongful death recoveries may supplement those remedies available through federal law.

A. *Choice of Law Analysis and Its Application in Yamaha*

State law may apply in an admiralty context when it does not displace any significant federal interests. Thus, if local interests predominate over federal interests, state law governs. Courts have employed various modes of analysis to determine if state interests predominate. Two of these modes are especially applicable to the facts in *Yamaha*.<sup>70</sup> First, courts often examine whether the state law to be applied would supplement, but not contradict, an admiralty rule that constitutes a pervasive system.<sup>71</sup> If the admiralty rule in question is meant to be a pervasive system, and the state law sought to be applied contradicts the federal rule, then the state law is pre-empted.<sup>72</sup> Second, courts often attempt to determine whether the uniformity of maritime law is crucial in an area where state law might

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70. There are additional factors that courts often examine. These include whether the state law to be applied is substantive rather than procedural and whether the area of law is one in which the outcome should be predictable and thus could be relied upon in determining primary conduct. *American Dredging Co. v. Miller*, 510 U.S. 443, 453 (1994). Due to the limitations of this Note, a discussion of these tests is omitted; however, it is this author's opinion that these tests would result in the application of federal law. The remedy available for a cause of action is certainly substantive law. Additionally, maritime tort is an area in which the outcome of one's actions should be predictable, which would also call for the application of federal law. The importance of outcome predictability is discussed *infra* at part IV.C. For a list of other tests that have been put forth, but have been found lacking, see Robertson, *supra* note 37, at 338–46.

71. *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 373–74 (1959); see also *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973); *Steelmet, Inc. v. Caribe Towing Corp.*, 779 F.2d 1485, 1488 (11th Cir. 1986); *Stanton v. Bayliner Marine Corp.*, 123 Wash. 2d 64, 83, 866 P.2d 15, 25 (1994); see also Robertson, *supra* note 37, at 328.

72. *Romero*, 358 U.S. at 375.

apply.<sup>73</sup> If uniformity is important, then federal law must control to the exclusion of state law. An examination of *Yamaha* in light of the well-accepted factors described above, but not mentioned in the *Yamaha* opinion, reveals that the Court erred in allowing state remedies to supplement federal general maritime law wrongful death recoveries as defined by *Moragne*.

### B. *Choice-of-Law Questions in Maritime Wrongful Death Context*

The U.S. Supreme Court has looked at the interplay between state and federal law in a wrongful death context in past cases, where it has supplied hints as to some of the federal interests that would pre-empt state law. These cases provide the fabric from which the *Yamaha* Court wove its flawed determination that state law could supplement the federal remedies applicable to a federal general maritime law wrongful death action.

One early case that considered this interplay was *The Harrisburg*.<sup>74</sup> In that case the U.S. Supreme Court held that because the majority of states did not have wrongful death laws, a federal court sitting in admiralty would not recognize a wrongful death action.<sup>75</sup> Many courts subsequently balked at the harshness of this rule. They were particularly concerned with the potential unfairness caused by the possibility that a shipowner liable for someone's death might be less harshly punished than one who merely caused an injury.<sup>76</sup> As a result, courts began applying state wrongful death law to supplement admiralty law where the state in question had a wrongful death statute.<sup>77</sup> This practice continued until the U.S. Supreme Court recognized a strict liability cause of action at admiralty for certain kinds of harms.<sup>78</sup> In the waters of those states with wrongful death laws that did not recognize a strict liability cause of action, however, some individuals were again left without all the causes of action otherwise available to them. This gap in wrongful death recovery became especially troublesome after 1959, when the U.S. Supreme Court decided that lower courts applying a state's wrongful

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73. See 1 Friedell, *supra* note 4, § 112; see also *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 216 (1917).

74. 119 U.S. 199 (1886).

75. See *id.* at 213–14.

76. See *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 395 (1970).

77. See *Norris*, *supra* note 30, § 6:2; see also *Yamaha Motor Corp. v. Calhoun*, 116 S. Ct. 619, 624 (1996).

78. See *supra* note 38 and accompanying text.

death statute in admiralty had to apply that state's liability determination as well as its applicable damage equations.<sup>79</sup>

It was against this backdrop that the U.S. Supreme Court decided *Moragne v. States Marine Lines, Inc.*,<sup>80</sup> which created a maritime law wrongful death action applicable to non-seamen killed within a state's three-mile wide territorial sea.<sup>81</sup> The Court concluded that the justification for *The Harrisburg* had become null and void and that it should be overruled.<sup>82</sup> To reach this conclusion, the Court looked at congressional intent in enacting DOHSA and the Jones Act as well as existing state law. As a result, the Court determined that the vast majority of jurisdictions had adopted a wrongful death statute, and that Congress had expressed a willingness to recognize wrongful death actions through DOHSA and the Jones Act. The Court then accordingly filled the gap left by DOHSA and created a general maritime law wrongful death action that could be applied within each state's three-mile territorial sea.<sup>83</sup>

Three important cases that outlined wrongful death jurisprudence in the admiralty courts followed *Moragne*. The first such case was *Mobil Oil Co. v. Higginbotham*.<sup>84</sup> There, oil workers were killed on the high seas in a helicopter crash en route to an offshore oil platform.<sup>85</sup> Their widows attempted to supplement tort damages available through DOHSA with the federal remedy created in *Moragne*.<sup>86</sup> The Court held that, if a death occurred on the high seas, only DOHSA would apply because of congressional intent that DOHSA create the sole remedy for survivors of non-Jones Act seamen killed through another's negligence on the high seas.<sup>87</sup> *Higginbotham* thus clarified that *Moragne* did not create legal rights for a non-seaman outside of a state's territorial seas.<sup>88</sup>

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79. See *The Tungus v. Skovgaard*, 358 U.S. 588, 592 (1959) (holding that when admiralty court is applying state law, it is not creating general maritime law and is therefore not free to apply only remedy or standard of liability; holding instead that it must apply law as whole, meaning that admiralty court could not apply state remedy to admiralty unseaworthiness strict-liability action).

80. 398 U.S. 375 (1970).

81. *Id.* at 409.

82. *Id.* at 388, 409.

83. *Id.* at 409.

84. 436 U.S. 618 (1978).

85. *Id.* at 619.

86. *Id.* at 625.

87. *Id.* As discussed above, DOHSA provides a remedy for those killed on the high seas. The Jones Act provides remedies for seamen who are injured while in the service of their employer. See *supra* notes 31–36 and accompanying text.

88. *Mobil Oil*, 436 U.S. at 625.

The second important case was *Offshore Logistics, Inc. v. Tallentire*.<sup>89</sup> In that case, the widows of two oil workers killed on an oil platform on the high seas outside of Louisiana's territorial waters attempted to recover damages through Louisiana's state wrongful death statute.<sup>90</sup> The Court held that a plaintiff could not recover via a state wrongful death statute when the death occurred on the high seas because outside the state seas, only DOHSA may apply.<sup>91</sup> In so holding, the Court found that section 7 of DOHSA, which provides that any provisions of any state statute should not be affected by the act,<sup>92</sup> was to be interpreted only as a clause allowing states to apply their wrongful death statutes within their territorial waters.<sup>93</sup> Section 7, it held, was not meant to give state law preclusive effect.<sup>94</sup> The Court concluded, therefore, that because Congress intended DOHSA to apply to deaths occurring on the high seas, state wrongful death statutes could not have any effect on the law outside of the states' territorial seas.<sup>95</sup>

Finally, in *Miles v. Apex Marine Corp.*,<sup>96</sup> the Court held that wrongful death damages under *Moragne* were limited to pecuniary damages only.<sup>97</sup> The opinion was based, in part, on Congress's intent, as expressed in DOHSA and the Jones Act, to limit the damages recoverable to pecuniary losses.<sup>98</sup> The Court also wanted to provide a uniform remedy for all maritime wrongful death actions.<sup>99</sup>

These cases form the bulwark of the U.S. Supreme Court's case law regarding maritime wrongful death actions and their interaction with state wrongful death statutes. In all of these cases, the Court addressed the concept of uniformity to some extent, whether acknowledging its importance, or explaining why it was not applicable to the facts. For example, *Miles* illustrates that the concept of uniformity of maritime law can be a controlling federal interest that may pre-empt state law.<sup>100</sup> Congressional intent to create a pervasive system of recoveries at

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89. 477 U.S. 207 (1986).

90. *Id.*

91. *Id.* at 231-32.

92. 46 U.S.C. § 767 (1995).

93. *Offshore Logistics*, 477 U.S. at 220-21.

94. *Id.*

95. *Id.* at 232.

96. 498 U.S. 19 (1990).

97. *Id.*

98. *Id.* at 31-32.

99. *Id.*

100. *Id.* at 33.

admiralty also might elevate federal law over state law.<sup>101</sup> The traditional modes of analysis used to determine if state law is applicable reflect these concerns and demonstrate that the *Yamaha* Court misread and unduly minimized federal interests in determining that state law applied.

C. *Moragne Articulates a Pervasive System of Wrongful Death Actions That Pre-empts State Laws*

State law may be applied if it supplements, but does not contradict, an admiralty rule that does not constitute a pervasive system.<sup>102</sup> In *Yamaha*, the Court ignored Congress's intent in passing DOHSA and the Court's past jurisprudence when it determined that *Moragne* was not meant to establish a pervasive system of recoveries.<sup>103</sup> Additionally, state remedies contradict established maritime law because admiralty law has already set forth the applicable remedies. Therefore, the *Yamaha* Court erred in allowing the plaintiffs to recover state remedies in addition to the federal recoveries defined in *Moragne*.

1. *The Yamaha Court Erred by Determining that Moragne Does Not Constitute a Pervasive System*

Contrary to the findings of *Yamaha*, the wrongful death cause of action created in *Moragne* excludes state causes of action. When the Court created a general maritime law wrongful death action, it intended to create a pervasive system, one that was not meant to be supplemented by state law. The *Moragne* Court suggested that lower courts interpreting this newly created general maritime law wrongful death action should consult maritime personal injury law to fill the necessary gaps.<sup>104</sup> Additionally, section 7 of DOHSA does not support the position that the *Moragne* action was meant to coexist with state law, as asserted by the *Yamaha* Court.<sup>105</sup> Therefore, state damages should have been pre-empted by the general maritime wrongful death action.

If the facts of *Yamaha* arose under maritime personal injury law, state law would have been pre-empted, and the general maritime law would have constituted the only scheme of recovery. In a maritime personal

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101. *Mobil Oil Co. v. Higgenbotham*, 436 U.S. 618, 625 (1978).

102. *See supra* notes 71–72 and accompanying text.

103. *Yamaha Motor Corp. v. Calhoun*, 116 S. Ct. 619, 628 (1996).

104. *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 405–06 (1970).

105. *See infra* notes 115–121 and accompanying text.

injury case, federal courts create federal common law by adopting rules and precedents based on particular state laws or general trends in the legal system. Once adopted, the borrowed law becomes binding as federal general maritime law in that circuit.<sup>106</sup> Because the new law becomes precedent, any conflicting law in that circuit that might have previously applied is pre-empted to the extent that it conflicts with the new law.<sup>107</sup>

According to the *Moragne* Court, the general maritime wrongful death action it created was to develop similarly.<sup>108</sup> As the *Moragne* action was interpreted and clarified by the courts, they adopted pieces of state law, including damages, as federal law.<sup>109</sup> When a court defined one of the elements of the general maritime law wrongful death action, conflicting state law in that circuit was pre-empted.<sup>110</sup> Many courts interpreted *Moragne* as limiting damages to pecuniary damages.<sup>111</sup> This limitation then pre-empted all non-pecuniary damages, both state and federal, in that circuit. The U.S. Supreme Court in *Yamaha*, however, ignored the decisions of the lower courts and mistakenly concluded that non-pecuniary damages were not pre-empted.

In addition, the *Yamaha* Court also misunderstood and misapplied the reasoning behind section 7 of DOHSA. The *Yamaha* Court read this section as evidence that Congress intended to allow state law to supplant federal law in admiralty jurisdiction, not just to fill the holes left by federal maritime laws.<sup>112</sup> Thus, the Court held that section 7 was specifically designed to prevent DOHSA from applying in state waters.<sup>113</sup> The Court reasoned that, because Congress did not pre-empt state law in the state's territorial seas when it had the opportunity, state damages were still available to the plaintiffs in *Yamaha*.<sup>114</sup>

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106. See Schoenbaum, *supra* note 19, at 123; see also Robertson, *supra* note 37, at 362-63.

107. See Schoenbaum, *supra* note 19, at 123.

108. *Moragne*, 398 U.S. at 405-06.

109. See *Mobil Oil Co. v. Higgenbotham*, 436 U.S. 618, 621-22 (1978) (describing evolution of wrongful death action); see also *Sea-Land Serv., Inc. v. Gaudet*, 414 U.S. 513, 584 (1974) (allowing for recovery of loss of society under *Moragne* action). It is important to note that *Gaudet* has been severely limited and is applicable only to longshoremen. See *Miles v. Apex Marine Corp.*, 498 U.S. 19, 31 (1990).

110. See *East River S.S. Corp. v. Transamerica DeLeval, Inc.*, 476 U.S. 858, 864-65 (1986) ("Drawn from state and federal sources, the general maritime law is an amalgam of traditional common law rules, modifications of those rules, and newly created rules.").

111. See *infra* note 130 and accompanying text.

112. *Yamaha Motor Corp. v. Calhoun*, 116 S. Ct. 619, 628 (1996).

113. *Id.*

114. *Id.*

The U.S. Supreme Court's logic, however, fails to take into account the circumstances surrounding the passage of DOHSA, especially the time during which it was passed. When Congress approved DOHSA in 1920, maritime law still strained under the yoke of *The Harrisburg*, which did not recognize a general maritime law wrongful death action.<sup>115</sup> Congress altered this situation by passing DOHSA, but it wished to preserve state recoveries for wrongful death actions brought on behalf of non-seamen killed on the states' territorial seas. It therefore added section 7, which was meant to allow states to provide a cause of action where federal law was not applicable.<sup>116</sup> Congress enacted section 7 to avoid the confusion of creating a new system of recovery when the ad hoc system developed by many federal admiralty courts of applying state wrongful death remedies in territorial waters was already operating smoothly.<sup>117</sup>

In determining that section 7 of DOHSA supported its position, the *Yamaha* Court failed to look at the legislative history and the arguments supporting section 7 when it was proposed. The original draft of section 7 stated that "the provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this Act as to causes of action accruing within the territorial limits of any State."<sup>118</sup> When section 7 was enacted, however, this phrase was missing, implying that Congress intended to exclude the application of all state laws once the federal courts had granted admiralty jurisdiction.<sup>119</sup> In fact, courts continued to supplement the general maritime law with state law until the Court's decision in *Mahnich v. Southern S.S. Co.*<sup>120</sup> recognized a strict liability cause of action, creating several contradictions with state wrongful death statutes. Soon thereafter, the U.S. Supreme Court realized the necessity of recognizing a maritime wrongful death action to provide a remedy to those who, because of the strict liability unseaworthiness cause of action recognized in *Mahnich*, were now being denied a recovery otherwise available. Thus, in *Moragne*, the Court recognized a federal general maritime wrongful death action.<sup>121</sup>

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115. 119 U.S. 199, 213 (1886).

116. See 46 U.S.C. § 767 (1995).

117. *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 397-98 (1970).

118. 59 Cong. Rec. 4482 (1920).

119. See 46 U.S.C. § 767.

120. 321 U.S. 96, 100-01 (1944).

121. See *Moragne*, 398 U.S. at 409.



Many lower courts also believed that section 7 was intended to continue to allow a state remedy only until a federal one was provided. Therefore, most of these jurisdictions held that when the general maritime law action was recognized, state law should have been preempted.<sup>122</sup> Many of these jurisdictions explicitly stated that the reasoning of section 7 had become moot, and the section, thus, no longer was persuasive.<sup>123</sup>

The *Moragne* Court itself looked at the congressional debate surrounding section 7 of DOHSA to determine if Congress had provided a guide as to when federal or state law should apply in a wrongful death context. The Court's examination revealed that Congress passed section 7 to preserve state wrongful death causes of action in admiralty within the states' territorial seas. The Court reasoned that in so doing, Congress was attempting to avoid complicating its newly created admiralty system of recoveries by continuing to allow states to enforce their wrongful death laws within their territorial seas.<sup>124</sup> In reaching this conclusion, the Court determined that a discussion of DOHSA on the floor of the House revealed a concern that a DOHSA cause of action only be provided in cases where there was not a remedy, which meant deaths outside of the state's territorial seas.<sup>125</sup> Thus, the *Moragne* Court believed that section 7 of DOHSA was meant only to ensure that states that were already applying their wrongful death statutes in their territorial waters could continue to do so.<sup>126</sup>

The *Moragne* Court, when it created a general maritime wrongful death action, recognized why Congress had reserved the territorial seas for state actions. However, because *Mahnich* created a gap in the Court's system of recovery for wrongful death, it became necessary to create a new cause of action.<sup>127</sup> The system that had been running smoothly since

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122. See, e.g., *Kelly v. Panama Canal Comm'n*, 26 F.3d 597, 601-02 (5th Cir. 1994); *Walker v. Braus*, 995 F.2d 77, 82 (5th Cir. 1993); see also *infra* note 123 and accompanying text.

123. See, e.g., *Preston v. Frantz* 11 F.3d 357, 358 (2d Cir. 1993), cert. dismissed, 115 S. Ct. 31 (1994); *Nelson v. United States*, 639 F.2d 469, 473 (9th Cir. 1980); *Spiller v. Thomas M. Lowe, Jr. & Assocs.*, 466 F.2d 903, 906 (8th Cir. 1972); *Shield v. Bayliner Marine Corp.*, 822 F. Supp. 81, 82-83 (D. Conn. 1993); *Anderson v. Whittaker Corp.*, 692 F. Supp. 764, 771-73 (W.D. Mich. 1988), *aff'd in part, rev'd in part on other grounds*, 894 F.2d 804 (6th Cir. 1990); *Gilmore v. Witschorek*, 411 F. Supp. 491, 494 (E.D. Ill. 1976). But see *Sutton v. Earles*, 26 F.3d 903, 917 (9th Cir. 1994) (holding that because *Gaudet* is still applicable to non-seamen, loss of society damages are still available).

124. *Moragne*, 398 U.S. at 397.

125. *Id.*; see also *Offshore Logistics Inc. v. Tallentire*, 477 U.S. 207, 225, 228 (1986).

126. *Moragne*, 398 U.S. at 398.

127. See *supra* notes 38-39 and accompanying text.

1920—the one that section 7 had been designed to preserve—had become outdated. Thus, the Court made Congress's original rationale in passing section 7 of DOHSA moot by creating a new system of recoveries to replace the old one. The *Yamaha* Court's reliance on this section for its assertion that state law was preserved even after *Moragne* was therefore misplaced.

Because Congress included section 7 of DOHSA to preserve state wrongful death actions where there was no remedy at the time, the *Yamaha* Court erred in viewing it as evidence that Congress intended to allow state law to supplant federal maritime law. Furthermore, the language of *Moragne* indicates that when the lower courts decided what damages were available under the general maritime wrongful death action, other conflicting damages were precluded. Therefore, in light of the legislative history of DOHSA, the *Moragne* Court's own view of the extent of the problem it was correcting, and the Court's opinion as to how the wrongful death action it had recognized should be developed, the *Yamaha* Court erred in finding that *Moragne* did not constitute a pervasive system of recovery.

## 2. *Yamaha Remedies Contradict Established Admiralty Law*

Not only did *Moragne* create a pervasive federal system of recovery, state law contradicts, rather than supplements, the federal standard. Therefore, under a traditional choice-of-law analysis, state law should have been pre-empted.

Some state wrongful death statutes, including Pennsylvania's, allow for recovery of non-pecuniary damages such as loss of society and punitive damages.<sup>128</sup> However, the U.S. Supreme Court in *Miles v. Apex Marine Corp.*<sup>129</sup> specifically held that a wrongful death plaintiff could only recover pecuniary damages through the general maritime law wrongful death action because non-pecuniary damages, even in a *Moragne* action, were inconsistent with the Jones Act. Several lower courts have viewed *Miles* as precluding non-pecuniary damages for *Moragne* actions brought by non-seamen, as these damages would be

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128. 42 Pa. Cons. Stat. Ann. § 8301 (West 1992); see also *Altamuroj v. Milner Hotel, Inc.*, 540 F. Supp. 870, 878–79 (E.D. Pa. 1982) (holding that Pennsylvania statute allows for recovery of loss of society). For other state wrongful death statutes, see Speiser, *supra* note 28.

129. 498 U.S. 19, 31–32 (1990). The Jones Act only allows seamen to recover pecuniary damages. Because the plaintiff was a seaman, the Court held that he was limited to pecuniary damages even under the general maritime law.

inconsistent with the damages generally allowed at admiralty.<sup>130</sup> Thus, courts that would apply a state remedy allowing for non-pecuniary damages are not supplementing federal law, but are providing an entirely different, contradictory scheme of recovery. The *Yamaha* Court incorrectly took a different position and held that a non-seaman plaintiff who is bringing a wrongful death claim from an accident in territorial waters may choose to seek either state or federal recovery schemes depending, most likely, on whichever are more beneficial to the plaintiff.<sup>131</sup>

As discussed above, *Moragne* was meant to constitute a pervasive scheme of recovery, despite the *Yamaha* Court's assertion that section 7 of DOHSA evidenced an intent to allow state law to apply in the states' territorial seas. Additionally, state non-pecuniary damages contradict, not supplement federal law. Therefore, according to traditional choice-of-law standards applied by admiralty courts to determine whether state or federal law should apply in a maritime wrongful death context, federal law should have controlled in *Yamaha*.

#### D. *The Yamaha Decision Wrongfully Assaults the Needed Uniformity of Maritime Law*

A second major factor that courts have weighed to determine whether state or federal law should apply is whether the uniformity principle of admiralty law is crucial to achieving the goals of maritime commerce.<sup>132</sup> The *Yamaha* Court misinterpreted previous cases in finding that the uniformity concerns enunciated earlier in the jurisprudence of the Court were of a different magnitude than those presented by the facts in *Yamaha*. Specifically, the Court erred in holding that the uniformity of

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130. See *Wahlstrom v. Kawasaki Heavy Indus., Ltd.*, 4 F.3d 1084, 1092 (2d Cir. 1993) (holding that "overwhelming" majority of courts are against allowing for loss of society damages for wrongful death action); see also *Nichols v. Petroleum Helicopters, Inc.*, 17 F.3d 119, 122-23 (5th Cir. 1994); *Miles v. Melrose*, 882 F.2d 976, 987-89 (5th Cir. 1989), *aff'd sub nom.* *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990); *Anderson v. Whittaker Corp.*, 692 F. Supp. 764, 770-72 (W.D. Mich. 1988); *Robertson*, *supra* note 37, at 372 (stating that although great weight of authority refuses to grant loss of society damages under general maritime law wrongful death action, issue not completely settled).

131. See *Yamaha Motor Corp. v. Calhoun*, 116 S. Ct. 619, 628-29 (1996).

132. Although the uniformity argument will be extensively addressed in part III, it is necessary in this section briefly to address uniformity so as to refute the assertion in *Yamaha* that uniformity is not a major concern in the area of maritime wrongful death remedies. This section will address the value of the uniformity of maritime law, whereas part III will assume this value because of its prominence in the Court's decisions on jurisdiction and point out the contradiction between the sudden de-emphasis of uniformity in *Yamaha* and the Court's expanded tests for jurisdiction.

remedies is not as important as the uniform availability of a cause of action. Because uniformity of remedies in maritime tort law is crucial, and because the Court misread past jurisprudence, the Court erred in finding that state law could still supplement the general maritime law wrongful death action created in *Moragne*.

There is a great need for uniformity in the context of maritime law, particularly in maritime tort law or other areas where foreign commerce may regularly be affected.<sup>133</sup> Such uniformity is important because foreign commerce interests need to be able to act with a degree of certainty when shipping goods to and from the United States. In fact, this need originally inspired the decision to confer federal jurisdiction in admiralty causes of action.<sup>134</sup> The uniformity of maritime tort law continues to be instrumental in ensuring that vessel operators can predict the consequences of their conduct through adherence to uniform rules of conduct enforced through a uniform system of remedies.<sup>135</sup>

Although the *Yamaha* Court acknowledged that uniformity was an important factor to be weighed in a choice-of-law analysis, it found that the uniformity concerns presented by the case were both different in nature and less important than those discussed in *Moragne* and other cases.<sup>136</sup> According to the Court, the earlier concerns addressed by these cases centered around whether or not a cause of action was available, not which remedies were available.<sup>137</sup> This is an incorrect analysis of the Court's maritime wrongful death jurisprudence. Commentators have argued that determining what remedy is available is just as important as whether a remedy is available at all, as it is the remedy that often creates the deterrence upon which actors base their conduct.<sup>138</sup> By narrowly reading *Moragne* and its progeny, the *Yamaha* Court failed to consider the important reasons why the Court's prior cases were concerned about

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133. *The Lottawanna*, 88 U.S. 558, 575 (1874); see also *American Dredging Co. v. Miller*, 510 U.S. 443, 458 (1994) (Souter, J., concurring) (discussing importance of federal maritime law in maintaining free flow of maritime commerce).

134. See *supra* notes 16–20 and accompanying text.

135. See, e.g., *Miles*, 498 U.S. at 31–36; *Offshore Logistics Inc. v. Tallentire*, 477 U.S. 207, 230 (1986); *Moragne v. States Marine Lines*, 398 U.S. 375, 401 (1970).

136. *Yamaha*, 116 S. Ct. at 626.

137. *Id.*

138. See Richard A. Posner, *Tort Law: Cases and Economic Analysis* 121 (1982) (“The threat of having to pay heavy damages will reduce the incidence of tortious conduct, and so increase social welfare.”).

uniformity in the first instance: a desire to create a system where shipowners could predict the consequences of their actions.<sup>139</sup>

*Mobil Oil Corp. v. Higginbotham*<sup>140</sup> provides the only jurisprudential support the *Yamaha* Court could have drawn upon for its position that uniformity is not of primary magnitude in maritime wrongful death choice-of-law decisions. A closer examination, however, reveals that the reasoning in *Higginbotham* is inapplicable to *Yamaha*. In *Higginbotham*, the Court held that, even though its decision that DOHSA plaintiffs were limited to non-pecuniary damages would hurt the uniformity of maritime law,<sup>141</sup> uniformity must be superseded by clear congressional intent.<sup>142</sup> *Yamaha*, by contrast, did not involve a congressional act, but rather common law in the form of the judicially-created general maritime law wrongful death action.<sup>143</sup> In *Yamaha*, there was no will of Congress to override the recognized need for uniformity of admiralty law, and thus the logic behind *Higginbotham* was inapplicable.

*Higginbotham* not only fails to support the *Yamaha* Court's position, it directly contradicts the *Yamaha* reasoning for de-emphasizing uniformity. *Yamaha* drew a distinction between ensuring the uniformity of remedies and ensuring the uniform availability of an action.<sup>144</sup> In an important footnote in *Higginbotham*, Justice Stevens, writing for the majority, reasoned that "[w]hen *Moragne* was decided, fatal accidents on the high seas had an adequate federal remedy, while the same accidents nearer shore might yield *more generous awards*, or none at all, depending on the law of the nearest state."<sup>145</sup> The *Higginbotham* Court was thus cognizant of the importance of uniform awards, including their size and kind. *Moragne*, according to Justice Stevens's footnote, was designed to provide a uniform system of *awards*, none more generous than the other, even though in *Higginbotham* this uniformity had been subordinated to congressional intent. The logic behind Stevens's footnote thus contradicts the *Yamaha* Court's conclusion that the uniformity of remedies is of a different magnitude than the uniform availability of a cause of action.

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139. See *supra* notes 16–20 and accompanying text.

140. 436 U.S. 618 (1978).

141. This is because, at that time, the general maritime law wrongful death action recognized some pecuniary damages that have since been limited by most courts. See *supra* note 109 and accompanying text.

142. *Higginbotham*, 436 U.S. at 624.

143. See *Yamaha Motor Corp. v. Calhoun*, 116 S. Ct. 619, 628 (1996).

144. *Id.* at 626.

145. *Higginbotham*, 436 U.S. at 624 n.18 (emphasis added).

The importance of uniform remedies was further emphasized by the U.S. Supreme Court in *Miles v. Apex Marine Corp.*<sup>146</sup> In that case, the uniformity of admiralty law was the cornerstone of the Court's decision to limit *Moragne* plaintiffs to pecuniary damages so that they could only have the same remedies available to Jones Act or DOHSA plaintiffs.<sup>147</sup> It seems unlikely that the uniformity concerns expressed only five years ago in *Miles* have eroded to the degree expressed by the Court in *Yamaha*.<sup>148</sup>

Nor should Congress's unseized opportunity to grant an exclusive cause of action to *Moragne* plaintiffs when it passed DOHSA and the Jones Act be determinative of whether Congress has spoken as to the importance of uniformity in the area of maritime wrongful death. Although Congress could have created a cause of action for non-seamen injured in the states' territorial seas when it passed DOHSA in 1920, such action was not necessary.<sup>149</sup> The lower courts had devised their own system of recoveries using state wrongful death statutes, and Congress was willing to let that system stand as long as the system provided a recovery for every individual.<sup>150</sup> Congress did not want to create a uniform system of recoveries because the bifurcated system that allowed states to apply their wrongful death statutes in their territorial seas functioned fairly and consistently until *Mahnich* was decided. Therefore, although Congress could have created a uniform system for maritime wrongful death when it passed DOHSA, its failure to do so should not be viewed as proof that Congress believed that the uniformity of maritime tort law was not of vital importance.

Finally, the Court's decision regarding uniformity also contradicts the trend in lower courts' decisions regarding maritime wrongful death based on the U.S. Supreme Court's earlier insistence on a uniform maritime

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146. 498 U.S. 19 (1990).

147. *Id.* at 31–36.

148. *See Yamaha*, 116 S. Ct. at 628 (citing *Miles* for proposition that where Congress has mandated scheme of recovery, it cannot be expanded upon).

149. *See Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 397–98 (1970). The Court stated that:

Congress, in acting to fill [the void created by a lack of a federal wrongful death statute], legislated only to the three-mile limit because that was the extent of the problem. The express provision that state remedies in territorial waters were not disturbed by the Act ensured that Congress' solution of one problem would not create another.

*Id.*

150. *See supra* note 35 and accompanying text.

law.<sup>151</sup> Although the U.S. Supreme Court is in no way bound to follow the lower courts, it is important to note the unanimity with which the lower courts responded to what they perceived as an emphasis on uniformity of maritime law. Because the U.S. Supreme Court had emphasized uniformity again and again in its prior decisions in maritime tort, the lower courts understandably came to accept this as a motivating factor in their decisions.<sup>152</sup>

The Court's departure from these uniformity principle concerns in *Yamaha* is not supported in its previous jurisprudence, including *Higginbotham*, nor is it the result of the presence of congressional intent to de-emphasize uniformity for another purpose. Rather, the *Yamaha* Court's decision that uniformity was not an important factor was motivated by an unwarranted distinction between the availability of remedies and the availability of a cause of action. Because both remedial and jurisdictional uniformity are crucial to maritime law wrongful death actions, federal law, not state law, should have provided the sole remedy to the Calhouns.

The availability of state law is inappropriate in *Yamaha* and cases like it, even to supplement federal recoveries. The *Moragne* recovery was meant to be a pervasive system at the time it was decided. Furthermore, state law supplants, rather than supplements, federal law because state law may allow for pecuniary damages, which are not allowed in any wrongful death recovery at maritime law. Therefore, under well-established standards, state law should not apply in this case. The *Yamaha* Court created dubious and problematic precedent by finding that state law was still applicable, especially when confronted with the conflict that comes from granting admiralty jurisdiction without applying federal maritime law.

#### IV. GRANTING ADMIRALTY JURISDICTION BUT NOT APPLYING SUBSTANTIVE MARITIME LAW CREATES UNRESOLVABLE CONFLICT

By deciding that there was not enough federal interest to provide a uniform federal remedy, but that there was enough federal interest to

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151. See *supra* note 133 and accompanying text.

152. For an excellent example of a lower court's reasoning in finding the uniformity principle essential in a clash between state and federal remedies, see *Wahlstrom v. Kawasaki Heavy Indus., Ltd.*, 4 F.3d 1084, 1090 (2d Cir. 1993) (holding that *Moragne* addressed specific issue of what remedies available at admiralty, and limiting plaintiff to federal non-pecuniary damages).

sustain federal jurisdiction, the *Yamaha* Court created a contradiction. The underlying reason for establishing maritime jurisdiction is to provide a uniform set of laws to encourage foreign commerce.<sup>153</sup> In response, courts have expanded federal admiralty jurisdiction to cover any situation where maritime commerce is likely to be disrupted.<sup>154</sup> This interest in uniformity, however, is not served by the Court's decision to allow plaintiffs to pursue state remedies in situations such as those in *Yamaha*.

A. *Review of Admiralty Jurisdiction*

Admiralty tort jurisdiction was originally established to provide a uniform set of rules to encourage a fledgling maritime commercial industry.<sup>155</sup> The federal government realized that it needed to provide a consistent code of conduct for maritime commerce so that merchants could accurately predict the consequences of their actions while in the territorial waters of the United States.<sup>156</sup>

Admiralty courts in the United States traditionally looked to the location where a tort occurred to determine whether federal courts would have jurisdiction over the matter.<sup>157</sup> However, as time progressed, the Court realized that more factors were needed in the test to reflect proper federal interests in resolving maritime controversies. Thus, its test for jurisdiction slowly evolved, although until 1970 maritime tort jurisdiction was still mostly based on the location of the tort.<sup>158</sup>

The Court began to add other major factors to the "location test" because of the evolution of varying forms of transportation, including airline travel and pleasure boating. The first major change in the Court's jurisdictional test came in *Executive Jet Aviation, Inc. v. City of Cleveland*.<sup>159</sup> In that case, a plane crashed into Lake Erie shortly after takeoff.<sup>160</sup> The U.S. Supreme Court held that, in order for there to be admiralty jurisdiction, the actions in question must relate in some way to

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153. See *supra* notes 16–20 and accompanying text.

154. See *Sisson v. Ruby*, 497 U.S. 358, 365 (1990).

155. 1 Friedell, *supra* note 4, § 105 (1996).

156. See *supra* notes 16–17 and accompanying text.

157. See *supra* note 19 and accompanying text.

158. See *supra* notes 18–22 and accompanying text.

159. 409 U.S. 249 (1972).

160. *Id.* at 250.



traditional maritime activity, as well as occur on navigable waters.<sup>161</sup> The test was further modified in *Foremost Insurance Co. v. Richardson*.<sup>162</sup> In establishing that there was admiralty jurisdiction for a collision of two pleasure boats in a seldomly-used shipping channel, the Court held that an action that has the potential to affect maritime commerce is sufficiently related to traditional maritime activity to confer admiralty jurisdiction.<sup>163</sup> Despite protests that its decision in *Foremost* overexpanded federal admiralty jurisdiction,<sup>164</sup> the U.S. Supreme Court reaffirmed the principles expressed in *Foremost* in *Sisson v. Ruby*.<sup>165</sup> The Court, in finding admiralty jurisdiction appropriate, held that lower courts are to examine the general nature of the conduct that conferred jurisdiction, not the facts surrounding that specific conduct, in order to determine if the conduct would affect maritime commerce.<sup>166</sup>

Maritime jurisdiction has thus evolved from a simple location test to a more complex test designed to measure the federal interest in granting jurisdiction. First, one must determine whether or not the accident occurred on navigable waters, meaning waters capable of carrying maritime commerce. Second, one must determine whether the activity in question was traditionally maritime in nature and had the potential to affect maritime commerce. If both of these prongs are met, federal maritime jurisdiction is appropriate.

*B. Resolving the Conflict Presented by Yamaha: Enough Federal Interest for Jurisdiction, But Not Enough for a Uniform System of Admiralty Remedies.*

The *Yamaha* Court's desire to preserve state remedies in a maritime wrongful death action clashes with the purpose behind expanding admiralty jurisdiction—the provision of uniform standards and remedies where federal interests exist. If there is enough of a federal interest to

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161. *Id.* at 268 (holding that plane crash during overland flight lacked significant relationship to traditional maritime activity and that maritime jurisdiction was thus inappropriate).

162. 457 U.S. 668, 677 (1982) (holding that boat accident in remote bayou had potential to affect maritime commerce).

163. *Id.* at 677.

164. See, e.g., Phyllis D. Carnilla & Michael P. Drzal, *Foremost Insurance Co. v. Richardson: If this is Water, It Must Be Admiralty*, 59 Wash. L. Rev. 1, 1 (1983) (noting that *Foremost* extended admiralty jurisdiction to “the edge of absurdity”).

165. 497 U.S. 358, 363–34 (1990).

166. *Id.* at 367 (holding that fire on docked yacht involved traditional maritime activity of moorage).

confer federal jurisdiction, or, in other words, if the tort in question may potentially affect maritime commerce, then a uniform law should be applied. In determining that federal jurisdiction existed, the *Yamaha* Court acknowledged that the case raised an issue that had enough potential to affect maritime commerce to grant federal jurisdiction. By doing so, it held, in effect, that there was enough of a significant federal interest involved to warrant federal jurisdiction.

Despite its reasoning regarding federal jurisdiction, however, the *Yamaha* Court held that when an accident involved non-seamen in territorial waters, federal interests were not sufficient to necessitate applying a uniform set of wrongful death remedies.<sup>167</sup> The Court therefore allowed the plaintiff to pursue state wrongful death remedies in addition to federal remedies.<sup>168</sup>

This discrepancy creates a conflict. The principle behind granting federal jurisdiction and mandating a uniform system of remedies is the same: to encourage maritime commerce through predictable standards. The Court's determination that the principle applies to jurisdiction, but not to the availability of remedies, is confusing and inappropriate.

During oral argument, the *Yamaha* Court openly questioned whether there was enough federal interest to allow federal courts to keep jurisdiction of cases such as *Yamaha*.<sup>169</sup> The brief jurisdictional analysis set forth by the Court in its opinion, however, belies the probing nature of the debate that took place regarding jurisdiction during oral argument. While questioning the Calhouns' attorneys, the Court asked whether there was, in fact, a sufficient federal interest in recreational boating accidents to allow for federal admiralty jurisdiction.<sup>170</sup> After the attorney's reply, the Court stated that it did not want "to continue to develop wrongful death rules in territorial waters where we don't really have that much of an interest."<sup>171</sup>

Despite orally admitting that there was little federal interest, the Court, in its published opinion, allowed for jurisdiction. Without citing any authority or explaining its decision, the Court instead disposed of the jurisdictional issue in one short sentence, concluding that a collision by

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167. *Yamaha Motor Corp. v. Calhoun*, 116 S. Ct. 619, 626–28 (1996).

168. *Id.* at 629.

169. Oral Argument at \*9, *Yamaha*, 1995 WL 648001 (No. 94-1387).

170. *Id.* at \*9–\*10.

171. *Id.*

watercraft on navigable waters automatically brought admiralty jurisdiction.<sup>172</sup>

The Court's determination that admiralty jurisdiction was appropriate simply because the collision occurred on navigable waters ignores the reasoning behind a grant of federal jurisdiction. The Court applied a test to determine if federal admiralty jurisdiction was appropriate without considering whether that test served the purpose of defining the federal interest. This blind application allowed the contradiction between jurisdictional and remedial uniformity to arise. Because uniformity of jurisdiction and remedy are merely different representations of the same principle, it seems the logical conclusion is that if there is not a federal interest significant enough to provide a uniform system of remedies, then there is not enough federal interest in uniformity to confer admiralty jurisdiction. By the same token, once a court determines that there is enough federal interest to confer jurisdiction, then it should uphold the principle of uniformity in its choice-of-law decisions as well. The contradiction created by the Court in deciding otherwise portends several problems in maritime wrongful death law.

C. *Problems Presented by Confusion Between the Application of State or Federal Law in Admiralty Jurisdiction: Choice-of-Law Difficulties, Economic Uncertainty, and Forum Shopping*

Applying state law in addition to federal law creates several problems that will hinder maritime commerce and may lead to confusion and unpredictability in the lower courts. The applicability of state law makes it difficult for foreign commerce interests to predict accurately the consequences of their conduct. Further, it encourages forum shopping by plaintiffs. Finally, it creates several confusing questions regarding how courts will conduct their choice-of-law analysis between state and federal law in areas other than remedies.

By allowing state law and federal law to apply in a wrongful death context at admiralty, *Yamaha* has the potential to damage maritime commerce interests. Before *Yamaha*, a shipowner knew that, regardless of whether a death occurred within the state's territorial waters or on the high seas, a plaintiff would be limited to pecuniary damages. These damages may be measured and predicted more easily than non-pecuniary damages. This is because pecuniary damages are compensatory in nature

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172. *Yamaha*, 116 S. Ct. at 623 ("Because this case involves a watercraft collision on navigable waters, it falls within admiralty's domain.").

and are generally very specific and provable, whereas non-pecuniary damages attempt to attach value to an intangible and are, by their very nature, more nebulous and unpredictable.<sup>173</sup> After *Yamaha*, shipowners are exposed to a wide array of state damage formulas and thus may be unable to measure accurately their exposure to loss. Judge Posner and others have argued convincingly that this unpredictability hinders the proper allocation of economic resources.<sup>174</sup>

In product liability cases such as *Yamaha*, ambiguity may not be as damaging because there is already some uncertainty as to which law will apply to companies that ship their products to several different jurisdictions. In other areas, however, ambiguity adds unnecessary uncertainty and unpredictability to a situation that would be otherwise clear. Shipowners, particularly owners of liners that carry several non-seaman passengers, will be frustrated by their inability to predict the consequences of their conduct. Because laymen and attorneys often find choice-of-law problems unfathomable,<sup>175</sup> it is unlikely that vessel owners will be able to make the difficult determination of knowing which law may govern their actions. This in turn leads to a difficulty in allocating resources.

For example, one state may allow for recovery of loss of society, while another may not. If vessel owners knew that in all cases companies would be responsible for paying a surviving family for their non-pecuniary damages such as loss of society, owners could measure their potential economic liability, compare it to the available safeguards, then decide the level of safety precautions they needed to achieve maximum economic efficiency.<sup>176</sup> Without that certainty, an owner may be unable to measure accurately his or her potential loss, making accurate cost-benefit analysis and proper economic choices more difficult for the owner. The addition of uncertainty to the owners' calculated exposure to

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173. Speiser, *supra* note 28, at 103–07.

174. See *infra* text accompanying notes 176–178. See generally Posner, *supra* note 138, at 1–5 (describing basic theory of how tort defendants can reach maximum economic efficiency). Any added uncertainty means that the shipowner is unable to discern what the costs of the accident may be. An accident cost will be much different if non-pecuniary damages are included. Owners use accident costs to measure their exposure to liability. This exposure then dictates what economic resources will be allocated to risk prevention, depending upon how risk-averse the owner is. Not knowing whether non-pecuniary damages are available adds uncertainty to an owner's accident cost determination, which may lead the owner either to over- or under-allocate resources into risk prevention. This inefficient allocation is minimized by providing one set of damages applicable to non-seamen admiralty plaintiffs. *Id.*

175. See James A.R. Nafziger, *Conflicts of Laws: A Northwest Perspective* 1 (1985).

176. See *supra* note 174 and accompanying text.

liability, may lead them to misallocate resources. This, in turn, will hinder maritime commerce because the resulting unpredictability will lead to a waste of economic resources by the shipowners.<sup>177</sup>

Furthermore, several questions arise from *Yamaha* regarding how choice-of-law questions are to be resolved as the lines between state jurisdictions are very unclear out at sea. Uncertainty is heightened by introducing several different laws where only one was applicable before. What if an accident occurs while a ship is in shared or disputed waters? What if the location of the accident is uncertain? For instance, what if someone dies in their state room on a yacht cruise up the coast of the United States through some negligence of the boat owner, but no one is quite sure when? Does the family get to apply any of the state laws that may be available to them? Or must the courts estimate time of death and speed of the ship to determine which state law would apply? The difficulties in allowing individual state laws to have force quickly become apparent. The best course would be to avoid these confusing questions, because the presence of an appropriate federal admiralty remedy means that the application of state remedies serves no meaningful purpose in the first place.

Unfortunately, *Yamaha* may also promote forum shopping. Courts have consistently viewed forum shopping as being undesirable because it can provide an unfair advantage to plaintiffs.<sup>178</sup> The jurisdiction, not the facts, could determine the results of the case. The Court's decision in *Yamaha* encourages forum shopping in that plaintiffs may look at the several jurisdictions and applicable laws available to them to find the most favorable state law for their claim. A general maritime wrongful death rule avoids this problem as there would be only one set of remedies available regardless of the forum.

Because maritime law was meant to encourage maritime commerce, any practices that inhibit the flow of commerce should be viewed skeptically. By allowing state wrongful death law to apply in the state territorial seas, the *Yamaha* Court needlessly restricted maritime commerce. The decision encourages uncertainty and makes it difficult for shipowners to properly allocate their economic resources. It also encourages forum shopping. These factors consequently damage the flow of shipping to and from the United States. Given the shaky doctrinal foundations of *Yamaha*, the confusion between jurisdiction and

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177. See Posner, *supra* note 138, at 1-5.

178. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 73-74 (1938); see also *Hanna v. Plumer*, 380 U.S. 460, 467 (1965) (describing *Erie* as attack on evil of forum shopping).

uniformity, and the possible detrimental effects of the decision, the Court's holding should be read as narrowly as possible.

*D. The Court's Test for Jurisdiction Should Be Changed in Light of Yamaha To Reflect Better the Existence of Federal Interests.*

Although the Court will most likely not overrule *Yamaha* anytime soon, the tension created by the Court when it granted federal jurisdiction but did not apply a uniform set of remedies should be addressed. There are many ways to correct the problem, but, because the Court has already determined explicitly that the state wrongful death remedies may apply,<sup>179</sup> it may be easier for the Court to reconfigure its jurisdiction test better to represent when federal interests are involved so it does not have to directly overrule *Yamaha*. The current jurisdictional test is overbroad in that it has the potential to create more *Yamaha*-like conflicts in which there may be no significant federal interests at stake, yet the parties are in federal admiralty court. One sure sign that federal interests are not being served is the application of state substantive law in federal court, because state law should only be applied when there is no overriding federal admiralty principle.<sup>180</sup> The current test for admiralty jurisdiction allows for the application of state substantive law in certain situations. This standard improperly measures the amount of federal interest involved in resolving the tort, and, consequently, should be modified.

As discussed above, federal jurisdiction is warranted in admiralty where there are significant federal interests in protecting maritime commerce.<sup>181</sup> The *Yamaha* Court, however, held that these federal interests were not enough to provide for a federal remedy.

To resolve this tension, the U.S. Supreme Court should change its jurisdictional test so that it actually reflects the significance of the appropriate federal interests. These interests involve providing a uniform law to assure the free flow of maritime commerce whenever this flow might be threatened. To reflect this concern, the Court should add a factor to the test for maritime tort jurisdiction. In the context of a wrongful death or personal injury action, if state substantive law appears to apply, then federal jurisdiction should be inappropriate. If, factually, there are insufficient interests to provide for unified maritime law, then conceptually there is little necessity to grant admiralty jurisdiction. This

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179. *Yamaha Motor Corp. v. Calhoun*, 116 S. Ct. 619, 629 (1996).

180. See *supra* notes 72–73 and accompanying text.

181. See *supra* parts IV.A., .B.

additional factor would limit admiralty courts to hearing cases that have the actual potential to disrupt maritime commerce.<sup>182</sup> Additionally, it would remove much of the uncertainty involved under the current scheme of law because the Court has found that nearly all injuries occurring on a boat at sea have the potential to disrupt maritime commerce.<sup>183</sup> Thus, maritime operators would be better able to predict the consequences of their conduct, which would lead to a better allocation of their resources and a stronger maritime economy.<sup>184</sup>

Under such a test, maritime jurisdiction would have been appropriate in *Yamaha* because the accident that caused Natalie Calhoun's death had the potential to affect maritime commerce. Federal law should have then applied, and the Calhouns should have been limited to recovering pecuniary damages. Although the best result may be to have the Court explicitly rule that a *Moragne* action precludes all state actions, it is unlikely to do so given its strong opinion in *Yamaha*. Therefore, this subtle change in the jurisdictional test is necessary to allow lower courts properly to strike the balance between federal and state law in a maritime wrongful death context.

## V. CONCLUSION

It is impossible for lower courts to undo the U.S. Supreme Court's decision. Already, the lower courts are faithfully applying *Yamaha* as precedent in their own opinions.<sup>185</sup> However, the U.S. Supreme Court and the courts interpreting *Yamaha* can and should limit the holding in *Yamaha* as severely as possible. *Moragne* was meant to create a uniform system of recovery to continue the maritime tradition of encouraging maritime commerce. State law, to the extent that it contradicts federal law, should be pre-empted. Additionally, *Yamaha* creates a strange

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182. The author recognizes the procedural difficulty of determining the substantive law before determining the jurisdiction. Although a thorough response is impossible due to the limitations of this Note, a possible starting point for this discussion would be the possibility of an in camera hearing to determine whether state or federal law would likely apply. This hearing could eliminate some of the judicial backtracking if a court in which a cause of action is filed subsequently determines that maritime jurisdiction is inappropriate because state substantive law should apply.

183. See *Yamaha*, 116 S. Ct. at 623 ("Because this case involves a watercraft collision on navigable waters, it falls within admiralty's domain.")

184. See *supra* note 174 and accompanying text.

185. See, e.g., *American Dredging Co. v. Lambert*, 81 F.3d 127, 128 (11th Cir. 1996); *Blome v. Aerospatiale Helicopter Corp.*, 924 F. Supp. 805, 809-10 (S.D. Tex. 1996); *Choat v. Kawasaki Motor Corp.*, 675 So. 2d 879, 883-86 (Ala. 1996).

anomaly where federal interests sufficient to provide federal jurisdiction are not significant enough to confer a uniform system of remedies.

Even if *Yamaha* is limited severely and becomes a footnote in the Court's jurisprudence, it serves to highlight a problem of admiralty jurisdiction—that federal interests are no longer served by an overexpanded test for federal jurisdiction. By finding that there can be enough interest to allow for jurisdiction, but not enough to mandate a federal remedy, the Court, in effect, also finds that its jurisdictional test is too broad to measure federal interests. It is this author's hope that the U.S. Supreme Court will realize the problematic nature of its decision and limit its effect while utilizing it as a catalyst to form a jurisdictional test that better reflects when federal interests are served.



