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Torpedoing the Uniformity or Maritime Law: American Dredging v. Miller

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CASENOTES

TORPEDOING THE UNIFORMITY OF MARITIME LAW: *AMERICAN DREDGING V. MILLER*

> *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 intended 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 and with foreign states.*[1]
>
> *Justice Joseph P. Bradley*

I. INTRODUCTION

Under the United States Constitution, federal courts have exclusive jurisdiction over cases involving maritime and admiralty issues.[2] Notable exceptions to this exclusivity arise under the "savings to suitors" clause,[3] created by the Judiciary Act of 1789.[4] Under this clause, state courts may hear cases involving

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1. Southern Pac. Co. v. Jensen, 244 U.S. 205, 215 (1917) (quoting The Lottawanna, 88 U.S. (21 Wall.) 558, 575 (1874) (opinion of Bradley, J.)).

2. U.S. CONST. art. III, § 2, cl. 1.

3. *See, e.g.*, American Dredging Co. v. Miller, 114 S. Ct. 981 (1994).

4. In *American Dredging*, Justice Scalia quotes the Judiciary Act of 1789 which provides, in relevant part,

> That the district courts shall have, exclusively of the courts of the several [s]tates . . . exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction . . . within their respective districts as well

maritime or admiralty disputes when state law adequately provides a remedy.[5] Within these suits, however, the state courts must apply substantive federal maritime law under the doctrine of preemption and federal supremacy.[6] Yet, the state courts may provide remedies and attach requirements to those remedies as they see fit, except when these provisions cause material prejudice to a characteristic feature of maritime law or interfere with the uniformity and proper harmony of maritime law administration.[7]

The well-settled doctrine of *forum non conveniens* allows a court to decline to hear a case, even when the statutory and constitutional requirements of jurisdiction and venue have been met.[8] This doctrine assures that a defendant, though within a particular court's reach, will not be subject to unreasonable oppression or harassment by suit in that court.[9]

Forum non conveniens has enjoyed popularity in maritime lawsuits.[10] However, there exists some dispute as to whether the doctrine is a "characteristic feature" of admiralty law, and whether a state's rejection of that doctrine in admiralty matters interferes with the uniform application of maritime law.[11] The United States Court of Appeals for the Fifth Circuit held in

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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.*

Id. at 984 (quoting the Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76-77 (1789) (codified as amended at 28 U.S.C.A. § 1333(1) (West 1993)) (alteration in original).

5. 20 U.S.C.A. § 1333(1) (West 1993) (providing that "[t]he district courts shall have original jurisdiction, exclusive of the courts of the states, of (1) [a]ny civil cases of admiralty or maritime jurisdiction, saving to suitors in all cases *all other remedies to which they are otherwise entitled.*" (emphasis added)).

6. *See, e.g., American Dredging*, 114 S. Ct. at 985; Garrett v. Moore-McCormack Co., 317 U.S. 239, 243 (1942).

7. Southern Pac. Co. v. Jensen, 244 U.S. 205, 216 (1917).

8. *See* Gulf Oil v. Gilbert, 330 U.S. 501, 507 (1947); *see also* David W. Robertson & Paula K. Speck, *Access to State Courts in Transnational Personal Injury Cases*: Forum non Conveniens *and Antisuit Injunction*, 68 TEX. L. REV. 937, 949 (1990).

9. *Gulf Oil*, 330 U.S. at 508.

10. Harold K. Watson, *Modern Procedural Considerations in Maritime Personal Injury Litigation: Procedural Weapons for Venue Battle*, 68 TUL. L. REV. 473, 480 (1994); *see also* Canada Malting Co. v. Patterson S.S., Ltd., 285 U.S. 413, 421-23 (1932).

11. *See* American Dredging Co. v. Miller, 114 S. Ct. 981 (1994); Ikospentakis v. Thallasic S.S. Agency, 915 F.2d 659 (1990); Exxon Corp. v. Chick Kam Choo, 817 F.2d. 307 (1987), *rev'd on other grounds*, 486 U.S. 140 (1988).

Exxon Corp. v. Chick Kam Choo[12] that *forum non conveniens* is in fact a "characteristic feature" of maritime law, and its imposition is necessary for the "uniform" administration of admiralty law.[13] Applying federal preemption analysis, the court held that a state statute prohibiting *forum non conveniens* in state court admiralty proceedings was invalidated by the doctrine's actual application in federal court.[14]

In 1994, the Supreme Court directly addressed the issue of federal preemption of state *forum non conveniens* jurisprudence in *American Dredging Co. v. Miller.*[15] Justice Scalia, writing for a five-justice majority, held that a Louisiana statute forbidding the application of *forum non conveniens* in state court proceedings involving matters of admiralty was *not* preempted by the doctrine's availability in the federal courts.[16] Finding that the doctrine is neither necessary to the uniform application of maritime law nor a "characteristic feature" of maritime law, the Court held that a state may decide to make *forum non conveniens* available as it sees fit, without federal interference.[17]

This casenote will assess the validity of Justice Scalia's reasoning, contrast it with the Fifth Circuit's holding in *Exxon Corp. v. Chick Kam Choo,*[18] which *American Dredging* effectively overrules, and criticize the analysis at the heart of the decision. Part II reviews previous Supreme Court decisions with which *American Dredging* conflicts. Part III analyzes the holding of *Exxon.* Part IV introduces the facts and procedural history of *American Dredging.* Parts V and VI challenge the interpretation of *forum non conveniens* as an "uncharacteristic" feature of admiralty law and discuss the actual importance of a uniform *forum non conveniens* doctrine in admiralty. Part VII assesses the dichotomy upon which the Court partially based its decision, and Part VIII predicts the decision's future ramifications.

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12. 817 F.2d 307 (1987).
13. *Id.* at 320.
14. *Id.* at 324.
15. 114 S. Ct. 981 (1994).
16. *Id.* at 988.
17. *Id.* at 987-89.
18. The comparison will not be a line-by-line assessment, but rather an analysis of the reasoning employed in both cases in addition to consideration of reasoning not utilized in either opinion.

II. PRIOR CASE LAW DEALING WITH PREEMPTION

A. Garrett v. Moore-McCormack[19]

In 1942, the Supreme Court specifically underscored the need for uniformity in admiralty suits under the Jones Act[20] in *Garrett v. Moore-McCormack*. Justice Black, in assessing the validity of a state burden-of-proof requirement that contravened federal maritime standards, rebuked the finding of the Pennsylvania Supreme Court that "the burden of proof . . . does not affect the substantive rights of the parties, but is merely procedural, and is therefore controlled by state law."[21] Stating that the Supreme Court had long required that the Jones Act have uniform application regardless of local common law rules, Justice Black rejected any reliance on a bright line between procedure and substance.[22] Rather, his analysis sought only to "assure litigants full protection for all substantive rights intended to be afforded them by the jurisdiction in which the right itself originates."[23] Litigants cannot rely on theoretical substantive rights when local custom effectively bars access. State courts must proceed so as to protect the substantive rights of parties.[24] Thus, as early as 1942, the Supreme Court recognized that substantive rights are only effective when regulated by the procedures by which they are applied.[25] No room for state idiosyncracies in maritime lawsuits exists; however, Justice Scalia overlooks this crucial fact in *American Dredging*. In subrogating a necessary federal maritime law policy to state determination, *American Dredging* creates confusion for potential litigants.[26]

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19. 317 U.S. 239 (1942).
20. 46 U.S.C. § 688 (1975).
21. 317 U.S. at 242.
22. *Id.* at 244.
23. *Id.* at 245.
24. *Id.*
25. *Id.* at 249.
26. *See* discussion *infra* part VIII.

B. Missouri ex rel. Southern Railroad v. Mayfield[27]

The Supreme Court considered state *forum non conveniens* provisions relating to the Federal Employers' Liability Act (FELA)[28] in *Missouri ex rel. Southern Railway v. Mayfield.* In an opinion by Justice Frankfurter, the Court held that state courts are free to apply their own procedural policies, including *forum non conveniens*, when hearing FELA suits.[29]

Missouri's highest court had denied motions to dismiss based on *forum non conveniens* in a decision involving two FELA suits consolidated for argument.[30] The Supreme Court was unsure of the rationale used by the Missouri court in arriving at this decision.[31] Justice Frankfurter made it clear that dismissals under *forum non conveniens* are not to be denied simply because federal law empowers state courts to hear FELA suits.[32] Thus, if the doctrine is available in state actions, it should also be available in state courts hearing FELA claims, so long as the policy does not discriminate against FELA suits or nonresidents.[33]

C. Southern Pacific Co. v. Jensen[34]

In *Jensen,* the Supreme Court decided on the validity of a remedy provided a widow under a New York state workmen's compensation statute.[35] Southern Pacific objected to the award, claiming that because the decedent was employed in interstate commerce as a stevedore, federal law should control and preempt the New York statute.[36] The opinion by Justice

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27. 340 U.S. 1 (1950).
28. 45 U.S.C. § 51 (1988).
29. 340 U.S. at 7.
30. Missouri *ex rel.* Southern Ry. v. Mayfield, 224 S.W.2d 105 (Mo.), *cert. granted* 339 U.S. 98 (1949).
31. *Mayfield,* 340 U.S. at 3.
32. *Id.* at 4.
33. *Id.* at 4-5. *But see* American Dredging v. Miller, 114 S. Ct. 981 (1994) (holding that a Louisiana statute specifically prohibiting *forum non conveniens* in Jones Act cases in state court was valid *despite* the apparent discrimination).
34. 244 U.S. 205 (1917).
35. *Id.* at 207-10.
36. *Id.* at 212.

McReynolds dealt directly with the extent to which a state court sitting in admiralty is bound to apply federal maritime law over state law. Realizing that defining the limits of pre-emption with exactness is impossible, the Court delineated several guiding principles.[37]

Acknowledging that federal maritime law will not preempt every state statute which may be applied in maritime cases, Justice McReynolds held that a state statute is clearly invalid if it serves to contravene an applicable act of Congress.[38] More importantly, a state law will be preempted "if it contravenes the essential purpose expressed by an act of Congress or works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law."[39] Using this analysis, the Court found that the New York statute was preempted by the entire body of federally created maritime law jurisprudence because it was unknown to common law.[40]

III. THE ANALYSIS OF *EXXON CORP. V. CHICK KAM CHOO*

A. *The Facts and Prior History of the Case*

Madame Choo's husband was killed in Singapore while repairing a ship owned by Exxon.[41] She brought suit in federal district court in Houston for damages under the Jones Act, the Death on the High Seas Act,[42] general maritime law claims, and the Texas wrongful death statute.[43] The federal court granted summary judgment in favor of Exxon on all but the state claim, and Madame Choo subsequently brought the identical claims in a Texas state court in Houston.[44] Exxon removed the case on diversity grounds to the federal district court, which dismissed the claims as res judicata and imposed sanctions on

37. *Id.* at 216.
38. *Id.*
39. *Id.*
40. *Id.* at 218.
41. *Exxon*, 817 F.2d 307, 309 (1987), *rev'd on other grounds*, 486 U.S. 140 (1988).
42. 46 U.S.C.A. §§ 761-68 (West 1975 & Cum. Supp. 1994).
43. 817 F.2d at 309.
44. *Id.*

Choo's counsel.[45] On appeal, the Fifth Circuit held that complete diversity did not exist and the sanctions were dissolved.[46] The suit returned to state court, and Exxon petitioned the federal court to enjoin the state court from proceeding.[47] Among other issues,[48] the court of appeals considered whether a state court must apply the federal doctrine of *forum non conveniens* when hearing admiralty claims.[49]

B. *The Decision*

The Fifth Circuit recognized and employed "five concepts or clusters of ideas" that guide federal preemption of maritime claims in state courts:

> [1] [S]tate law is not preempted when it contains a detailed scheme to fill a gap in maritime law. . . . [2] [S]tate law is not preempted when the law regulates behavior in which the state has an especially strong interest. . . . [3] [M]aritime law preempts whenever a uniform rule will facilitate maritime commerce, or, . . . when non-uniform regulation will work a material disadvantage to commercial actors. . . . [4] [M]aritime law preempts . . . when the state law impinges on international or interstate relations. . . . [5] [P]laintiffs should win personal injury or death maritime tort claims.[50]

Basing its analysis on these factors, the court held that "[f]ederal forum non conveniens analysis must preempt [a state's open forum statute] in a maritime suit by an alien in Texas courts."[51] Judge Gee chose to analyze the unique aspects of the *forum non conveniens* doctrine as applied to these five underlying factors rather than labelling it "procedural" and upholding the state law under a convenient, though erroneous,

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45. *Id.*
46. Chick Kam Choo v. Exxon Corp., 764 F.2d 1148 (5th Cir. 1985).
47. *Exxon*, 817 F.2d at 304.
48. The court also considered Madame Choo's challenges to jurisdiction and the anti-injunction act, *id.* at 309, as well as the current status of the Texas state claims. *Id.* at 310.
49. *Id.* at 316-24.
50. *Id.* at 317-18.
51. *Id.* at 320.

interpretation of the so-called "reverse-*Erie*" doctrine.[52] Based on the reverse of *Erie Railroad v. Tompkins* holding,[53] the doctrine requires that state courts sitting in admiralty apply only *substantive* maritime law and leaves them free to apply state procedural guidelines.[54]

While the court recognized that state procedural rules are generally not preempted by federal maritime law, it purposefully stated that this is not because state procedural rules take precedence over maritime law, but because they seldom conflict with it.[55] When they do, however, "it is clear that [the state procedural rules] must yield."[56] Judge Gee simply refused to rely upon a simple "procedural-substantive" dichotomy "[b]ecause the Erie diversity doctrine and the 'reverse-*Erie*' maritime doctrine spring from distinct principles and policies."[57]

Under the five factor analysis, the Texas statute failed on all counts.[58] As *forum non conveniens* is a well-established doctrine, it cannot be said that the statute operated "to fill gaps" in the federal maritime law.[59] Nor does the statute reflect a valid use of state "police power, since a purported state interest in preserving an action for non-resident aliens cannot be considered strong."[60]

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52. In *Exxon* the court stated:

> It has been universally and correctly assumed that state procedural rules govern actions in state courts under the 'savings to suitors' clause—the "reverse-*Erie* metaphor captures this assumption perfectly. . . . [I]f the 'reverse-*Erie*' doctrine is perfectly symmetrical, it follows that state courts are not obligated to apply federal *forum non conveniens* analysis in maritime cases. . . . [But w]e reject this facile syllogism; drawing conclusions from metaphors is dangerous.

Id. at 319.

53. 304 U.S. 64 (1938).

54. *See Exxon*, 817 F.2d at 316, 319-20.

55. *Id.* at 319.

56. *Id.*

57. *Id.* Judge Gee explained that "the substance/procedure dichotomy is simply shorthand for distinctions that must be drawn on the basis of policies underlying the doctrine. The 'reverse-*Erie*' question is whether the inconsistent state law, whether deemed a matter of substance or procedure, conflicts with maritime law." *Id.* (citations omitted).

58. *See id.*

59. *Id.* at 320.

60. *Id.*

Conversely, the important interests of uniformity, predictability, and federal plenary power over international relations militate strongly in favor of preemption.[61] Recognizing that controversies arising out of international shipping are inevitable, Judge Gee refused to apply the Texas statute to admiralty cases and expose alien corporations to the inconvenience of litigation in states where their contacts, though quite tenuous, satisfy the "minimum contacts" jurisdictional criteria.[62]

The holding in *American Dredging Co. v. Miller*[63] effectively overrules the Fifth Circuit's holding in *Exxon*. Thus, it is likely that the inconvenience and the inevitable stifling of trade due to potential liability in distant state courts articulated by Judge Gee will be realized following the decision in *American Dredging*.

IV. FACTS AND PROCEDURAL HISTORY OF *AMERICAN DREDGING CO. V. MILLER*

William Robert Miller, a longtime resident of Mississippi, was hired by American Dredging to work aboard a tugboat operating on the Delaware River.[64] American Dredging is a Pennsylvania corporation with its principal place of business in New Jersey.[65] Mr. Miller was injured in the course of employment on the tug and received medical treatment in Pennsylvania, New York, and upon his return home to Mississippi.[66]

In 1989, Mr. Miller filed suit in the Civil District Court for the Parish of Orleans, Louisiana, under the Jones Act.[67] The Jones Act authorizes a seaman injured in the course of employment to bring a cause of action for damages over which state and federal courts have concurrent jurisdiction.[68]

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61. *Id.*
62. *See id.* at 321-23 (construing Erie R.R. v. Tompkins, 340 U.S. 64 (1938)).
63. 114 S. Ct. 981 (1994). *See infra* part IV.
64. *Id.* at 984.
65. *Id.*
66. *Id.*
67. 46 U.S.C.A. app. § 688 (West Cum. Supp. 1994).
68. *American Dredging*, 114 S. Ct. at 989.

American Dredging filed a motion for dismissal under the doctrine of *forum non conveniens* which the trial court granted and the Louisiana Court of Appeals for the Fourth District affirmed.[69] The Supreme Court of Louisiana reversed the dismissal, holding that, under Article 123(c) of the Louisiana Code of Civil Procedure, *forum non conveniens* was not available in Jones Act claims brought in state court.[70] On certiorari to the United States Supreme Court, American Dredging contended that the Louisiana statute prohibiting *forum non conveniens* dismissals in state court admiralty proceedings was preempted by the doctrine's application in federal court.[71]

V. AN ERRONEOUS INTERPRETATION OF "CHARACTERISTIC FEATURE"

Nowhere is it disputed that a state law will be preempted if it works "material prejudice" to a characteristic feature of maritime law.[72] According to Justice Scalia, *forum non conveniens* is not one of those features.[73] The Court recognized that the doctrine enjoyed "its earliest and most frequent expression" in matters of maritime law.[74] This is true not because the doctrine originated in admiralty, but rather because the unique nature and considerations of maritime law, and the parties involved therewith, often necessitate its application.[75]

Indeed, *forum non conveniens* was long recognized at common law and was recognized as a common rule of application within the federal courts as early as 1947.[76] Recently, the availability

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69. Miller v. American Dredging Co., 580 So.2d 1091 (La. Ct. App. 1991).

70. Miller v. American Dredging Co., 595 So.2d 615 (La. 1992), *cert. granted*, 113 S. Ct. 1840 (1993). The Louisiana Supreme Court found that "the doctrine of forum non conveniens is not a substantive feature of the general maritime law." *Id.* at 619.

71. *See American Dredging*, 114 S. Ct. at 987-90.

72. *Id.* at 985; *see also* Canada Malting Co. v. Paterson S.S., Ltd., 285 U.S. 413 (1932).

73. *American Dredging*, 114 S. Ct. at 986.

74. *Id.*

75. That is, the transitory and global nature of many multi-national maritime companies are frequently inconvenienced by suit in United States forums, the satisfaction of jurisdictional requirements notwithstanding. *Cf.* Robertson & Speck, *supra* note 8.

76. Gulf Oil v. Gilbert, 330 U.S. 501 (1947). The court held that "this exception is rooted in the kind of relief which these courts grant and the kinds of problems which

of the doctrine was reaffirmed in a non-admiralty context.[77] However, given the provisions of the federal venue transfer statute, *forum non conveniens* usually occurs only where the proper forum is another country.[78]

Because *forum non conveniens* is available in all federal cases and has its roots in the common and civil law rather than in admiralty, the majority held that the doctrine is not a "characteristic feature" of admiralty.[79] Justice Scalia plainly asserts that because *forum non conveniens* "neither originated in admiralty nor has exclusive application there," Louisiana's refusal to apply it "does not . . . work 'material prejudice to [a] characteristic featur [sic] of the general maritime law.'"[80] This statement apparently relies on a misuse of the term "characteristic feature." Nowhere does *Southern Pacific Co. v. Jensen*,[81] upon which the majority relies for part of its federal preemption analysis, equate "characteristic feature" with a feature not applied anywhere else. The fact that *forum non conveniens* existed in case law and statutes long before United States admiralty law should not negate its identity as a characteristic feature of admiralty law. *Jensen* does not require that "characteristic features" of admiralty be entirely exclusive to admiralty; rather, "characteristic" means merely a distinguishing feature or quality.[82]

Thus, Justice Scalia and the majority erroneously interpreted *Jensen*'s "characteristic feature" language to mean "exclusive feature." Justice Scalia ignores this inconsistency later in the opinion when he discusses the evolution of the burden of proof requirements of admiralty law. He compares these requirements to a state statute which places the burden of proof in admiralty upon the plaintiff rather than, as in the preempting federal law, upon the defendant.[83] Though the idea of placing the bur-

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they solve." *Id.* at 514.

77. Piper Aircraft v. Reyno, 454 U.S. 235 (1981). For a discussion of the Supreme Court's interpretation of the *Piper* decision, see Watson, *supra* note 10, at 481-83.

78. Watson, *supra* note 10, at 481 (construing 28 U.S.C. § 1404(a) (1988)).

79. *American Dredging*, 114 S. Ct. at 986-87.

80. *Id.* (quoting Southern Pac. Co. v. Jensen, 244 U.S. 205, 216 (1917)).

81. 244 U.S. 205 (1917).

82. RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1987).

83. *American Dredging*, 114 S. Ct. at 988 (discussing Garrett v. Moore-McCormack Co., 317 U.S. 239, 249 (1942)).

den of proof upon the defendant neither originated nor functions exclusively in admiralty, the Court does not hesitate to preempt a state statute which conflicts with this characteristic feature of maritime law.[84]

In litigation, parties rely upon the placement of the burden of proof; as a "characteristic feature," it is necessary for competent, successful research and trial strategy. The burden of proof is designed to insure litigants full use of substantive rights guaranteed under admiralty law.[85] It is difficult to see, then, why a doctrine that preserves these substantive rights by assuring that they will only be litigated in a convenient forum is not accorded at least the same status.

VI. *FORUM NON CONVENIENS* IS NEEDED FOR MARITIME LAW UNIFORMITY

A. *An Improper Reliance on Earlier Case Law*

The majority next considered whether a state statute prohibiting *forum non conveniens* dismissals in state court admiralty proceedings is invalid because it interferes with the uniform application of the general federal maritime law.[86] Justice Scalia relied on the federalism arguments of *Missouri ex rel. Southern Railway v. Mayfield*[87] in holding that "despite that uniformity requirement . . . a state court presiding over an action [under the Federal Employers Liability Act][88] . . . 'should be freed to decide the availability of the principle of *forum non conveniens* in these suits according to its own local law.'"[89] This seems to suggest that, under the Jones Act, which incorporates by reference the judicially developed doctrine of

84. *Id.* It is irrelevant that Justice Scalia discusses the point in the section dealing with the need for uniformity and not in the section dealing with "characteristic feature." Here, a change to a characteristic feature negates the possibility of uniformity in that feature's application.

85. *Garrett*, 317 U.S. at 245.

86. *American Dredging*, 114 S. Ct. at 987 (questioning Southern Pac. Co. v. Jensen, 244 U.S. 205, 216 (1917)).

87. 340 U.S. 1 (1950).

88. 45 U.S.C. § 51 (1988).

89. *American Dredging*, 114 S. Ct. at 989 (quoting *Mayfield*, 340 U.S. at 5).

liability in FELA,[90] state courts are free to decide whether to apply *forum non conveniens* at all.[91]

This reliance, however, is built upon an incomplete recitation of Justice Frankfurter's opinion in *Mayfield*. Frankfurter held that states may deny access to its courts through the application of the doctrine.[92] However, he also found that a state court properly imposes *forum non conveniens* where it "enforces its policy *impartially* . . . so as not to involve *a discrimination against Employer's Liability Act suits*."[93] The statute[94] at issue in *American Dredging* clearly involves a discrimination against those bringing suits under the Jones Act and other maritime litigants. In recognizing *forum non conveniens* in some cases but specifically not in maritime actions, Louisiana actually contravenes the *Mayfield* interpretation of FELA, which, as Justice Scalia asserts, the Jones Act *should* incorporate.[95]

Further, the holding in *Mayfield* reflects a lower court's decision to hear a case because it erroneously believed that the doctrine of *forum non conveniens* could not bar a cause of action in a state court if the action was based on a federal statute.[96] Thus, the opinion only assured the courts of Missouri that they were free to apply their own notions of forum convenience to decide whether to hear certain FELA cases.[97] Yet, Justice Scalia reads *Mayfield* to hold that *forum non conveniens* is solely a state consideration.[98] However, the actual holding asserts that states may *apply* the doctrine as they see fit, according to their notions of procedural policy.[99] Unlike *American Dredging*, then, *Mayfield* presupposes the availability of the doctrine and holds that a state may apply it *despite* a federally-created cause of action.

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90. *Id.* (quoting Kerman v. American Dredging, 355 U.S. 426, 439 (1958)).
91. *See Id.*
92. *Mayfield*, 340 U.S. at 5.
93. *Id.* at 4 (emphasis added).
94. LA. CODE CIV. PROC. ANN. art. 123 (West Supp. 1994).
95. *American Dredging*, 114 S. Ct. at 989. The court found that the Jones Act "adopts the 'judicially developed doctrine of liability' under the Federal Employers' Liability Act." *Id.* (quoting Kernan v. American Dredging Co., 355 U.S. 426, 439 (1958)).
96. *See Mayfield*, 340 U.S. at 3.
97. *Id.* at 5.
98. *American Dredging*, 114 S. Ct. at 989.
99. *Mayfield*, 340 U.S. at 3.

It has been held that FELA merely creates a cause of action for injured parties; it does not guarantee one.[100] Restating the holding in *Mayfield*, states may decline valid jurisdiction when necessary.[101] The statute in *American Dredging,* however, does not allow for individual *forum non conveniens* rulings in particular suits. Lastly, it forbids such rulings in an entire *class* of suits.[102] While the majority may have read this restriction to be permissible, the holding of *Mayfield* would indicate otherwise: "availability" of the doctrine should be in reference to a judge's decision based on local law,[103] and should not indicate, as *American Dredging* holds, state acceptance of the doctrine.

B. American Dredging *Overlooks the True Reasons for Uniformity*

In an early case discussing federal preemption in the admiralty context, the Supreme Court stated that, within the "savings to suitors clause[104] . . . it could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several states."[105] This superseding need for uniformity which Justice Scalia recognizes in the *American Dredging* opinion undoubtedly concerns the interest of potential parties and the Court recognizes the existence of rules "upon which maritime actors rely in making decisions about primary conduct—how to manage their business and what precautions to take."[106] Justice Scalia further states that, given the discretionary nature of *forum non conveniens*, "uniformity and predictability of outcomes [are] almost impossible."[107]

The discretionary nature of the doctrine is not disputed, and there is an "unbroken line of decisions in the lower federal courts 'holding that federal judges have' unqualified discretion" in deciding whether to hear certain admiralty suits.[108] While

100. *See id.* at 4.
101. *Id.*
102. LA. CODE CIV. PROC. ANN. art. 123 (West Supp. 1994).
103. 340 U.S. at 5.
104. 28 U.S.C.A. § 1333(1) (West 1993).
105. American Dredging Co. v. Miller, 114 S. Ct. 981, 987 (1994) (quoting The Lottawanna, 88 U.S. (21 Wall.) 558, 575 (1874)).
106. *Id.* at 988-89.
107. *Id.* at 989.
108. *Id.* at 994 (quoting Canada Malting Co. v. Paterson S.S., Ltd., 285 U.S. 413,

it may be true that one cannot count on the fact that *forum non conveniens* will be applied,[109] one *may* rely on the fact that, in federal court, it *can* be applied.[110] To this end, the Supreme Court in *Gulf Oil v. Gilbert*[111] (a case relied upon by the Court in *American Dredging)* offered several factors to be considered when determining the validity of a *forum non conveniens* motion.[112] Unequivocally foremost among these factors is whether the inconvenience to the defendant substantially negates any convenience to the plaintiff.[113] After this determination, a court may consider public factors such as "administrative difficulties"[114] or the state's interest in hearing the claim in deciding whether the chosen forum is proper.[115] In effect, the Louisiana statute[116] bypasses the private-party requirements set forth in *Gulf Oil* and provides that the court's interest in hearing maritime claims automatically supersedes any interest of the defendant, even if the choice of forum operates to "vex, harass, or oppress" him.[117] Thus, the majority in *American Dredging* tacitly overrules a case upon which they rely. Specific factors have been delineated by previous Supreme Court holdings,[118] effectively creating a doctrine of uniform application[119] within the federal courts upon which potential parties and other businesses would be justified in relying.[120] A party should not be discouraged from relying upon the proper

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421-22 & nn.2-4 (1932)).

109. *American Dredging*, 114 S. Ct. at 989.

110. *See generally* Gulf Oil v. Gilbert, 330 U.S. 501 (1947).

111. *Id.*

112. *Id.* at 508.

113. *Id.*

114. *Id.*

115. *Id.* at 509.

116. LA. CODE CIV. PROC. ANN. art. 123 (West Supp. 1994).

117. *See* Gulf Oil v. Gilbert, 330 U.S. 501, 508 (1947). This proposition holds true regardless of the fact that the plaintiff's choice of forum is presumptively proper. *Id.*

118. *Id.* at 506.

119. It should be remembered that federal law preempts state laws where there is an interest in maintaining uniformity, so the state laws do not destroy 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. (21 Wall.) 558, 575 (1874).

120. In the *American Dredging* majority opinion, Justice Scalia recognized that *forum non conveniens*, because of its "discretionary nature" cannot be relied upon in making decisions about secondary conduct on behalf of litigants and must be preempted for the sake of uniformity. *American Dredging*, 114 S. Ct. at 988-89.

exercise of a judge's discretion, and the transitory nature of the parties in admiralty suits inherently enlists judicial discretion. In his dissent, Justice Kennedy pointed out that it is a "virtue, not a vice, that the doctrine preserves discretion for courts to find *forum non conveniens* in unusual but worthy cases."[121]

The Louisiana statute at issue contravenes a commonly available federal court doctrine, and in doing so disrupts the uniformity of general maritime law. Despite any inconvenience, a party who would ordinarily have available the defense of *forum non conveniens* would be forced to try its case in a Louisiana state court. This would not be the case in federal court, where maritime law originates and upon whose laws maritime businesses rely.[122] Thus, by sanctioning this law, the Supreme Court has condoned the lack of uniformity which admiralty jurisdiction was designed to prevent.[123] This statement accurately applies a key principle of *The Lottawanna*: the field of maritime law, one of general application across the country and across the world, is better regulated by the federal government than by the apparently idiosyncratic states.[124]

VII. THE FALSE "PROCEDURAL VS. SUBSTANTIVE" DICHOTOMY

A. *The "Reverse-*Erie*" Doctrine is Inapplicable Here*

In the *American Dredging* dissent, Justice Kennedy asserted that "[p]rocedural or substantive, the *forum non conveniens* doctrine promotes comity and trade," two of the main goals of uniform admiralty law.[125] This statement contravenes the dichotomy between procedure and substance upon which Justice Scalia relies in the majority opinion.[126]

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121. *Id.* at 996.

122. This is because the doctrine of *forum non conveniens* is available and popularly applied in federal courts. *See, e.g.*, Canada Malting Co. v. Paterson S.S., Ltd., 285 U.S. 413 (1932).

123. *See generally* Gulf Oil v. Gilbert, 330 U.S. 501 (1947) (discussing the doctrine of *forum non conveniens*); *see also* Robertson & Speck, *supra* note 8, at 950-51.

124. *See generally* The Lottawanna, 88 U.S. (21 Wall.) 558 (1874).

125. *American Dredging*, 114 S. Ct. at 995.

126. *Id.* at 988. Justice Scalia states that because *forum non conveniens* is procedural rather than substantive, state qualifications are not preempted by federal legislation. *Id.*

Traditional notions of substance versus procedure arise from a "mirror image" of the holding of *Erie Railroad v. Tompkins*.[127] Just as federal courts hearing diversity actions are bound to apply the substantive law of the state in which they sit pursuant to the *Erie* doctrine, state courts sitting in admiralty are bound to apply substantive federal maritime laws.[128] This so-called "reverse-*Erie*" doctrine has gained acceptance due to facility of use and the easily-drawn parallels.

However, as American Dredging pointed out in its brief,[129] and as Justice Kennedy realized,[130] the relatively clear-cut differences between substance and procedure discussed in *Erie* are less clear in admiralty proceedings. The evolution of diversity and admiralty jurisdiction have not been parallel.[131] *Forum non conveniens* simply is not as disconnected from admiralty law as are the elements of procedure which the *Erie* doctrine addresses. *Forum non conveniens* is an "admiralty practice of long standing,"[132] and, as American Dredging noted in their brief, "the *forum non conveniens* problem . . . is one that is inescapably connected with the substantive rights of the parties . . . [and not] 'merely' an 'administrative' problem."[133]

B. *The Special Admiralty Considerations of the Doctrine*

The line between "substance" and "procedure," even if it does exist, does not provide any answers within the admiralty context. The *American Dredging* majority attempts to nurture the distinction in its reliance upon *Garrett v. Moore-McCormack Co.*,[134] by stating that the burden of proof, which "[i]n earlier times . . . was regarded as 'procedural' . . ." is now "viewed as

127. 304 U.S. 64 (1938).

128. Robertson & Speck, *supra* note 8, at 953.

129. *See* Brief of Petitioner at 25-26, American Dredging Co. v. Miller, 114 S. Ct. 981 (1994) (No. 91-1950), WL 409366 (U.S. La. Pet. Brief).

130. *American Dredging*, 114 S. Ct. at 995.

131. *See* Exxon Corp. v. Chick Kam Choo,. 817 F.2d 307, 319 (1987), *rev'd on other grounds*, 486 U.S. 140 (1988).

132. Alexander M. Bickel, *The Doctrine of* Forum non Conveniens *as Applied in the Federal Courts in Matters of Admiralty*, 35 CORNELL L.Q. 12, 13 (1949).

133. *See* Brief of Petitioner at 24, *American Dredging* (No. 91-1950) (quoting Bickel, *supra* note 132, at 17).

134. 317 U.S. 239 (1942).

a matter of substance."[135] Justice Scalia relied heavily on the language in *Garrett*, stating that the "burden of proof . . . 'was a part of the very substance of . . . [a plaintiff's] claim and cannot be considered a mere incident of a form of procedure.'"[136] However, he fails to explain *why* the burden of proof is part of the substance of the claim. Justice Black, elaborating upon this point in the very sentence quoted by Justice Scalia, does *not* say that the burden of proof is "substantive because it is not procedural," as Justice Scalia would suggest, but rather because it is "*[d]eeply rooted in admiralty*."[137] Justice Black, deconstructing the substance-procedure dichotomy, found a basis in admiralty law which Justice Scalia chose to ignore.

The *Garrett* Court also remarked that "the state court was bound to *proceed* in such manner that all the substantial rights of the parties under controlling federal law would be protected."[138] The *Garrett* Court recognized that there are issues, besides those which are traditionally labeled substantive, that bear significantly upon the parties' rights. Federal courts recognize that certain rights, though substantive, should not be adjudicated in an inconvenient forum.[139] *Forum non conveniens* is, in this sense, "preservative" of the substantive rights of both parties. Forcing a defendant to litigate in an extremely inconvenient forum cannot insure him of the "full scope of these [federally created] rights" under *Garrett*,[140] even if it is "merely" a "displacement" of venue requirements.[141] *Garrett* does not permit this.

Thus, the Supreme Court's reliance upon *Mayfield* is unjustified for another reason: the effect of *forum non conveniens* upon FELA cases does not involve an issue of the same importance as admiralty uniformity.[142] That the Jones Act incorporates by reference the FELA liability standards cannot be disputed.[143]

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135. *American Dredging*, 114 S. Ct. at 988 (quoting *Garrett*, 317 U.S. at 249).
136. *Id.* at 988.
137. *Garrett*, 317 U.S. at 249 (emphasis added).
138. *Id.* at 245 (emphasis added).
139. *See generally* Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947).
140. *Garrett*, 317 U.S. at 249.
141. *See American Dredging*, 114 S. Ct. at 988.
142. *See generally* Brief of Petitioner at 22-27, *American Dredging*, (No. 91-1950), 1993 WL 409366 (U.S. La. Pet. Brief).
143. *American Dredging*, 114 S. Ct. at 989.

However, it should *not* be said that, in adopting these standards, Congress intended to undermine the importance of convenience in the admiralty court.[144] Yet, the *American Dredging* opinion finds precisely such an intent. This holding is based upon an over reliance upon a "facile syllogism"[145] between the *Erie* doctrine and the perhaps mislabeled reverse-*Erie* doctrine. However, admiralty jurisdiction and diversity jurisdiction did *not* evolve symmetrically, and precise symmetry should be neither expected nor created.[146] As stated previously,[147] the proper question in so-called "reverse-*Erie*" cases should be whether a state law interferes with a characteristic feature of general federal maritime law, or whether it works material prejudice to the uniform application of that law.[148] Indeed, "procedural or substantive, the *forum non conveniens* doctrine promotes comity and trade. The States are not free to undermine these goals."[149]

VIII. RAMIFICATIONS OF THE *AMERICAN DREDGING* DECISION

The future of the *forum non conveniens* doctrine in admiralty, whether in state or federal court, does not look promising following the decision of *American Dredging v. Miller.* Comity and trade, both at the heart of uniform maritime law, will suffer. It is likely that shipping companies, knowing that minimum contacts with Louisiana or states with similar laws expose them to potentially infinite lawsuits, will be loathe to establish those contacts.[150] Much litigation could "turn on the fortuities of diversity."[151]

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144. *See generally* Brief of Petitioner, *American Dredging Co. v. Miller*, 114 S. Ct. 981 (1994) (No. 91-1950).

145. Exxon Corp. v. Chick Kam Choo, 817 F.2d 307, 319 (1987), *rev'd on other grounds*, 486 U.S. 140 (1988).

146. *Id.*

147. *See supra* part III.B.

148. *Exxon*, 817 F.2d at 319.

149. *American Dredging*, 114 S. Ct. at 995.

150. *Cf. Exxon*, 817 F.2d at 322. In his opinion in *Gulf Oil*, Justice Jackson noted that the Supreme Court had held the "use of an inappropriate forum in one case an unconstitutional burden on interstate commerce." Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 505 (1947) (construing Davis v. Farmers Coop. Equity Co., 262 U.S. 312 (1922)).

151. *Exxon*, 817 F.2d at 320. Because cases brought under the "savings to suitors" clause are not within the ambit of federal question jurisdiction (though they do in-

In *Garrett,* Justice Black expressed fear that if state courts could "substantially alter the rights of either litigant . . . the remedy afforded by the state would not enforce, but would actually deny, federal rights" that Congress tries to ensure.[152] Because of the *American Dredging* holding, a formerly important principle of maritime law will be considered *only* if the admiralty case involves diversity of citizenship. In many situations,[153] Louisiana law will prevent a federal court from exercising an important doctrine. Justice Kennedy "thought that the required accommodation was the other way around."[154]

Perhaps above all else, the *application* of the Louisiana law will often result in irrational outcomes,[155] cutting against previously superseding ideas of uniformity. Alien parties who cannot satisfy the diversity requirements of federal court will be stranded in remote courts in which *forum non conveniens* is forbidden, while suits involving an aggrieved United States citizen and an alien defendant will be removable to federal courts and almost certainly dismissed on *forum non conveniens* grounds.[156] Judge Gee could not "tolerate this pointless intrusion on the basic uniformity of the maritime law,"[157] but in *American Dredging*, it is given life.

IX. CONCLUSION

The doctrine of *forum non conveniens* has long been a characteristic feature of maritime law, one upon which various ship-

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volve admiralty claims), the only possibility for removal to federal court under 28 U.S.C. § 1441 (1988) is through traditional diversity jurisdiction: diversity of citizenship and a fifty-thousand dollar or more claim. 28 U.S.C. § 1332 (1988). For a more in-depth discussion, see Robertson & Speck, *supra* note 8, at 943-44. Further, in the *American Dredging* dissent, Justice Kennedy suggests that the holding marks a dangerous precedent for the future of uniform federal law. He wonders if, in states like Louisiana, federal courts will even bother with *forum non conveniens* motions, knowing that a plaintiff could simply bring suit in state court. *American Dredging*, 114 S. Ct. at 986.

152. Garrett v. Moore-McCormack Co., 317 U.S. 239, 245 (1942).

153. For examples, and arguably "irrational" results of these situations, see *Exxon*, 817 F.2d at 321.

154. *American Dredging*, 114 S. Ct. at 996 (Kennedy, J., dissenting).

155. *Exxon,* 817 F.2d at 320.

156. *Id.*

157. *Id.* at 321.

ping companies could rely and under which they could be assured that they would not be compelled to suffer inconvenient lawsuits in distant forums. Because of the importance of maintaining uniformity and harmony in admiralty cases, this reliable doctrine should not be circumvented by the idiosyncracies of the laws of the several states. Further, its importance should not be undermined by references to a facile and imprecise reliance upon a procedural-substantive dichotomy. The Supreme Court, in *American Dredging Co. v. Miller,* considered the doctrine a simple procedural matter, unimportant to admiralty uniformity. *Forum non conveniens*, now irreparably discredited in admiralty law, can no longer assure litigants of the uniformity on which maritime law is based and upon which litigants have traditionally depended.

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