MARITIME LAW—AMERICAN DREDGING COMPANY v. MILLER: THE SUPREME COURT LEAVES THE FORUM NON CONVENIENS DEBATE UNRESOLVED

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INTRODUCTION

When the United States Supreme Court grants certiorari, judges and practitioners hope that the resulting decision will resolve a controversial issue in a definitive manner. That hope was left unfulfilled in American Dredging Co. v. Miller.\(^1\) The Court in that case failed to resolve the issue of whether federal procedural law or state procedural law should determine the applicability of the doctrine of forum non conveniens in maritime cases brought in state courts pursuant to the “saving to suitors” clause of maritime law.\(^2\)

Seaman William R. Miller brought a personal injury claim in a Louisiana state court, the Civil District Court for the Parish of Orleans.\(^3\) The state court held, and the Fourth Circuit Court of Appeal of Louisiana affirmed, that the state had no connection to the case for the following reasons: (1) the plaintiff was a Mississippi resident, (2) the defendant was a Pennsylvania corporation with its principal place of business in New Jersey, (3) the accident occurred on the Delaware River, on the defendant’s ship, which had never been in Louisiana waters, and (4) the plaintiff was treated for his injuries in Pennsylvania, New York, and Mississippi.\(^4\) The trial court granted, and the appeal court affirmed the defendant’s mo-

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2. The saving to suitors clause provides: “The district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.” 28 U.S.C. § 1333(1) (1994). The original wording of this portion of the statute in the Judiciary Act of 1789 was “saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it.” Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77 (1789). The current wording is clearer, simpler, and conforms with the abolition of the distinction between law and equity in American courts. See 28 U.S.C. § 1333, Reviser’s Note (1994). The “saving to suitors” phrase means reserving or insuring that litigants are able to bring a lawsuit in state court for a remedy that a state court is legally able to provide.


tion to dismiss the case based on forum non conveniens because the plaintiff was able to file his case in another forum that was more appropriate—Pennsylvania. The Supreme Court of Louisiana reversed the court of appeal's decision and denied the dismissal, concluding that forum non conveniens was not a substantive feature of maritime law and thus the doctrine could be preempted by the rule of Louisiana civil procedure which prohibits the application of the doctrine in the Jones Act or maritime cases. The United States Supreme Court affirmed the judgment of the Supreme Court of Louisiana, concluding that forum non conveniens was not characteristic of maritime law, nor did Louisiana's refusal to apply the doctrine cause any harm to the uniformity and harmony of maritime law.

In its decision, the United States Supreme Court held that there was no need for forum non conveniens to be uniformly applied in maritime cases in state and federal courts, since the doctrine is only a matter of "judicial housekeeping" for federal courts. Thus, when a maritime case is brought in state court, the federal rule may be preempted by a conflicting state law. In the Miller case, Louisiana civil procedure disallowed the use of the forum non conveniens defense in Jones Act or maritime cases brought in state court, contrary to federal procedure which allows the defense. The Supreme Court held that the state of Louisiana had

5. See Miller, 580 So. 2d at 1092.
6. See infra note 27 and accompanying text for an explanation of the Jones Act.
9. Id.
10. See infra note 27 and accompanying text for the details of the Jones Act.
11. LA. CODE CIV. PROC. ANN. art. 123 B, C (West Supp. 1996). Paragraphs B and C of Article 123 provide:

B. Except as provided in Paragraph C, upon the contradictory motion of any defendant in a civil case filed in a district court of this state in which a claim or cause of action is predicated solely upon a federal statute and is based upon acts or omissions originating outside of this state, when it is shown that there exists a more appropriate forum outside of this state, taking into account the location where the acts giving rise to the action occurred, the convenience of the parties and witnesses, and the interest of justice, the court may dismiss the suit without prejudice; however, no suit in which the plaintiff is domiciled in this state, and which is brought in a court which is otherwise a court of competent jurisdiction and proper venue, shall be dismissed pursuant to this Article. In the interest of justice, and before the rendition of the judgment of dismissal, the court shall require the defendant or defendants to file with the court a waiver of any defense based upon prescription, provided that a suit on the same cause of action is commenced in a court of competent jurisdiction within sixty days from the rendition of the judgment of dismissal.
the right to apply its local procedural rule despite the apparent con­


clict with federal law. In their dissent in Miller, Justices Kennedy


12. See Miller, 510 U.S. at 456.


13. See id. at 462 (Kennedy, J., dissenting).


14. See id. at 453-54.


15. See id. at 467-70 (Kennedy, J., dissenting).
over all admiralty and maritime cases. Recognition of the need for federal jurisdiction over maritime cases preceded the Constitution. Thus, Alexander Hamilton observed that even those persons who most strongly supported states' rights accepted the propriety of the national courts adjudicating maritime causes. The chief reason for this accommodation by states' rights proponents was that maritime cases often involved foreign nations. In establishing a special body of law pertaining to maritime activity, Americans were following the jurisprudential paradigm of nations worldwide that recognized maritime law as a distinct body of law.

The Constitution vested power over admiralty cases in United States courts. The jurisdiction of federal courts, however, was not exclusive. Congress granted a maritime plaintiff the right to seek in state court any common law remedy that a state court is legally competent to provide. This right is the "saving to suitors" clause that originated in the Judiciary Act of 1789. Thus, Congress granted concurrent jurisdiction to the states to provide remedies to

16. See U.S. CONST. art. III, § 2, cl. 1. "The judicial Power [of the United States] shall extend ... to all Cases of admiralty and maritime Jurisdiction." Id.


18. See id.

19. See 1 SCHOENBAUM, supra note 16, § 1-1, at 3. Maritime law took definite form as early as the Code of Hammurabi, around 1800 B.C. See 1 id. § 1-2, at 3. The word "maritime" comes from the Latin "mare," meaning sea, and means "of the sea." WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY 1101 (2d ed. 1968). The word "admiralty" comes from the Arabic word meaning "ruler of" and is the law dealing with cases arising on the high seas. Id. at 25. "Maritime" encompassed a broader scope than "admiralty" since the latter referred to a specialized English medieval court. See 1 SCHOENBAUM, supra note 16, § 1-1, at 1. Today, the terms "maritime" and "admiralty" are used interchangeably. See id; see also GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY § 1-1, at 1 & n.1 (2d ed. 1975).

20. See supra note 16 for the wording of the Constitutional grant of power.

maritime litigants in whatever cases state courts were competent to
do so.

State courts are competent to adjudicate maritime actions in
personam, where the defendant is a person. Thus, a plaintiff may
bring a maritime action in personam in either a federal court under
maritime law or in a state court under the “saving to suitors”
clause. Regardless of whether the action is brought in federal or
state court, the substantive law applied in the case is federal mari­
time law, consisting of federal statutes, and federal and state judges’
decisions.

On the other hand, state courts are not competent and may not
adjudicate a maritime action in rem because such a cause of action
was unknown to the common law. Admiralty has exclusive juris­
diction over proceedings in rem, “that is, where a vessel or thing is
itself treated as the offender and made the defendant by name or
description.”

In the case of personal injuries suffered by an employed sea­
man, however, a state court has concurrent jurisdiction with a fed­
eral court over such an in personam maritime case. This expanded
protection of seamen was codified by the Merchant Marine Act of
1920, popularly known as the Jones Act. Thus, seamen can sue

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22. See Madruga v. Superior Court, 346 U.S. 556, 560-61 (1954); see also 1
Schoenbaum, supra note 16, § 4-1 to 4-2, at 134-35.
23. See 1 Schoenbaum, supra note 16, § 4-1 to 4-2, at 134-35.
24. See 1 Schoenbaum, Admiralty and Maritime Law § 1-2, at 9
(Hornbook Series, 2d ed. 1994).
25. See id. § 1-2, at 7.
at 46 U.S.C. app. § 688(a) (1994)). The applicable text of the Jones Act is:

Any seaman who shall suffer personal injury in the course of his employment
may . . . maintain an action for damages at law, with the right of trial by jury,
and in such action all statutes of the United States modifying or extending the
common-law right or remedy in cases of personal injury to railway employees
shall apply . . . . Jurisdiction in such actions shall be under the court of the
district in which the defendant employer resides or in which his principal office
is located.

Id.

The commentary following the text indicates that the statutes referred to are prob­
ably the Employers’ Liability Acts, codified in the Railroads section of the United
States Code. See 45 U.S.C. §§ 51-60 (1994). In particular, section 56 of Title 45 speci­
fies where an action may be brought and the jurisdiction of the court:

Under this chapter an action may be brought in a district court of the
United States, in the district of the residence of the defendant, or in which the
cause of action arose, or in which the defendant shall be doing business at the
time of commencing such action. The jurisdiction of the courts of the United
for personal injury under the Jones Act under either admiralty law in state or federal court, or at law in state court.\textsuperscript{28}

Since 1966, the procedural rules used in admiralty cases brought in federal court have been the Federal Rules of Civil Procedure.\textsuperscript{29} Actions brought in state court are usually subject to state procedural rules. Thus, the question arises as to whether federal procedures must be used in a maritime case brought in state court.

\textbf{B. History of the Doctrine of Forum Non Conveniens}

The doctrine of forum non conveniens\textsuperscript{30} was adopted by the States under this chapter shall be concurrent with that of the courts of the several states.\textsuperscript{45}

28. The chief advantage of a suit at law is the right to a trial by jury, which is not available in admiralty. See \textit{Gilmore & Black}, supra note 19, § 1-10, at 24 n.79. A seaman could sue for personal injury under the Jones Act "either at law or in admiralty, and he usually picks the former, for he wants to present his case to the jury." \textit{Id.}

As noted by one commentator, a case brought in state court under the "saving to suitors" clause of 28 U.S.C. § 1333 "has been labelled 'reverse-Erie' because it gives the plaintiff the best of both worlds: federal substantive law and state procedures (most importantly, a jury trial)." Paula K. Speck, Forum Non Conveniens and Choice of Law in Admiralty: Time for an Overhaul, 18 J. MAR. L. & COM. 185, 199 (1987).


30. The doctrine dates back to Scottish estate cases and those involving businesses owned by foreign-domiciled partners. See Paxton Blair, The Doctrine of Forum Non Conveniens in Anglo-American Law, 29 COLUM. L. REV. 1, 29 (1929).

[1]In Scotland the types of cases where the plea of forum non conveniens has been most frequently sustained are (a) suits where foreign executors are being called upon to account to a court other than that of their appointment; and (b) suits where the court is asked to settle the accounts of a partnership where the business was carried on abroad and neither partner is domiciled in the jurisdiction.

\textit{Id.} (footnotes omitted).

Blair mentioned an appeal from the Scottish Court of Sessions that was decided in the English House of Lords in 1926, namely \textit{La Societe du Gaz de Paris v. La Societe Anonyme de Navigation "Les Armateurs Francais"} where a French ship owner was sued by a French shipper for damaged cargo, having obtained jurisdiction over the owner by attaching his property while it was in Scotland. The owner's forum non conveniens claim was finally granted in the appeal to the House of Lords, where Lord Shaw said:

If in the whole circumstances of the case it be discovered that there is a real unfairness to one of the suitors in permitting the choice of a forum which is not the natural or proper forum, either on the ground of convenience of trial or the residence or domicile of parties, or of its being either the \textit{locus contractus}, or the \textit{locus solutionis}, then the doctrine of forum non conveniens is properly applied.

American states at common law. The doctrine is alternately called "inconvenient forum," and is defined as the "discretionary power of [the] court to decline jurisdiction when [the] convenience of parties and ends of justice would be better served if [the] action were brought and tried in another forum."32

In the United States, the constitutional grant of federal judicial power over maritime cases clearly gave federal courts the ability to adjudicate maritime cases between foreigners or between a foreigner and a United States citizen.33 Such was the situation in the 1804 case of Mason v. The Ship Blaireau.34 Chief Justice Marshall, after hearing doubts expressed as to the propriety of an American court's jurisdiction in a case between two foreigners, pointed out that jurisdiction should be evaluated in terms of public convenience factors.35 This supported the Court's decision to deny a forum non conveniens dismissal and hear the case.36 Thus, while the Court was not obligated to hear the case, it made a discretionary decision to do so.

Courts also had the discretionary right to refuse to handle cases, invoking the doctrine of forum non conveniens if there was a more appropriate forum available to the litigants, as happened in the case of The Maggie Hammond.37 In that case, the Supreme Court focused on the pivotal role of a court in deciding to dismiss a case in the interests of justice to the parties.38

31. See Robert Braucher, The Inconvenient Federal Forum, 60 Harv. L. Rev. 908 (1947). Braucher noted in his description of the history of forum non conveniens that: [A]t least as early as 1817 a [New York] state court asserted and exercised a discretionary power to deny its facilities to a cause as to which it had jurisdiction, and such a power has often been asserted in actions between aliens, non-residents, and foreign corporations and in suits involving the 'internal affairs' of foreign corporations. It is these cases which must be relied on as establishing the doctrine of forum non conveniens in American law. Id. at 914 (footnotes omitted).


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

34. 6 U.S. (2 Cranch) 240 (1804).

35. See id. at 264.

36. See id.

37. 76 U.S. (9 Wall.) 435 (1869).

38. See id. at 457. A British company, Morland & Co., sued, in an American court, a British ship owned by a British subject living in Nova Scotia, regarding the enforcement of a maritime lien for a breach of contract for merchandise not delivered. In the Supreme Court's opinion affirming the circuit court's decision to enforce the lien and deny a forum non conveniens removal, Justice Clifford stated that, in the United States, it seems to be settled that our admiralty courts have full jurisdiction over suits between foreigners, if the subject-matter of the controversy is of a maritime
In the early years of the United States, the doctrine of forum non conveniens allowed federal and state courts the option to hear a case or to dismiss it to a more convenient forum that would accept the case.\(^{39}\) In the 1947 non-admiralty case *Gulf Oil Corp. v. Gilbert*,\(^{40}\) Justice Jackson enumerated some of the factors to be considered when applying the doctrine of forum non conveniens, including: advantages and obstacles to a fair trial, respect for the plaintiff's choice of forum so long as it does not harass the defendant, access to proof, availability of witnesses, access to the site of the action of the case, enforceability of the judgment, congestion of the courts, burden of jury duty, and appropriateness of having the trial in a state whose law governs the case.\(^{41}\)

Until 1948, whenever a state or federal court determined that a case should be adjudicated in an alternative forum, the case was dismissed under forum non conveniens. In 1948, Congress amended the United States Code to include a provision allowing federal district courts to transfer civil cases to another district court where the action could have originally been brought, in the interest of justice and for the convenience of the parties.\(^{42}\) The statute, "drafted in accordance with the doctrine of *forum non conveniens*, . . . was intended to be a revision rather than a codification of the common law."\(^{43}\) In fact, section 1404(a) allows federal courts wider "discretion to transfer . . . than they had to dismiss on grounds of nature, but the question is one of discretion in every case, and the court will not take cognizance of the case if justice would be as well done by remitting the parties to their home forum.

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\(^{39}\) See Cicek Zoroglu, Case Comment, 17 SUFFOLK TRANSNAT'L L. REV. 516, 519 (1994).


\(^{41}\) See id. at 508-09. Justice Jackson enumerated the factors to be considered in a forum non conveniens inquiry, noting that "[a]n interest to be considered, and the one likely to be most pressed, is the private interest of the litigant . . . . But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." Id. at 508.

\(^{42}\) See 28 U.S.C. § 1404(a) (1994). In the federal system, a case can be transferred from one federal court to another using this section, which states: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." Id.

Forum non conveniens.

Thus, under section 1404(a), if the federal forum is held to be inconvenient, a diversity case need not be dismissed but can be transferred to another federal district court, carrying with it the law of the original court. The "housekeeping measure" of transfer allows the federal system to operate more justly and efficiently.

Forum non conveniens, on the other hand, does not involve the transfer of a case, but rather, the dismissal of a case in one jurisdiction subject to the case being tried in an alternative jurisdiction. However, if the alternative forum's remedy is "so clearly inadequate or unsatisfactory that it is no remedy at all, . . . the district court may conclude that dismissal [on the grounds of forum non conveniens] would not be in the interests of justice."

When a litigant brings a Jones Act or maritime suit in federal court, federal substantive admiralty law and federal procedures are applied. When a litigant brings a Jones Act or maritime suit in a state court, federal substantive maritime law is applied. However, the issue arises, as it did in the Miller case, whether federal or state procedural law should be applied in such cases. Lacking any congressional legislation on the application of forum non conveniens in Jones Act or maritime cases brought in state court, the Supreme

44. Id.
46. Piper Aircraft, 454 U.S. at 254. In an article on the due process limitations on nationwide service of process, Professor Robert Lusardi noted that both transfer and forum non conveniens provide some protection for defendants. See Robert A. Lusardi, Nationwide Service of Process: Due Process Limitations on the Power of the Sovereign, 33 VILL. L. REV. 1, 34 n.158 (1988). In addition, he noted that both doctrines "were intended to limit a jurisdictional system which focused on physical power over the defendant, rather than intended as methods of finding a fair forum for the litigation." Id. at 37. He concluded that the constitutional rights of the defendant should not be trampled by the plaintiff's ability to force a court to exert jurisdiction over the defendant based on the slightest of connections with the forum, but rather the interests of all should be balanced. See id. at 40-48.
47. Piper Aircraft, 454 U.S. at 254.
48. See, e.g., id. at 235. In Piper, representatives of Scottish decedents killed in Scotland brought a wrongful death action against American manufacturers of the airplane. The case was dismissed under forum non conveniens under the presumption that the action could be brought in Scotland, which was thought to be a more convenient forum, despite the fact that the substantive law in the alternative forum, Scotland, might be less favorable to the plaintiffs. The Court held that the application of the doctrine of forum non conveniens may not be prohibited because the alternative forum offers less advantageous law. See id. at 250.
Court over the years has developed its own interpretation. Similarly, states adjudicating Jones Act and maritime cases have sometimes set up their own rules regarding the application of forum non conveniens, such as Louisiana did in enacting Article 123 of its code of civil procedure.  

C. History of Louisiana Civil Procedure Article 123

In the state of Louisiana, the Louisiana rules of civil procedure control the applicability of forum non conveniens. Article 122 of those rules is the sole article that deals with change of venue. Under Article 122 a change is allowed only if a litigant proves that the trial would be unfair or prejudicial "or some other sufficient cause." In the 1967 case *Trahan v. Phoenix Insurance Co.*, the Louisiana First Circuit Court of Appeal rejected the lower court's reasoning that the last phrase of the venue statute—"or some other sufficient cause"—was meant to allow the addition of forum non conveniens to the list of reasons for a change of venue. On the contrary, the Court of Appeal held that forum non conveniens was "foreign" to Louisiana law, and not allowed. As a result of the court's decision, the Louisiana State Law Institute recommended a new provision. The Louisiana legislature passed this new provision in 1970 as Article 123. Article 123 deals with forum non conveniens, specifying the situations in which it can be applied by the court at its discretion in the interest of justice. However, the last paragraph of the Article, paragraph C, forbids the application of forum non conveniens to any Jones Act or maritime claim.

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50. See *supra* note 11 for the text of Article 123.

> Any party by contradictory motion may obtain a change of venue upon proof that he cannot obtain a fair and impartial trial because of the undue influence of an adverse party, prejudice existing in the public mind, or some other sufficient cause. If the motion is granted, the action shall be transferred to a parish wherein no party is domiciled.

*Id.*

52. *Id.*
54. *Id.* at 121.
55. *Id.* at 122. The court held "that the doctrine of 'forum non conveniens' is foreign to our jurisprudence and contrary to express legislative declaration . . . . [It is] repugnant to the express statutory law of this state." *Id.*
56. See *supra* note 11 for the relevant text of Article 123.
57. See *supra* note 11.
58. See *supra* note 11.
The application of the new statute by Louisiana state courts established Louisiana as an "open forum" state for maritime claims, since no such claim would be dismissed from Louisiana state courts for forum non conveniens.\textsuperscript{59} Any doubt as to the interpretation of Article 123 was clarified by the Supreme Court of Louisiana in \textit{Markzannes v. Bermuda Star Line, Inc.}\textsuperscript{60} In \textit{Markzannes}, the court held that Article 123 C prohibited the application of forum non conveniens to all causes of action arising under the Jones Act or maritime law.\textsuperscript{61} Further, while Article 123 B allowed dismissal of a case based on a federal statute and occurring outside Louisiana on forum non conveniens grounds, "Louisiana courts may apply Louisiana procedural law in causes of action brought in Louisiana courts."

The large maritime bar in the state of Louisiana, with its historical and contemporary maritime ties and interests, handles significant numbers of Jones Act and maritime claims on a regular basis.\textsuperscript{63} Thus, it is not surprising that a Louisiana case, \textit{American Dredging Co. v. Miller},\textsuperscript{64} raised the question of whether federal forum non conveniens law could preempt conflicting state forum non conveniens law.

\section*{II. \textit{American Dredging Co. v. Miller}}

Seaman William R. Miller, a Mississippi resident, was employed by American Dredging Company ("American Dredging"), a

\begin{itemize}
\item \textsuperscript{59} The Louisiana Supreme Court, in \textit{Lavergne v. Western Co. of North America}, 371 So. 2d 807 (La. 1979), attempted to clarify Article 123 by holding that a state court could impose a restriction on the application of forum non conveniens so long as such a prohibition did not modify a characteristic feature of maritime law. The court stated that
\begin{quote}
\textit{a state court, having concurrent jurisdiction with the federal courts as to \textit{in personam} admiralty claims, is free to adopt such remedies and attach to them such incidents as it sees fit so long as it does not attempt to modify or displace essential features of the substantive maritime law.}
\end{quote}
\textit{Id.} at 810.
\item \textsuperscript{60} Several years later, the Louisiana Supreme Court abandoned any pretense that forum non conveniens could be prohibited in maritime cases only if the failure to apply the doctrine did not affect a characteristic feature of maritime law and held that forum non conveniens was prohibited in any maritime or Jones Act case. \textit{See} \textit{Markzannes v. Bermuda Star Line, Inc.}, 545 So. 2d 537, 537 (La. 1989).
\item \textsuperscript{61} \textit{See id.} at 537.
\item \textsuperscript{62} \textit{Id.}
\item \textsuperscript{63} \textit{See} Telephone Interview with Thomas J. Wagner, Attorney of Record for American Dredging Company (Jan. 27, 1995).
\item \textsuperscript{64} 510 U.S. 443 (1994).
\end{itemize}
Pennsylvania company with its principal place of business in New Jersey.\textsuperscript{65} In December 1987, Miller was injured while working on American Dredging's tugboat "John R.,” which was operating in the Delaware River.\textsuperscript{66} He was treated at facilities in Pennsylvania, New York, and then in various locations in Mississippi, upon his return to his native state in February 1988.\textsuperscript{67} As an injured seaman, Miller filed an action in a Louisiana state court against American Dredging under the Jones Act,\textsuperscript{68} pursuant to the “saving to suitors” clause of maritime law.\textsuperscript{69}

A.  \textit{Civil District Court for the Parish of Orleans}

Miller filed his complaint with the Civil District Court for the Parish of Orleans on December 1, 1989, claiming injuries sustained while working on the tug "John R." in the employ of defendant American Dredging.\textsuperscript{70} American Dredging’s registered agent in Louisiana received service of process.\textsuperscript{71} Thereafter, American Dredging filed exceptions for lack of in personam jurisdiction\textsuperscript{72} by the court and forum non conveniens,\textsuperscript{73} claiming that the agent was maintained in Louisiana simply in order to enable the company to bid on dredging projects in Louisiana and that the company had no property or bank accounts in the state.\textsuperscript{74}

Miller argued that the Louisiana Supreme Court’s holding in \textit{Markzannes v. Bermuda Star Line, Inc.}\textsuperscript{75} upheld the state civil procedure law disallowing the application of forum non conveniens in

\footnotesize
\textsuperscript{65} See id. at 445.
\textsuperscript{67} See Miller, 595 So. 2d at 616.
\textsuperscript{68} See supra note 27 for the text of the Jones Act.
\textsuperscript{69} See supra note 2 for the text of 28 U.S.C. § 1333(1) (1994). The “saving to suitors” clause reserves to a litigant the right to sue in state court for any remedy that can be given by the common law as it is applied in state court. See id.
\textsuperscript{71} See id. at *2.
\textsuperscript{72} See supra note 22 and accompanying text for an explanation of in personam jurisdiction.
\textsuperscript{73} See supra notes 30-50 and accompanying text for an explanation and history of the doctrine of forum non conveniens.
\textsuperscript{74} See Respondent’s Brief at *13A, Miller (No. 89-25877).
\textsuperscript{75} 545 So. 2d 537, 537 (La. 1989).
Jones Act or maritime law cases. American Dredging argued that forum non conveniens is part of general maritime law and both discourages forum shopping by plaintiffs and fosters uniformity in maritime law. American Dredging urged the court to follow the Louisiana Supreme Court's rejection of any modification or displacement of maritime law by state courts as stated in Lavergne v. Western Co. of North America. American Dredging also requested that the court repudiate as erroneous the "open forum" policy stated in Kassapas v. Arkon Shipping Agency, Inc. and Markzannes v. Bermuda Star Line, Inc., which prohibited dismissal of maritime cases from Louisiana courts under the doctrine of forum non conveniens. The civil district court granted the forum non conveniens exception and dismissed the case, "[s]ubject to the right of plaintiff to pursue this claim in a court of competent jurisdiction in Pennsylvania."

B. Court of Appeal of Louisiana, Fourth Circuit

Miller appealed the grant of forum non conveniens and dismissal of the suit. The Court of Appeal of Louisiana affirmed the trial court's judgment. In its discussion, the court described the doctrine as "a characteristic feature of the general maritime law," and cited federal decisions that support the application of federal forum

76. See id. See supra note 11 for the relevant text of article 123 of the Louisiana Code of Civil Procedure; see also supra notes 51-62 and accompanying text for a discussion of articles 122 and 123 and the Markzannes case.

77. See Respondent's Brief at *47A, Miller (No. 89-25877).


79. 485 So. 2d 565, 566 (La. Ct. App.).

80. 545 So. 2d 537, 537 (La. 1989) (per curiam). See supra notes 60-62 and accompanying text for a discussion of Markzannes.

81. Respondent's Brief at *49A, Miller (No. 89-25877). The doctrine of forum non conveniens provides that a case can be filed in another jurisdiction. If this is not possible, then the originating court may not dismiss the case but, to the contrary, must adjudicate it.


83. Id. at 1092 (citing Ikospentakis v. Thalassic S.S. Agency, 915 F.2d 176, 178 (5th Cir. 1990)). In the latter case, a plaintiff's voluntary dismissal of his case from federal district court in order to refile in Louisiana state court deprived the defendant of the legal defense of forum non conveniens, a defense which he would have had in federal court but which was not recognized in Louisiana state courts due to the passage of Louisiana Code of Civil Procedure Article 123. See Ikospentakis, 915 F.2d at 177-78. See supra note 11 for the text of Article 123. The United States Court of Appeals for the Fifth Circuit reversed the trial court's grant of the voluntary dismissal. See Ikospentakis, 915 F.2d at 180.
non conveniens law to maritime cases, whether brought in federal or state court.\textsuperscript{84} Miller argued that the court must abide by the provisions of Louisiana Code of Civil Procedure Article 123, Section C, which forbids the application of forum non conveniens in maritime cases and by the holding of the Supreme Court of Louisiana in the case of \textit{Markzannes v. Bermuda Star Line, Inc.}\textsuperscript{85} In \textit{Markzannes}, the court held that "Louisiana courts may apply Louisiana procedural law in causes of action brought in Louisiana courts."\textsuperscript{86}

The court of appeal disagreed with Miller's arguments. Instead, the court affirmed the trial court's reasoning that the Louisiana "Supreme Court's per curiam holding in \textit{Markzannes} was not binding, and maintained [American Dredging Company's] exception based on an application of federal law."\textsuperscript{87} The court of appeal agreed with the trial court that there was no connection between the case and the state of Louisiana, other than the presence of American Dredging's agent for service of process, which was considered an inadequate basis for a suit in the state, and that therefore the doctrine of forum non conveniens would allow a dismissal of the case.\textsuperscript{88}

\textbf{C. Supreme Court of Louisiana}

Miller applied for and was granted certiorari by the Supreme Court of Louisiana for the purpose of determining whether, in a maritime case brought in Louisiana state court, the federal doctrine of forum non conveniens must be applied or whether Louisiana state law barring the application of forum non conveniens was the governing law.\textsuperscript{89} The Supreme Court of Louisiana noted that had

\textsuperscript{84} The Louisiana Court of Appeal quoted the United States Court of Appeals for the Fifth Circuit in \textit{Exxon Corp. v. Chick Kam Choo}, 817 F.2d 307, 324 (5th Cir. 1987), \textit{rev'd on other grounds}, 486 U.S. 140 (1988), which stated that:

\begin{quote}
Under the federal uniformity doctrine state courts \textit{must} apply the \textit{forum non conveniens} rule of the general maritime law in any case brought before them by citizens of foreign lands over which the federal courts would have admiralty jurisdiction. State law inconsistent with that doctrine cannot be applied in a maritime defense [sic].
\end{quote}

\textit{Miller}, 580 So. 2d at 1092 (quoting \textit{Exxon}, 817 F.2d at 324).

\textsuperscript{85} 545 So. 2d 537 (La. 1989) (per curiam).

\textsuperscript{86} \textit{Id.} at 537 (construing Missouri \textit{ex rel. S. Ry. Co. v. Mayfield}, 340 U.S. 1 (1950)).

\textsuperscript{87} \textit{Miller}, 580 So. 2d at 1093.

\textsuperscript{88} See \textit{id.}

this case been brought in federal court, there would be no issue of forum non conveniens because, pursuant to the United States Code, a federal court has the ability to simply transfer a case to another federal court where it might have been brought originally. A Louisiana state court has no similar ability. Thus, the only option available to a state court is dismissal under forum non conveniens.

After a discussion of the doctrine of forum non conveniens as adopted by thirty-two states and the District of Columbia by 1992, the court noted that “[b]y contrast, Louisiana courts have refused to apply the common law doctrine of forum non conveniens, finding it ‘foreign to our jurisprudence.’” The passage of Article 123 of the Louisiana Code of Civil Procedure, disallowing the application of forum non conveniens to Jones Act or maritime claims, followed the decision in *Trahan v. Phoenix Insurance Co.* that forum non conveniens was disallowed by Louisiana law. The court concluded that “Louisiana courts may not dismiss cases for forum non conveniens except as provided in [Article 123],” thus concluding in the same manner it had in the *Markzannes* case that the doctrine cannot be applied in a Jones Act or maritime law case.

Substantive maritime law is applied to in personam admiralty cases in either state or federal court, according to the Supreme Court of Louisiana. The court claimed that since a state court has concurrent jurisdiction with a federal court as to in personam claims, the former has the right to “adopt such remedies, and to attach to them such incidents as it sees fit so long as it does not attempt to make changes in the substantive maritime law.” Thus, the court inquired whether the doctrine affects the substantive maritime law. If so, then the prohibition on its application in maritime cases under Article 123 would be preempted by the federal

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91. See Miller, 595 So. 2d at 616 n.5.
92. See id. at 616.
93. Id. at 617 (quoting *Trahan v. Phoenix Ins. Co.*, 200 So. 2d 118, 121 (La. Ct. App. 1967)).
94. See supra note 11 for the text of Article 123.
96. Miller, 595 So. 2d at 617 (citing Fox v. Board of Supervisors, 576 So. 2d 978 (La. 1991)).
97. See id.
98. See id.
99. Id. at 617-18.
100. See id. at 618.
doctrine.\textsuperscript{101}

Since the United States Supreme Court had not discussed forum non conveniens in a Jones Act or admiralty case at the time the Supreme Court of Louisiana heard this case, the court analogized the United States Supreme Court's treatment of forum non conveniens in a Federal Employers' Liability Act ("FELA") case,\textsuperscript{102} Missouri \textit{ex rel. Southern Railway Co. v. Mayfield}.\textsuperscript{103} In Mayfield, which originated in Missouri, the Supreme Court held that a state "should be freed to decide the availability of the principle of \textit{forum non conveniens} in [FELA] suits according to its own local law."\textsuperscript{104}

Citing various United States Supreme Court and courts of appeals cases that involved federal courts sitting in diversity, the Supreme Court of Louisiana noted that the doctrine of forum non conveniens is a procedural law that allows federal courts to manage their caseloads.\textsuperscript{105} In the same way, the court stated, Louisiana courts want to control their caseloads, and the Louisiana legislature decided to effect that desire by disallowing the application of the doctrine in Jones Act or maritime cases.\textsuperscript{106} The court reasoned that, in nearly all cases, the use of the Louisiana rule would not be outcome-determinative because the substantive law applied in the case is maritime law, which is consistent from state to state.\textsuperscript{107} The Supreme Court of Louisiana concluded that "forum non conveniens is not a substantive feature of the general maritime law. Accordingly, . . . application of Louisiana's forum non conveniens rule is not preempted by federal admiralty law."\textsuperscript{108} The judgment of the lower court was reversed and the case remanded for further proceedings.\textsuperscript{109} American Dredging then filed a petition for a writ of certiorari to the United States Supreme Court, and the writ was granted.\textsuperscript{110}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{101} See id.
\item \textsuperscript{102} See id.
\item \textsuperscript{103} 340 U.S. 1, 4-5 (1950). The incorporation of the standards of FELA by the Jones Act was stated by the United States Supreme Court in Garrett \textit{v. Moore-McCormack Co.}, 317 U.S. 239, 244 (1942).
\item \textsuperscript{104} Mayfield, 340 U.S. at 5.
\item \textsuperscript{105} See Miller, 595 So. 2d at 618.
\item \textsuperscript{106} See id.
\item \textsuperscript{107} See id. at 619.
\item \textsuperscript{108} Id.
\item \textsuperscript{109} See id.
\item \textsuperscript{110} See American Dredging \textit{Co. v. Miller}, 507 U.S. 1028 (1993).
\end{itemize}
\end{footnotesize}
D. United States Supreme Court’s Holding in American Dredging Co. v. Miller

The question presented to the United States Supreme Court was “whether, in admiralty cases filed in a state court under the Jones Act, 46 U.S.C. app. § 688, and the ‘saving to suitors clause,’ 28 U.S.C. § 1333(1), federal law preempts state law regarding the doctrine of forum non conveniens.”

1. Majority Opinion

The Court began its analysis by citing the provisions in the Constitution, the Judiciary Act of 1789, and the United States Code, all of which combined to give the federal courts the power to adjudicate maritime cases. The court reasoned that federal courts have exclusive in rem jurisdiction over admiralty cases; they do not share in rem jurisdiction with state courts when the cause of action is maritime. On the other hand, a state court can exercise in personam jurisdiction over an admiralty case, and under such circumstances may “‘adopt such remedies, and . . . attach to them such incidents, as it sees fit’ so long as it does not attempt to make changes in the ‘substantive maritime law.’” The Court noted that the substantive law is altered when a state’s remedy either changes a characteristic feature of maritime law or interferes with its uniformity. Thus, the first issue the Court considered

111. 510 U.S. 443 (1994).
112. Id. at 445. Justice Scalia wrote the majority opinion in which Chief Justice Rehnquist and Justices Blackmun, O’Connor, Souter, and Ginsburg joined. See id. at 444. Justice Souter filed a concurring opinion. See id. at 457 (Souter, J., concurring). Justice Stevens filed an opinion, concurring in part and concurring in the judgment. See id. at 458 (Stevens, J., concurring). Justice Kennedy filed a dissenting opinion in which Justice Thomas joined. See id. at 462 (Kennedy, J., dissenting).
113. See supra note 16 for the text of U.S. Const. art. III, § 2, cl. 1; see also supra note 2 for the text of 28 U.S.C. § 1333(1) (1994). The Miller majority quoted the Judiciary Act of 1789, which provided:
That the district courts shall have, exclusively of the courts of the several States . . . exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction . . . within their respective districts as well as upon the high seas; saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it.
Miller, 510 U.S. at 446 (quoting the Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76-77 (1789)) (alterations in original).
114. See supra note 26 and accompanying text.
116. See id. (citing Southern Pac. Co. v. Jensen, 244 U.S. 205, 216 (1917)).
was whether the doctrine of *forum non conveniens* caused either of those events to occur.\footnote{117. Changes in the maritime law could occur if the "state remedy 'works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations.'" \textit{Id.} (quoting Jensen, 244 U.S. at 216).} \footnote{118. \textit{See id.} at 447-49. \textit{See supra} notes 30-50 and accompanying text for the background of *forum non conveniens*.} \footnote{119. \textit{Miller}, 510 U.S. at 450.} \footnote{120. \textit{Id.} (quoting Jensen, 244 U.S. at 216) (alterations in original).} \footnote{121. \textit{Id.} at 451 (quoting Jensen, 244 U.S. at 216).} \footnote{122. \textit{See, e.g.,} Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920) (striking down a state statute permitting a maritime plaintiff to recover damages under state workmen's compensation because such independent actions by states would destroy the harmony and uniformity intended by the Constitution in granting maritime rulemaking power to Congress and not to the individual states); The Lottawanna, 88 U.S. (21 Wall.) 558, 566, 575 (1874) (holding that maritime law was to be applied uniformly throughout the United States since the Constitution was aimed at consistency and uniformity of commercial intercourse).} \footnote{123. \textit{See Miller}, 510 U.S. at 452 (citing Romero v. International Terminal Operating Co., 358 U.S. 354, 373-74 (1959) (describing maritime cases where state remedies and state statutes were allowed to be applied in admiralty cases, such as those regarding liens, wrongful death, partition, and sales of ships, and breach of warranty in maritime insurance contracts)).} 

After a background exploration of the source of *forum non conveniens*,\footnote{118. \textit{See id.} at 447-49. \textit{See supra} notes 30-50 and accompanying text for the background of *forum non conveniens*.} the Court concluded that the doctrine "neither originated in admiralty nor has exclusive application there. To the contrary, it has long been a doctrine of general application."\footnote{119. \textit{Miller}, 510 U.S. at 450.} Since the doctrine is not peculiar to maritime law, the Court held that Louisiana's refusal to apply the doctrine in a maritime case in state court did not produce "'material prejudice to [a] characteristic feature of the general maritime law,'" and must therefore be allowed.\footnote{120. \textit{Id.} (quoting Jensen, 244 U.S. at 216) (alterations in original).} \footnote{121. \textit{Id.} at 451 (quoting Jensen, 244 U.S. at 216).} 

The second issue the Court considered was whether Louisiana's refusal to apply *forum non conveniens* in maritime cases in state court "'interfer[ed] with the proper harmony and uniformity' of maritime law."\footnote{122. \textit{See, e.g.,} Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920) (striking down a state statute permitting a maritime plaintiff to recover damages under state workmen's compensation because such independent actions by states would destroy the harmony and uniformity intended by the Constitution in granting maritime rulemaking power to Congress and not to the individual states); The Lottawanna, 88 U.S. (21 Wall.) 558, 566, 575 (1874) (holding that maritime law was to be applied uniformly throughout the United States since the Constitution was aimed at consistency and uniformity of commercial intercourse).} Earlier cases decided by the Supreme Court strongly supported the concept of uniformity in the application of maritime law.\footnote{123. \textit{See Miller}, 510 U.S. at 452 (citing Romero v. International Terminal Operating Co., 358 U.S. 354, 373-74 (1959) (describing maritime cases where state remedies and state statutes were allowed to be applied in admiralty cases, such as those regarding liens, wrongful death, partition, and sales of ships, and breach of warranty in maritime insurance contracts)).} The \textit{Miller} Court noted that uniformity was far from absolute, since decisions were made in other cases that went against a uniform application of law, yet were judged not to threaten the harmony of maritime law.\footnote{124. \textit{See id.} at 453.} The Court decided it did not have to grapple with such inconsistent applications, since it perceived *forum non conveniens* as a law of procedure, not of substance.\footnote{124. \textit{See id.} at 453.}
In explanation of the latter point, the Court described the doctrine as "nothing more or less than a supervening venue provision," and as such it has no influence on the manner in which persons conduct their affairs nor on persons' rights to have substantive maritime law applied. Since the doctrine is applied at the discretion of the trial court based on a multiplicity of factors, each case will be unique, and the Court declined to apply a strict standard for use in every case. The resultant lack of uniformity in the doctrine's application was acceptable to the Court.

However, the Court stated that maritime federal common law should harmonize with congressional enactments, particularly the Jones Act. Since the Jones Act incorporates by reference the remedies available to railway employees, the Court held that the Act "adopts 'the entire judicially developed doctrine of liability' under the Federal Employers' Liability Act (FELA)." Thus, state courts must adopt FELA's requirement to apply uniform federal substantive law.

The Court found support for its position in Missouri ex rel. Southern Railway Co. v. Mayfield. The Mayfield Court held that, when FELA was applied in a state court action, the state court could determine as a matter of local policy whether or not to allow the application of forum non conveniens. The Court in Miller thereby concluded that since the Jones Act adopts FELA requirements and FELA allows state determination of applicability of forum non conveniens unrestrained by federal law, then Jones Act cases may use forum non conveniens or not, as each state may decide. By analogy, the Court surmised that "maritime commerce in general does not require a uniform rule of forum non con-

125. Id.
126. See id. at 454.
127. See id. at 448-49 (quoting Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508-09 (1947)). For a description of the Gilbert factors, see supra note 41 and accompanying text.
128. See Miller, 510 U.S. at 455-56.
129. See id.
130. See id. at 455. See supra note 27 for the text of the Jones Act.
132. See Miller, 510 U.S. at 455-56 (construing Garrett v. Moore-McCormack Co., 317 U.S. 239, 244 (1942)).
134. See id. at 4-5.
135. See Miller, 510 U.S. at 456.
On the other hand, the Court emphasized the importance of harmony in the application of forum non conveniens in Jones Act as well as maritime cases. It often happens that an injured seaman combines a claim for tort damages under the Jones Act with a claim for unseaworthiness, maintenance, and cure into one action under maritime law. In such a combined case, the harmony of forum non conveniens could be disturbed because the seaman could have one claim dismissed for forum non conveniens (under maritime law) but not the other claim (the Jones Act claim under state law prohibiting the application of forum non conveniens).

The Miller Court found further support for its holding in Bainbridge v. Merchants & Miners Transportation Co. In Bainbridge, the Court held that when a Jones Act case is brought in state court, state law should determine venue. Thus, the Court concluded in the Miller case that while forum non conveniens is applicable in federal courts, its application is not similarly required in state courts. The Court noted that its decision was limited to the facts of the case, one of them being that both parties to the dispute were domestic, and thus the Court refused to make a broader holding extending the effect of their ruling to foreign litigants.

2. Concurring Opinions

Justice Souter, joining in the majority opinion and filing a separate concurring opinion, noted that there may be cases where the line between the substantive and the procedural is difficult to establish. He emphasized that in such cases, "how a given rule is characterized for purposes of determining whether federal maritime law pre-empts state law will turn on whether the state rule unduly interferes with the federal interest in maintaining the free flow of mari-

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136. Id.
137. See id. at 456-57.
138. See id. at 457.
139. See id. The Court stated that "harmonization of general admiralty law [referring to the unseaworthiness and maintenance and cure claims filed by seamen] with congressional enactments [referring to the Jones Act claims filed by seamen] would have little meaning if we were to hold that, though forum non conveniens is a local matter for purposes of the Jones Act, it is nevertheless a matter of global concern requiring uniformity under general maritime law." Id. at 456-57.
140. 287 U.S. 278 (1932).
141. See id. at 280-81.
142. See Miller, 510 U.S. at 457.
143. See id.
144. See id. at 457-58 (Souter, J., concurring).
time commerce.”

Justice Stevens, who concurred in the judgment and in the final section, Part II.C of the majority opinion, attacked as “untrustworthy” the 1917 majority decision in *Southern Pacific Co. v. Jensen*, which held that the Court may “forbid state tribunals from applying state laws in admiralty cases.” Justice Stevens claimed that *Jensen* and the cases that followed, *Knickerbocker Ice Co. v. Stewart* and *Washington v. W.C. Dawson & Co.*, allowed state laws, even those approved by congressional acts, to be improperly eliminated or restricted by court action. Noting that Congress has not legislated on the applicability of forum non conveniens in maritime cases brought in state courts, Justice Stevens concluded that until that time comes, “we should not lightly conclude that the federal law of the sea trumps a duly enacted state statute.” Justice Stevens could see no danger to maritime commerce from the differences among states in the application of forum non conveniens. He asserted that protection is afforded by other means without resorting to reliance on “*Jensen’s* special maritime pre-emption doctrine and its abstract standards of ‘proper harmony’ and ‘characteristic features.’”

145. *Id.*
146. 244 U.S. 205 (1917).
147. *Miller*, 510 U.S. at 458-59 (Stevens, J., concurring) (construing Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917)). In *Jensen*, a railroad worker was killed while unloading a ship. *See Jensen*, 244 U.S. at 207-08. The New York courts affirmed the damage award made to Jensen’s family by the Workmen’s Compensation Commission of New York, *see id.* at 209-10, but the United States Supreme Court struck down the award. *See id.* at 212, 218. The Court held that the Compensation Statute gave the plaintiff an award based on the injury the workman received and not based on fault, which was a remedy unknown to the common law and thus not a remedy intended to be saved to suitors as an exception to the jurisdiction of federal courts over maritime cases. *See id.* at 218. The Court held that state legislation could not preempt federal legislation if it offended a “characteristic feature” of maritime law, or if it interfered with the “harmony and uniformity” of maritime law. *Id.* at 216.
149. 264 U.S. 219 (1924).
150. *See Miller*, 510 U.S. at 459 (Stevens, J., concurring). Justice Stevens stated that “*Jensen* and its progeny represent an unwarranted assertion of judicial authority to strike down or confine state legislation—even state legislation approved by Act of Congress—without any firm grounding in constitutional text or principle.” *Id.* Justice Stevens complained that state-passed laws, such as workmen’s compensation laws, could be declared inapplicable in cases that came under admiralty jurisdiction and that even Congress could not override the admiralty law. *See id.*
151. *Id.* at 461.
152. *See id.* at 461-62 (citing the Commerce and the Due Process clauses of the U.S. Constitution as the other means that afford protection to maritime litigants).
153. *Id.* at 461.
3. Dissenting Opinion

Justice Kennedy disagreed with the conclusions drawn by the majority from the history of forum non conveniens and Supreme Court precedents. The majority had rejected the need for "uniformity and the elimination of unfair forum selection rules" in determining whether to apply forum non conveniens to maritime cases in state courts. While Justice Kennedy conceded that state courts can exercise discretion in hearing maritime cases, he objected to state courts' ability to reject the use of forum non conveniens in all cases. According to Justice Kennedy, the Court's holding thus "condone[d] the forum shopping and disuniformity that the admiralty jurisdiction is supposed to prevent." In addition, Louisiana's rule is damaging to friendly relations among states and nations by disallowing the application of the doctrine in any maritime cases brought in Louisiana state courts, thus impeding maritime trade.

Justice Kennedy cited various cases to demonstrate how the dismissal of cases for an inconvenient forum has a positive effect on the United States' trading relations with other nations. Justice Kennedy concluded that "forum non conveniens is an established feature of the general maritime law," and it is confusing and disruptive of maritime trade when Louisiana state courts apply a different rule. While Miller involved an American seaman and an American defendant, Justice Kennedy indicated that the issue of forum non conveniens should be resolved in a manner applicable beyond the specific facts of Miller. Justice Kennedy concluded that American Dredging deserved a "principled ruling on its objection," and asserted that the discretionary aspect of the doctrine

154. Id. at 462 (Kennedy, J., dissenting).
155. See id.
156. Id. at 463.
157. See id.
158. See id. at 464-68.
159. Id. at 466.
160. See id. at 466-67.
161. See id. at 470. Similarly, a recent law review article bemoaned the fact that the Miller Court had not analyzed the forum non conveniens doctrine in terms of its purpose, thus leaving unresolved the question as to whether the Court's holding applied to foreign as well as domestic (American) maritime litigants. See Julie C. Ashby, Note, Hung Out to Dry, But Still Dripping Wet: The United States Supreme Court Docks Forum Non Conveniens in Miller v. American Dredging Co., 18 Tul. Mar. L.J. 347, 358 (1994).
162. Miller, 510 U.S. at 470 (Kennedy, J., dissenting). "Though it may be doubtful that a forum non conveniens objection will succeed when all parties are domestic,
was “a virtue, not a vice.”

III. Analysis

State and federal cases involving the doctrine of forum non conveniens illustrate the various and often conflicting interpretations given to the doctrine by the courts. From the beginning of American jurisprudence, courts have treated maritime cases differently from non-maritime cases. Similarly, forum non conveniens has been treated differently from other procedural rules. A maritime case brought in federal court follows substantive maritime law and federal procedures. A maritime case brought in state court generally follows substantive maritime law. However, in American Dredging Co. v. Miller, the Supreme Court held that state courts may nonetheless apply their own procedural rules, including the doctrine of forum non conveniens. Miller held that application of Louisiana’s forum non conveniens rule in a maritime case was allowed for two reasons: (1) forum non conveniens was not considered a “characteristic feature” of maritime law, that is, exclusively applied in maritime law, and (2) the application of Louisiana’s forum non conveniens doctrine did not cause harm to the uniformity or harmony of maritime law.

The majority’s holding requires that, in order to be characteristic of maritime law, the procedure of forum non conveniens must be applied only in maritime law. The doctrine has little chance of fulfilling that requirement. Indeed, it would be difficult for any procedural rule to be limited in its application to one type of law. After the Court created its own definition of “characteristic,” it concluded that forum non conveniens was not characteristic of maritime law. As a result, the Court could not require the application of federal forum non conveniens in a maritime case brought in state court if the latter wished not to apply the doctrine. Louisiana could thus apply its own forum non conveniens procedures, even though they conflicted with federal procedures. In addition, the majority

that conclusion should ensue from a reasoned consideration of all the relevant circumstances, including comity and trade concerns.” Id. at 469.

163. Id.
164. See supra note 16 and accompanying text for an explanation of the Constitution’s grant of judicial power in admiralty and maritime cases.
165. See supra notes 30-50 and accompanying text for the history of the forum non conveniens doctrine.
166. See Miller, 510 U.S. at 453.
167. See id. at 447.
168. See id. at 450.
claimed that permitting Louisiana to employ its own version of *forum non conveniens* did not disrupt the uniformity of federal maritime law. The majority's manipulation of a definition to justify Louisiana's preemption of federal *forum non conveniens* is an inadequate solution to the problem presented.

A more appropriate solution regarding the application of *forum non conveniens* is the perspective suggested by Justice Kennedy's dissent in *Miller*. Justice Kennedy argued that "*forum non conveniens* is an established feature of the general maritime law." The *Miller* majority, he argued, was incorrect in defining "established feature" as one which necessarily originated in admiralty or was peculiar to admiralty. Instead, the Court should have focused on "whether [forum non conveniens] is an important feature of the uniformity and harmony to which admiralty aspires." Had the Court done so, it would have concluded that the doctrine is vital for preserving harmony in maritime trade and preventing an American state, such as Louisiana, from denying a defendant the *forum non conveniens* defense, which would result in the "forum shopping and disuniformity" that uniform maritime law is intended to avoid.

A. Supreme Court Majority in Miller "Misses the Boat"

1. The "Characteristic" Test is Overly Restrictive

In analyzing whether *forum non conveniens* was a characteristic feature of maritime law, the *Miller* Court found that, while *forum non conveniens* originated in Scottish estate cases and was applied in many early maritime cases, the doctrine has not been exclusive to maritime law. In *Miller*, the Court established the standard that, in order for a procedural feature to be characteristic of maritime law and thus governed by federal maritime law, the feature had to be exclusively applied in maritime law. Since fo-
rum non conveniens was applied in non-maritime cases, the Miller Court concluded that forum non conveniens was not an exclusive feature characteristic of maritime law.

This conclusion raises the question of whether there would be any rule that could possibly satisfy the Court's test of "characteristic." It is doubtful that any procedure would be solely applied in a maritime context and nowhere else. The fact that the Court chose to apply the exclusivity definition in the case of forum non conveniens suggests that the Court was less interested in enforcing the application of a doctrine routinely applied in maritime law and more interested in finding a reason to justify Louisiana's application of state procedure in a maritime case brought in its state courts.

The Miller Court's interpretation of the characteristic-feature test is an overly narrow one, considering the traditional, widespread application of forum non conveniens in maritime cases. Even the

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relations." Id. at 447 (quoting Southern Pacific Co. v. Jensen, 244 U.S. 205, 216 (1917)). For a discussion of the Jensen case, see supra note 147.

177. See, e.g., Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981) (indicating that in a case for damages from an airplane crash, the denial of forum non conveniens was not permitted because the law of the country to which the case was moved was less advantageous); Missouri ex rel. S. Ry. Co. v. Mayfield, 340 U.S. 1 (1950) (reversing the lower court's denial of forum non conveniens in an accident case because the only reason for the denial was that the lower court incorrectly believed they were required to reject the forum non conveniens defense in Federal Employers' Liability Act cases); Koster v. Lumbermens Mut. Cas. Co., 330 U.S. 518 (1947) (holding that a stockholder's derivative suit filed in the plaintiff's home state of New York was properly dismissed by the district court applying forum non conveniens because it was more convenient for the company to hold the trial in Illinois and the plaintiff was not inconvenienced by the change); Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947) (holding that, in a civil lawsuit involving damages from a fire that occurred in Virginia, the court in New York, where the suit was filed, did not abuse its discretion in applying forum non conveniens and dismissing the case to a more appropriate forum, Virginia, because that is one of many factors that are balanced by courts in deciding whether or not to apply the doctrine).

178. See, e.g., Chick Kam Choo v. Exxon Corp., 486 U.S. 140 (1988) (affirming the right of defendant to present its argument in Texas state court that federal maritime forum non conveniens law preempts the Texas constitutional statute allowing "open courts" and thus the prohibition of forum non conveniens at the state court's discretion); Canada Malting Co. v. Paterson S.S. Ltd., 285 U.S. 413 (1932) (affirming the New York district court decision to dismiss the case for forum non conveniens because collision, while in American waters, involved only Canadian persons and Canadian-owned ships).


180. See supra note 30 and accompanying text for a description of early cases applying the forum non conveniens doctrine; see also The Belgenland, 114 U.S. 355, 367 (1885) (United States admiralty courts had proper jurisdiction over cases between foreigners "unless special circumstances exist to show that justice would be better su-
dictionary definition of “characteristic,” “belonging to or especially typical or distinctive of the character or essential nature of,”181 does not indicate that the trait can only be found in a particular group or type. Simply because the doctrine happens to be characteristic of non-maritime law does not mean that it cannot also be accurately described as characteristic of maritime law. Certainly the application of forum non conveniens in non-maritime cases does not preclude its application in maritime cases or vice-versa. Thus, the “characteristic” test employed by the majority is too limiting and leads to perverse results.

2. Harmony and Uniformity in Maritime Law are Threatened by the *Miller* Decision

The Court in *Miller* also evaluated whether the denial of forum non conveniens caused harm to the uniformity and harmony of maritime law. The Court began by recognizing not only the historical importance of uniformity in maritime law, citing *Southern Pacific Co. v. Jensen*,182 but also the fact that absolute uniformity is not required.183 Justice Scalia, writing for the majority, stated that due to the “discretionary nature of the doctrine, combined with the multifariousness of the factors relevant to its application,” referring to the factors enumerated by the *Gilbert* Court,184 the application of forum non conveniens makes “uniformity and predictability of outcome almost impossible.”185 The *Miller* Court thus seemed to accept some amount of variation and lack of uniformity in the application of the doctrine without regarding that situation as creating any harmful effects.

In fact, the Court has tolerated disuniformity by permitting states to determine when to apply forum non conveniens. In *Chick Kam Choo v. Exxon Corp.*,186 the Court held that as to Jones Act served by declining it"; The Maggie Hammond, 76 U.S. (9 Wall.) 435, 457 (1869) (in a case between two foreigners, the Court granted a forum non conveniens dismissal, noting that courts have the discretion to do so if it would better serve justice); Mason v. The Ship Blaireau, 6 U.S. (2 Cranch) 240, 264 (1804) (in a case between two foreign ships, the court of appeals in Maryland appropriately heard the case, even though the court had the ability to dismiss the case). See supra notes 34-36 and 37-38 and accompanying text for discussions of *Mason* and *The Maggie Hammond*, respectively.

182. See supra note 147 for a discussion of *Jensen*.
183. See Miller, 510 U.S. at 451 (citing *The Lottawanna*, 88 U.S. (21 Wall.) 558, 575 (1874)).
184. See supra note 40-41 and accompanying text discussing *Gilbert*.
and maritime claims brought in state court, the state was competent to resolve the issue of whether or not to apply forum non conveniens and could permit state procedure to preempt federal procedure.\textsuperscript{187} At the same time, the Court admitted that federal maritime forum non conveniens determinations might preempt state determinations and that the defendants should be permitted to make that argument to the Texas state courts.\textsuperscript{188} In addition, Justice White noted in his concurrence in \textit{Chick Kam Choo} that the uniformity in maritime law is so important that federal law may require that a case be dismissed for forum non conveniens even if it preempts a state court’s forum non conveniens law.\textsuperscript{189}

When the Supreme Court of Missouri, as described in \textit{Missouri ex rel. Southern Railway Co. v. Mayfield},\textsuperscript{190} denied the forum non conveniens exception of the defendant in a FELA case, it reasoned that uniformity of federal law required such action.\textsuperscript{191} In reversing the decision, the United States Supreme Court emphasized that it did not mean to imply to the states that forum non conveniens was prohibited in FELA cases, but simply that FELA cases should be treated in a non-discriminatory manner.\textsuperscript{192} Thus, the Court held that forum non conveniens could be treated as a local procedure, so long as it is applied equally in all cases.\textsuperscript{193}

In Louisiana, forum non conveniens is not applied equally in all cases. The doctrine is prohibited only in maritime and Jones Act cases.\textsuperscript{194} Since the Jones Act incorporates FELA, by analogy there is discrimination against FELA cases brought under the Jones Act in Louisiana, which is specifically prohibited by the Court’s holding in \textit{Mayfield}.\textsuperscript{195} Thus, in Louisiana, the doctrine of forum non conveniens is denied not only to Jones Act and maritime cases, but to FELA cases brought under the Jones Act as well. This result would

\textsuperscript{187} See \textit{id.} at 150. The Court noted that a majority of the Court of Appeals for the Fifth Circuit, in \textit{Exxon Corp. v. Chick Kam Choo}, 817 F.2d 307, 324 (5th Cir. 1987), allowed a forum non conveniens dismissal to Singapore as a more appropriate forum than Texas because “[i]n this maritime context, . . . the so-called ‘reverse-Erie’ uniformity doctrine required that federal forum non conveniens determinations pre-empt state law.” \textit{Id.} at 145 (citation omitted).

\textsuperscript{188} See \textit{Chick Kam Choo}, 486 U.S. at 150.

\textsuperscript{189} See \textit{id.} at 151 (White, J., concurring).

\textsuperscript{190} See \textit{supra} notes 133-34 and accompanying text for a discussion of \textit{Mayfield}.


\textsuperscript{192} See \textit{id.}

\textsuperscript{193} See \textit{id.}


\textsuperscript{195} See \textit{supra} notes 133-34 and accompanying text for a discussion of \textit{Mayfield}.
be unanticipated by those filing Jones Act FELA suits in Louisiana and could substantially affect the outcomes of such cases. The Court has noted numerous times that the application of forum non conveniens is discretionary on the part of the court applying the doctrine. Yet in permitting some states to prohibit the application of the doctrine, the Court is fostering harmful disuniformity.

Predicting the outcome of a case is nearly impossible; but the ability to rely on the application of consistent rules is a reasonable expectation. The uniform application of forum non conveniens in maritime cases brought in either state or federal court would assure litigants of fair and consistent procedures accompanying the application of uniform maritime substantive law. By not insisting on uniform procedures, the Miller Court has caused harm to the traditional uniformity and harmony of maritime law.

3. Substantive Rights and Procedural Rules Collide in Miller

Erie Railroad Co. v. Tomkins established that state substantive law and federal procedural rules would be applied to cases in federal court under diversity jurisdiction (the Erie doctrine). The purpose of the doctrine was to ensure that there would be no discrimination against litigants who were not citizens of the state and that the same result would be obtained whether the case was filed in federal or state court. A type of reverse-Erie has been created in Miller, where federal substantive law and state procedures are applied in maritime cases brought in state court. In this instance, however, the application of the same substantive law, federal maritime law, in federal or state court, would not ensure uniformity of

197. Permitting the several states to selectively apply the doctrine is inconsistent with long established precedent:

One thing is . . . unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states.

The Lottawanna, 88 U.S. (Wall.) 558, 575 (1874).
198. 304 U.S. 64 (1938).
199. See id. at 74-75.
200. See id.
outcome regardless of forum because different state procedures are applied that affect the manner in which the substantive law is applied.

As noted, the Supreme Court cases involving forum non conveniens seem themselves to suffer from inconsistency.201 This lack of uniformity in the Court's decisions causes confusion among practitioners.202 Even Justice Scalia could not delineate a test for uniformity, observing that "[i]t would be idle to pretend that the line separating permissible from impermissible state regulation is readily discernible in our admiralty jurisprudence, or indeed is even entirely consistent within our admiralty jurisprudence."203

The implication from Miller is that the forum non conveniens procedure does not affect maritime law in any manner that concerns the Court, such as impacting the substantive maritime law. The Miller Court in fact described the forum non conveniens doctrine as a matter of "judicial housekeeping" for federal courts,204 in much the same way that transfers among federal courts permit the allocation of cases for the convenience of the courts and parties.205 The Court held that when a maritime case is filed in state court, the state should be allowed to apply its own local procedural rules.206 Thus, a state court can disregard the federal procedure, as long as substantive maritime law is not affected. The assumption made by

201. For example, although the Jensen Court held that state law could not interfere with maritime law, the Chick Kam Choo Court permitted state procedure to pre-empt federal procedure. See Chick Kam Choo v. Exxon, 486 U.S. 140, 150 (1988); Southern Pac. Co. v. Jensen, 244 U.S. 205, 212 (1917); see also supra notes 147 and 186-89 and accompanying text for a discussion of Jensen and Chick Kam Choo, respectively.

202. Telephone Interview with James A. George, Co-counsel for William R. Miller, Sr. (Feb. 20, 1995).

203. Miller, 510 U.S. at 452.

204. Id. at 457.

205. See supra note 42 and accompanying text for an explanation of federal transfers.

206. See Miller, 510 U.S. at 447 (construing Madruga v. Superior Court of California, 346 U.S. 556, 561 (1954) (quoting Red Cross Line v. Atlantic Fruit Co., 264 U.S. 109, 124 (1924))). "[T]he State, having concurrent jurisdiction [with the federal courts], is free to adopt such remedies, and to attach to them such incidents, as it sees fit." Red Cross Line, 264 U.S. at 124.
the Court is that a procedural rule does not affect the outcome of a maritime case. However, this has been shown not to be the case.

For example, the Court in an earlier case actually required that a procedural rule be applied in preference to a conflicting state procedure, even though not characteristic of maritime law, because the litigant's substantive maritime rights would be affected. In the maritime case of *Garrett v. Moore-McCormack Co.*,²⁰⁷ brought in Pennsylvania state court, the Supreme Court held that the application of a procedural rule—specifically, allocation of the burden of proof—was more than a mere housekeeping detail because it affected the seaman's substantive right to obtain relief.²⁰⁸ Pennsylvania treated the burden of proof of a seaman's release as a procedural rule, and imposed the burden on the plaintiff.²⁰⁹ The Supreme Court stated that the general admiralty rule required the party setting up the seaman's release to bear the burden of proof.²¹⁰ Although burden of proof was not an exclusive characteristic of admiralty, the Court held that a state procedural rule, here the burden of proof, should not obstruct the uniform application of law in Jones Act cases brought in state court.²¹¹ Thus, the seaman was entitled to the full procedural, as well as substantive, protection of maritime law.

The *Garrett* decision illustrates the Supreme Court holding that a conflicting state procedural rule that substantially affects a litigant's substantive rights can be preempted by a federal rule in a maritime case brought in state court.²¹² Based on *Garrett*, if American Dredging could have proven that its substantive maritime rights were in any way compromised, then the *Miller* Court should have insisted that Louisiana apply the forum non conveniens doctrine, despite the fact that Louisiana had a conflicting procedure.

In a seemingly inconsistent decision, the Supreme Court, in *Red Cross Line v. Atlantic Fruit Co.*,²¹³ permitted the application of a state remedy—specific performance—that was not recognized by maritime law.²¹⁴ Two parties had a written contract that provided

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²⁰⁷. 317 U.S. 239 (1942).
²⁰⁸. See id. at 249.
²⁰⁹. See id. at 242.
²¹⁰. See id. at 248.
²¹¹. See id. at 249. "This Court has specifically held that the Jones Act is to have a uniform application throughout the country, unaffected by 'local views of common law rules.'" Id. at 244 (quoting Panama Ry. Co. v. Johnson, 264 U.S. 375, 392 (1924)).
²¹². See id. at 249.
²¹³. 264 U.S. 109 (1924).
²¹⁴. See id. at 124.
for arbitration under the Arbitration Law of New York.\textsuperscript{215} The Red Cross Line had chartered a vessel from the Atlantic Fruit Company, but Atlantic refused to perform.\textsuperscript{216} When Atlantic refused to participate in arbitration, Red Cross sought specific performance of the contract as provided for by the Arbitration Law of New York.\textsuperscript{217} The lower state courts upheld the remedy, but the New York Court of Appeals reversed, stating that admiralty law controlled.\textsuperscript{218} The Supreme Court reversed, agreeing with the trial court. The Court reasoned that New York's procedural law requiring specific performance as the remedy, while not a remedy recognized by maritime law, nevertheless did not affect or change substantive maritime law.\textsuperscript{219} Because maritime law permits the enforcement of arbitration agreements, the Court concluded that the New York Arbitration Law requiring enforcement did not change substantive maritime law.\textsuperscript{220} Since specific performance is not permitted under maritime law, the plaintiff would have had no remedy in this maritime case. Yet the Court permitted specific performance to apply because it held that the substantive maritime law was not changed.\textsuperscript{221} Thus, the Court permitted a state procedure unknown to admiralty to be applied in a maritime case brought in state court in the interest of justice. In balancing the competing interests of a state in applying its own law in its own courts versus the interest in a uniform application of maritime law, the \textit{Red Cross} Court showed a decided preference for the state interest, regardless of the effect on maritime law.

Evidencing a similar preference, the \textit{Miller} Court held that a state is not required to apply the forum non conveniens procedure in a maritime case brought in state court.\textsuperscript{222} Yet other Supreme Court decisions have forced a state to apply forum non conveniens, regardless of the substantive effect on the litigants. In some of these cases, the Court's decision as to the applicability of forum non conveniens could result in reduced damages for plaintiffs. For ex-

\begin{itemize}
\item \textsuperscript{215} See id. at 118-19. The Arbitration Law of New York provided "that a provision in a written contract to settle by arbitration a controversy thereafter arising between the parties 'shall be valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract.'" Id. at 118.
\item \textsuperscript{216} See id. at 119.
\item \textsuperscript{217} See id.
\item \textsuperscript{218} See id. at 119-20.
\item \textsuperscript{219} See id. at 124.
\item \textsuperscript{220} See id.
\item \textsuperscript{221} See id. at 118-19.
\item \textsuperscript{222} See American Dredging Co. v. Miller, 510 U.S. 443, 450-51 (1994).
\end{itemize}
ample, in the following two cases, the Supreme Court's dismissal on the grounds of forum non conveniens meant that the plaintiffs were subject to less generous law in the foreign forums than in the forums in which they originally filed.223

In the first case, *Canada Malting Co. v. Paterson Steamship Ltd.*,224 the Court denied the plaintiffs a larger recovery by permitting the defendant to use the forum non conveniens defense to remove the case from an American to a Canadian court.225 Thus, although the outcome was changed by the use of the forum non conveniens defense, maritime law was neither interfered with nor changed. In the second case, *Piper Aircraft Co. v. Reyno*,226 the Court confirmed the *Paterson* holding that the dismissal of a suit on the grounds of forum non conveniens "may not be barred solely because of the possibility of an unfavorable change in law."227 The Court concluded that it was more important to maintain the integrity of maritime law and the proper application of the procedural rule of forum non conveniens than to permit the choice of forum to be based solely on the outcome for the litigants.228

Thus, the Supreme Court has insisted on the application of a maritime procedural rule in cases where the Court determines that the substantive rights of the litigant may be affected, as in *Garrett v. Moore-McCormack Co.*229 Yet the Court has also insisted on the application of a maritime procedural rule where the substantive rights of the litigants are less important than ensuring the uniform


225. See id. at 418.


227. Id. at 248-49. The Court further explained the importance of forum non conveniens by the following:

In fact, if conclusive or substantial weight were given to the possibility of a change in law, the *forum non conveniens* doctrine would become virtually useless. Jurisdiction and venue requirements are often easily satisfied. As a result, many plaintiffs are able to choose from among several forums. Ordinarily, these plaintiffs will select that forum whose choice-of-law rules are most advantageous. Thus, if the possibility of an unfavorable change in substantive law is given substantial weight in the *forum non conveniens* inquiry, dismissal would rarely be proper.

*Id.* at 250.

228. See *id.* at 251-52.

applicability of maritime procedural rules, as in Paterson230 and Piper Aircraft.231 These conflicting interpretations by the Supreme Court make it difficult for lower courts to ascertain the correct standard for applying procedural rules in maritime cases brought in state courts. Since the Court has not clearly articulated a standard with reasonable parameters, lower courts are left to their own interpretations or to the latest pronouncement of the Court. This is not a satisfactory state of affairs.

A recent example of the confusion among courts can be found in Ballard Shipping Co. v. Beach Shellfish,232 which was heard by the United States Court of Appeals for the First Circuit. Ballard cited American Dredging Co. v. Miller for the proposition that a state regulation is not invalidated by a federal regulation as long as the state regulation is procedural rather than substantive.233 In Ballard, an oil tanker owned by the defendant ran aground in Narragansett Bay, Rhode Island, spilling over 300,000 gallons of heating oil into the bay, causing the closing of the bay to shellfishing activities for two weeks.234 The captain and the owner of the vessel were convicted of violations of the Federal Water Pollution Control Act and fined.235 When some individuals brought suit against the owner, Ballard, in Rhode Island, Ballard brought “a petition in admiralty for limitation or exoneration from liability.”236 In that admiralty action, some shellfish dealers asserted claims of extreme economic losses during the two week clean-up period, alleging negligence under federal maritime law and Rhode Island common law and economic losses under the Rhode Island Environmental Injury Compensation Act.237 The district court dismissed the plaintiffs’ federal claims as well as their state claims, based on a Supreme Court holding that “compensation for economic losses standing

232. 32 F.3d 623 (1st Cir. 1994).
233. See id. at 628.
234. See id. at 624.
235. See id. The captain and owner of the ship were fined $30,500 and $500,000 respectively. See id. In addition, the owner “agreed to pay $3.9 million in compensation for federal cleanup costs, $4.7 million for state cleanup costs and damage to natural resources, $500,000 of which was to be available to compensate individuals, and $550,000 to settle claims for lost wages by local fishermen.” Id.
236. Id.
237. See id.
alone is unavailable in admiralty cases." Therefore, the district court held that federal admiralty law, which disallowed recovery for economic losses, preempted the Rhode Island law allowing such recovery. The plaintiffs appealed.

The First Circuit, in assessing Supreme Court cases involving conflict of state laws with federal maritime law, referred to the Court's holding in Southern Pacific Co. v. Jensen, which disallowed state preemption of federal maritime law if the latter suffered interference with its characteristic features or its harmony and uniformity. However, the First Circuit also noted that later Supreme Court cases allowed state laws to preempt federal maritime law, citing American Dredging Co. v. Miller. Since Miller read "characteristic" as only narrowly applying to a federal rule that originated in admiralty or has exclusive application in admiralty, the First Circuit held that because the denial of recovery for purely economic losses did not originate in admiralty, it was not characteristic of admiralty and thus could be preempted by Rhode Island's conflicting state law which allowed recovery. In reaching this conclusion, the Ballard court accepted the very narrow definition that the Miller Court gave to "characteristic."

As to "harmony" and "uniformity," the First Circuit noted that the Miller Court had not "articulate[d] a definitive test," holding instead that "there is no preemption where the relevant state law is procedural rather than substantive." Since the Rhode Island law in question was substantive, and the First Circuit found that the Supreme Court decisions offered no single comprehensive test as to substantive law, but rather reflected a balancing of state and federal interests on a case-by-case basis, the Ballard court decided to apply a balancing test as to the relative burdens placed on the plaintiffs and defendants. Conclusion that Rhode Island's interest in protecting the environment was more important than the federal need for harmony or uniformity, the First Circuit held the Rhode Island law constitutional and allowed the plaintiffs damages for purely

238. Id. at 624-25 (construing Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303 (1927)).
239. See id. at 625.
240. See id.
241. See id. at 627 (construing Southern Pac. Co. v. Jensen, 244 U.S. 205, 216 (1917)).
242. See id. (citing American Dredging Co. v. Miller, 510 U.S. 443 (1994)).
243. See id. at 627-28.
244. Id. at 628 (citing Miller, 510 U.S. at 453).
245. See id. at 628-29.
economic losses, despite the fact that maritime law prohibits such recovery. 246

Thus, despite the fact that the Rhode Island law was contrary to federal law in allowing recovery for economic loss as a result of damage to natural resources, the court allowed Rhode Island law to preempt federal law. 247 The reliance on Miller in Ballard to preempt conflicting federal maritime law illustrates the danger inherent in not insisting on a uniform application of maritime procedural as well as substantive law. 248 Allowing state law to preempt substantive federal maritime law is even more dangerous than permitting state procedures to preempt federal procedures, yet both seem to have resulted from the Miller decision. Such preemption begins to erode the very reason for the existence of federal maritime law: the consistent application of a standardized body of law in every state and federal court.

B. Solution: Justice Kennedy Suggests a Realistic Compromise

The regulation of maritime activities has historically been differentiated from domestic law as being of special significance. 249 The special substantive maritime law is uniformly applied in both state and federal courts without controversy. 250 Maritime cases brought in federal courts apply federal procedural rules. 251 Yet there is currently no federal legislation on the role of the procedural rule of forum non conveniens in maritime or Jones Act cases brought in state court. The Miller Court attempted to clarify this dilemma by holding that the procedural law which follows the substantive law when a case is brought in state court may be determined by states in whatever manner they choose. As a result of

246. See id. at 631.
247. See id.
249. See supra Part I.A.
250. See supra note 24 and accompanying text.
251. See supra note 29 and accompanying text.
that holding, state procedural rules may be applied over conflicting federal procedural rules in maritime cases in state court. Such a holding, however, would seem to go against the attempt to keep maritime law consistent from state to state, and to avoid the forum shopping and disuniformity that maritime law was intended to eliminate.\textsuperscript{252}

Justice Stevens endorsed the majority's view in his concurring opinion in \textit{Miller}.\textsuperscript{253} Nonetheless, he implied that Congress should consider definitively resolving this dilemma by legislation.\textsuperscript{254} In the meantime, however, such a solution would continue to unfairly penalize defendants brought into court in states such as Louisiana that prohibit application of forum non conveniens in any maritime case.

A somewhat different solution, advanced by Justice Souter, who concurred in \textit{Miller}, is that whether the federal rule is allowed to preempt the state rule should depend on whether the state rule interferes with maritime commerce.\textsuperscript{255} Since a preliminary, factual evaluation would need to be made to determine whether maritime commerce has been interfered with, this solution may lead to greater expenditures of time and money on that one issue than are warranted. On the other hand, such a solution might allow occasional applications of forum non conveniens where it is not now permitted.

Justice Kennedy suggested the most reasonable solution. He favored the application of forum non conveniens as a fair and flexible doctrine that would have a positive effect on foreign trade as well as on domestic cases.\textsuperscript{256} In Justice Kennedy's view, forum non conveniens is an established feature of maritime law which should be applied uniformly by the states.\textsuperscript{257} He does not seem to think that forum non conveniens must have originated or been applied exclusively in maritime law in order to be understood as "characteristic" of maritime law. Justice Kennedy's broader definition of "characteristic" promotes rather than limits the uniformity of maritime law. Thus, he seems to support the holding of the \textit{Jensen}

\begin{footnotes}
\item[253] See \textit{id.} at 458 (Stevens, J., concurring).
\item[254] See \textit{id.} at 460-61.
\item[255] See \textit{id.} at 457-58 (Souter, J., concurring).
\item[256] See \textit{id.} at 463-67 (Kennedy, J., dissenting). Justice Kennedy complained that "Louisiana's open forum policy obstructs maritime commerce and runs the additional risk of impairing relations among the states and with our foreign trading partners." \textit{id.} at 467.
\item[257] See \textit{id.}
\end{footnotes}
Court that disapproved of any state remedy that would prejudice a characteristic feature of maritime law or would interfere with the harmony and uniformity of maritime law.\textsuperscript{258} Justice Kennedy would require that forum non conveniens be an established feature, that is, used regularly in maritime law, rather than require that the doctrine be used exclusively in maritime law, as is required by the majority. Justice Kennedy’s view promotes a policy of uniform application of maritime law, of which all members of the Court approve.\textsuperscript{259}

Another resolution for the dilemma, implied by Justice Stevens, may be action by Congress.\textsuperscript{260} Congress should establish the standard that some federal procedures are essential to do justice in maritime cases because such provisions assure that fair and uniform procedures are applied to maritime cases whether brought in federal or state court. The doctrine of forum non conveniens should be included as one of those procedures. Such a solution would not create confusion concerning the applicability of certain procedures, such as forum non conveniens, and would not prejudice any defendant due to the particular forum chosen by the plaintiff. In addition, the fair and uniform application of maritime substantive law is assured when procedural rules that may be outcome-determinative are applied in an identical manner in every court in which a maritime case is brought.

\textbf{Conclusion}

The federal judiciary applies maritime substantive law and federal procedural rules in maritime and Jones Act cases. Under \textit{Miller}, the state courts, while required to apply maritime substantive law, are free to apply their own local procedural law, including the doctrine of forum non conveniens. Far from being a matter of federal court housekeeping, the doctrine can have a substantial effect on whether justice is done in maritime cases. For that reason, the \textit{Miller} Court erred by ruling that Louisiana’s procedural denial of the doctrine to a maritime defendant can preempt procedures applied in federal court, which allow the application of the doctrine at the discretion of the court. Because the Supreme Court and lower courts have rendered conflicting interpretations as to the appropriate application of forum non conveniens, that doctrine should

\textsuperscript{258} See Southern Pac. Co. v. Jensen, 244 U.S. 205, 216 (1917).
\textsuperscript{259} See supra Part II.D.1 for the \textit{Miller} majority view.
\textsuperscript{260} See \textit{Miller}, 510 U.S. at 460-61 (Stevens, J., concurring).
be a federal procedure that is applied uniformly in maritime and
Jones Act cases in both federal and state courts. Furthermore,
states should be barred from applying a conflicting rule. The
Supreme Court should abandon the exclusive application require-
ment for forum non conveniens and adopt Justice Kennedy’s “es-
tablished feature of maritime law” as a benchmark for application
of forum non conveniens in maritime cases brought in state courts.
This solution would foster just decisions in maritime and Jones Act
cases brought in state as well as federal courts.

Marilyn Maxwell Gaffen