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AIR DISASTER LITIGATION WITHOUT DIVERSITY

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THE RECENT introduction of H.R. 2202¹ once again² brings into question the need for diversity jurisdiction³ in federal courts. Many trial attorneys complain⁴ that H.R. 2202's abolishment of diversity jurisdiction virtually eliminates federal jurisdiction in areas where it is desirable, such as in air disaster cases.⁵ Other

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¹ H.R. 2202, 96th Cong., 1st Sess. 1 (1979) [hereinafter cited as H.R. 2202], "A Bill to abolish diversity of citizenship as a basis of jurisdiction of Federal district courts, to abolish the amount in controversy requirement in Federal question cases, and for other purposes." 125 CONG. REC. H692 (daily ed. Feb. 15, 1979).

² In 1978 an identical bill, H.R. 9622, 95th Cong., 2d Sess. (1978), passed the House by a vote of 266 to 133. 124 CONG. REC. H1,570 (1978). A similar bill, S. 2389, 95th Cong., 2d Sess. (1978), encountered substantial opposition from organized bar groups. MacKenzie, *Diversity at the Crossroads*, The National Law Journal, Oct. 2, 1978, at 1, col. 1. See note 4 *infra*.

³ Diversity jurisdiction, the first granted to federal courts, was originally conferred in the Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73 (codified at 28 U.S.C. § 1332 (1976)). See U.S. CONST. art. III, § 2.

⁴ The opposition comes from various organized bar groups, in particular, the Association of Trial Lawyers of America (ATLA), whose membership of 34,000 are counsel for plaintiffs. See MacKenzie, *Diversity at the Crossroads*, *supra* note 2; *Diversity of Citizenship Jurisdiction/Magistrates Reform; Hearings on H.R. 761, H.R. 5546, H.R. 7493, H.R. 9123, H.R. 9622 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 68-77 (1977) [hereinafter cited as *Hearings*] (testimony of Robert G. Begam); *id.* at 230-46 (testimony of John P. Frank).

⁵ This concern is evidenced by the following statistics: In the year between July 1, 1976 and June 30, 1977, 605 diversity cases involving airplane personal injury were filed in United States district courts. *Hearings, supra* note 4, at 361 [Appendix III—Statistics, furnished by Administrative Office of the United States Courts]. In 1976, the most recent year for which complete statistics are available, there were thirty aircraft accidents involving domestic and international scheduled air carriers, which resulted in seventy-seven fatalities. BUREAU OF THE CENSUS, U.S. DEP'T. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: Table No. 1134, at 671 (99th ed. 1978). Note that these figures do not include the statistics from the Tenerife disaster, March 27, 1977, in which two Boeing 747's

observers believe that the retention of diversity jurisdiction merely maintains an unwieldy system for the resolution of such controversies.⁶ One solution to both of these concerns may be found in a bill creating a federal cause of action in air disaster cases. This article will discuss the following points: (1) the arguments for and against diversity jurisdiction; (2) the problems caused by the lack of uniformity in state laws applied in air tort litigation and the creation of a federal cause of action as a solution to these problems; and (3) the alternative jurisdictional bases for federal litigation of air disaster cases.

I. DIVERSITY JURISDICTION: PROS AND CONS

A. *The Advantages of Federal Courts*

The American trial bar has vigorously opposed⁷ H.R. 2202,⁸ which, with one exception,⁹ abolishes the jurisdiction of federal courts based on diversity of citizenship¹⁰ for suits exclusively be-

collided, claiming over five hundred lives. *Collision Course*, NEWSWEEK, Apr. 11, 1977, at 48; . . . *What's he doing, He'll kill us all*, TIME, Apr. 11, 1977, at 22.

⁶ See, e.g., Tydings, *Air Crash Litigation: A Judicial Problem and a Congressional Solution*, 18 AM. U. L. REV. 299, 299-306 (1969); Note, *The Applicability of Federal Common Law to Aviation Tort Litigation*, 63 GEO. L. REV. 1083 (1975) [hereinafter cited as *Aviation Tort Litigation*]; Comment, *The Case for a Federal Common Law of Aircraft Disaster Litigation: A Judicial Solution to a National Problem*, 51 N.Y.U. L. REV. 231, 232-38 (1976) [hereinafter cited as *Judicial Solution*]; Comment, *Air Crash Litigation: Disaster in the Courts*, 7 SW. U. L. REV. 661, 661-75 (1975) [hereinafter cited as *Disaster in the Courts*] (forward by Judge Peirson M. Hall, Senior Judge, United States District Court, Central District of California).

⁷ See notes 2 and 4 *supra*.

⁸ H.R. 2202, *supra* note 1, revitalizes a campaign to abolish diversity jurisdiction which nearly succeeded in 1978. See notes 2 and 4 *supra*. Much of the authority referred to herein therefore consists of legislative materials published in connection with the earlier proceedings.

⁹ Interpleader jurisdiction under 28 U.S.C. § 1335 (1976) would be retained. See generally H.R. 2202, *supra* note 1.

¹⁰ 28 U.S.C. § 1332(a) (1976) provides:

The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and is between—

- (1) citizens of different States;
- (2) citizens of a State and citizens or subjects of a foreign state;
- (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and
- (4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

tween citizens of different states.¹¹ Trial lawyers argue that they need to retain this option of availing themselves of federal courts because those courts offer the following advantages: (1) impartial forums for out-of-state litigants;¹² (2) more competent judges;¹³ (3) superior procedural rules;¹⁴ and (4) forums which may have less crowded dockets than state courts.¹⁵

Foremost among these advantages is the availability of impartial forums for out-of-state litigants, especially in areas where regional prejudice exists. According to traditional theory, fear of local bias is the primary reason for diversity jurisdiction.¹⁶ Leading commentators, however, have found other historical roots. Judge Henry J. Friendly,¹⁷ for instance, has suggested that while the local bias theory gained rapid acceptance after the Constitutional Convention in 1787, it was not the dominant force behind the incorporation of diversity jurisdiction into article III of the Constitution.¹⁸ Rather, it was a desire to provide an alternative forum, particularly to encourage commercial expansion into states where the workings of the local court systems tended to discourage investment by otherwise eager entrepreneurs. "[T]he method of appointment and the tenure of the judges," Judge Friendly has stated, "were not of

¹¹ The anti-diversity proposal strikes out paragraph (1) of § 1332(a), but retains paragraphs (2) through (4), which pertain to alienage jurisdiction. H.R. 2202, *supra* note 1, at § 1(b). See note 10 *supra*. The "amount in controversy" requirement is increased from \$10,000 to \$25,000 for these cases. H.R. 2202, *supra* note 1, at § 1(a). It is eliminated completely, however, for section 1331 "Federal Question" cases. *Id.* § 2(b). The bill also modifies the venue provisions in 28 U.S.C. § 1391 (1976) by permitting suit where all plaintiffs reside, in addition to where all defendants reside and "in any judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated" in non-diversity cases. H.R. 2202, § 3(a). Non-diversity cases are currently limited, except where provided elsewhere, to the judicial district where all defendants reside, or where the claim arose. 28 U.S.C. § 1391(b) (1976).

¹² See text accompanying notes 16-26 *infra*.

¹³ See text accompanying notes 27-38 *infra*.

¹⁴ See text accompanying notes 39-46 *infra*.

¹⁵ See text accompanying notes 47-50 *infra*.

¹⁶ *Bank of United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 87 (1809) (opinion of Chief Justice Marshall). See also H.R. REP. NO. 893, 95th Cong., 2d Sess. 3, 4 (1978).

¹⁷ Judge, United States Court of Appeals for the Second Circuit.

¹⁸ Friendly, *The Historical Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 482, 492-97 (1928).

the sort to invite confidence."¹⁹

Whatever its true historical justification, the local bias theory has been generally accepted and is now the leading argument for the retention of diversity jurisdiction.²⁰ Some individuals within the anti-diversity group question the extent to which this bias exists today.²¹ There is significant support,²² nevertheless, even within this anti-diversity group,²³ for the proposition that local bias does exist today and is serious enough to warrant attention.²⁴

The fundamental issue beyond the existence of local bias, however, is the extent to which federal courts actually do offer greater impartiality than state courts. One argument is that since juries in both state and federal courts are drawn from the same geo-

¹⁹ *Id.* at 497-98. Examples of the abuses sought to be avoided were found in Connecticut, where members of the council which appointed judges also sat on the Supreme Court of Errors. The same council members often appeared as advocates before the judges they appointed, thereafter reviewing cases in which they were professionally interested. Sometimes they even argued before their fellow appellate justices. *Id.* at 498. See also C. WRIGHT, *HANDBOOK OF THE LAW OF FEDERAL COURTS* 85 (3d ed. 1976).

²⁰ See, e.g., AMERICAN LAW INSTITUTE, *STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS* 107-08 (1969); Frank, *For Maintaining Diversity Jurisdiction*, 73 YALE L.J. 1 (1963); Shapiro, *Federal Diversity Jurisdiction: A Survey and a Proposal*, 91 HARV. L. REV. 317, 329-30 (1977).

²¹ See, e.g., *Hearings*, *supra* note 4, at 220 (testimony of Charles Alan Wright); H.R. REP. NO. 893, *supra* note 16, at 3, 4 (1978).

²² See Shapiro, *supra* note 20, at 330:

[S]ectional prejudice is by no means a thing of the past, and as a New Englander, I would add that prejudice even against those from neighboring states is not unheard of. The vestiges of provincialism may still remain, especially outside urban areas, and juries drawn from small venires are more likely to be affected than those selected from wider areas. Moreover, with respect to corporations, is it really so clear that a truly local business, with all the influence it may have in the community, has no advantage against an out-of-state individual or corporate adversary?

See also *Hearings*, *supra* note 4, at 239 (testimony of John P. Frank).

²³ See H.R. REP. NO. 893, *supra* note 16, at 4.

²⁴ The antidiversity group argues, however, that a better alternative would be "to commit time and resources to improving the quality of the state courts," rather than to partially combat the problem in federal court in those fortuitous cases where the parties are of diverse citizenship. *Id.* See also McGowan, *Federal Jurisdiction: Legislative and Judicial Change*, 28 CASE W. RES. L. REV. 517, 533 (1978):

But if the justification for diversity jurisdiction comes down to the proposition that federal courts provide 'better justice' than do state courts, then we must ponder why this better justice should be granted on the fortuitous basis of diverse citizenship, when it is denied in suits between parties residing in the same state.

graphic area, litigation in federal courts is not an effective shield against local bias.²⁵ The response to that argument is that the neutralizing element is not the jury, but the federal judge.²⁶

Lifetime tenure and immunity from reductions in compensation²⁷ result in federal judges who, according to one commentator, "are as insulated from majoritarian pressures as is functionally possible, precisely to insure their ability to enforce the Constitution without fear of reprisal."²⁸ In contrast, state judges are normally selected for fixed terms by appointments, elections or initial appointments, followed by retention elections. Each of these methods for the selection and retention of state judges is more political in nature²⁹ than the one employed in federal courts and makes a state judge more vulnerable to political pressures than his federal counterpart.³⁰

The independence of the judge, of course, can play a significant part in the outcome of any trial.³¹ In a recent article, Professor Shapiro discussed how litigation can be influenced by a judge's independence:

Many cases are settled with the participation of the judge or disposed of on questions of law before, during, or after trial, others are profoundly affected by virtually unreviewable discretion-

²⁵ See, e.g., 124 CONG. REC. H1,560 (daily ed. Feb. 28, 1978) (remarks of Rep. Sawyer). See Shapiro, *supra* note 20, at 329.

²⁶ See Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1127-28 (1977).

²⁷ U.S. CONST. art. III, § 1. Federal judges may, however, be removed by impeachment for improper conduct. *Id.* Note that while this may lead to more independent judges, it may adversely affect the quality of the federal judiciary, as in cases where judges remain active long after they should have retired. See note 34 *infra*.

²⁸ Neuborne, *supra* note 26, at 1127. The author also refers to "a series of psychological and attitudinal characteristics . . . instilling elan and a sense of mission in federal judges and exerting . . . a palpable influence on the quality of judicial conduct." *Id.* at 1124.

²⁹ Neuborne, *supra* note 26, at 1127 n.81. The contrast was colorfully articulated during the House debate on H.R. 9622, 95th Cong., 2d Sess. (1978), where Rep. Hyde stated, "The difference between a federal judge and a state judge is profound. A federal judge is on Mount Olympus; he is appointed for life. A state judge is elected, and he is in the political swamps and gets those phone calls from political people. So, there is a vast difference in the atmosphere of the two courts." 124 CONG. REC. H1,560 (daily ed. Feb. 28, 1978).

³⁰ Trial judges are appointed with lifetime tenure in only four states—Massachusetts, Rhode Island, New Hampshire and New Jersey. Neuborne, *supra* note 26, at 1127 n.81.

³¹ Shapiro, *supra* note 20, at 330.

ary rulings or by the manner in which the judge conducts the trial; still others are tried by the judge without a jury or involve equitable remedies in addition to legal relief. In all these cases the judge's own bias or lack of bias can determine whether an out of state party is prejudiced.³³

The foregoing analysis suggests a second advantage of the federal courts: federal judges are generally considered to be more competent³³ than their state counterparts.³⁴ This disparity exists because the selection process for the federal judiciary, while political in nature, is far more concerned with professional competence than the methods of selection of the states.³⁵ Several additional elements contribute to the higher quality of the federal judiciary. First, there are fewer federal judges, so it is easier to maintain a higher level of quality.³⁶ Second, since much of the legal research conducted in a given case is performed by judicial clerks rather than by the judge himself, the considerable disparity in the caliber of the clerks results in the dispensation of a different caliber of justice.³⁷ Third, federal judges are better paid than the state judges.³⁸

Federal courts are also advantageous because of their superior procedural rules. For cases involving numerous parties domiciled in many different jurisdictions, there is little question that, through federal procedural devices, litigation is much more convenient in federal court than in many state courts. Among the procedural advantages under the Federal Rules of Civil Procedure are the "100 mile bulge" for service of process,³⁹ subpoenas for out-of-

³³ *Id.*

³⁴ See Shapiro, *supra* note 20, at 330; Neuborne, *supra* note 26, at 1121-22.

³⁵ See, e.g., Wright, *The Federal Court and the Nature and Quality of State Law*, 13 WAYNE L. REV. 317, 327 (1967); Neuborne, *supra* note 26, at 1121; McGowan, *supra* note 24, at 533. Of course, there are exceptions. As John Frank notes, "nor are all federal judges wiser or abler or all federal procedures more satisfactory than state procedures. The federal bench has its share of incompetents, tyrants and fools . . ." Frank, *supra* note 20, at 10.

³⁶ Neuborne, *supra* note 26, at 1122.

³⁷ *Id.* at 1121.

³⁸ *Id.* at 1122. According to Professor Neuborne, federal clerks are selected from the most recent top law school graduates, while state trial clerks "are either career bureaucrats or patronage employees [who] may lack both the ability and dedication of their federal counterparts." *Id.*

³⁹ *Id.* at 1121. In 1977, for example, federal judges earned \$54,500 per year for life, while the average state trial judge was paid \$33,823 per year. *Id.* at 1121 n.61, citing NATIONAL CENTER FOR STATE COURTS, SURVEY OF JUDICIAL SALARIES IN THE STATE COURT SYSTEM 4 (1976).

⁴⁰ See FED. R. CIV. P. 4(f).

state parties⁴⁰ and the availability of pretrial discovery in out-of-state districts.⁴¹

Although many states have patterned their rules after the Federal Rules of Civil Procedure, the utility of these rules in federal courts is enhanced by a variety of statutory procedural devices not found in the states.⁴² Among these devices is the Multidistrict Litigation Statute,⁴³ under which actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Another device permits the transfer of a case to a more convenient forum.⁴⁴ Still another statute, the federal interpleader statute,⁴⁵ permits nationwide service of process. In addition, federal courts offer litigants the opportunity to register a judgment in any other district.⁴⁶

Finally, in areas with heavy case backlogs in both the state and federal courts, trial lawyers currently enjoy the option of filing cases over which both the state and federal courts have concurrent jurisdiction in the court with the smallest backlog.⁴⁷ It is believed by many trial lawyers that elimination of this option would result in a much larger backlog in the state courts.⁴⁸ While

⁴⁰ See FED. R. CIV. P. 45(e)(1).

⁴¹ See FED. R. CIV. P. 45(d).

⁴² See Shapiro, *supra* note 20, at 328; 124 CONG. REC. H1,560 (daily ed. Feb. 28, 1978) (remarks of Rep. Sebelius) (referring to the inadequacy of state procedures for reaching across state lines to influence procedures in the increasingly complex litigation regarding interstate operations). Note, however, that most states have enacted liberal long arm statutes, which facilitates in personam jurisdiction over carriers or manufacturers, assuming the required minimum contacts are present. See *Shaffer v. Heitner*, 433 U.S. 186 (1977); *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

⁴³ 28 U.S.C. § 1407 (1976).

⁴⁴ 28 U.S.C. § 1404(a) (1976).

⁴⁵ 28 U.S.C. § 2361 (1976).

⁴⁶ 28 U.S.C. § 1963 (1976).

⁴⁷ This option is commonly referred to as forum shopping. One motivation is the size of the potential verdict. Since \$10,000 is the threshold amount for a case to be brought in federal court, the sights of the jury are lifted to a potentially larger verdict. 124 CONG. REC. H1,560 (daily ed. Feb. 28, 1978) (remarks of Rep. Sawyer).

⁴⁸ See *Hearings*, *supra* note 4, at 237-38:

[W]hat happens is that diversity clusters, of course, where the most people are and therefore the Federal districts that are the most crowded with diversity are in the areas where the State courts are also most crowded. The practical consequence is . . . that you are simply going to move the manure from one pile to another. . . .

it is argued that the deficiencies of a court system in a given state are a problem for that state to solve, and not a federal problem,⁴⁹ it is also a problem over which the out-of-state litigant has no control. As one leading commentator suggests, the out-of-state litigant should not be saddled with the shortcomings of a state's court system "if the Constitution authorizes an alternative."⁵⁰

B. *Arguments for Abolition*

The main objectives of the proposed anti-diversity legislation are to reduce the congestion which currently exists in federal courts⁵¹ and to eliminate "its insidious effects on litigants."⁵² There are, however, more fundamental reasons for this bill, including the notion that cases founded on diversity jurisdiction are poorly suited for trial in federal court.⁵³ Also, principles of federalism and a sensitivity to the proper jurisdictional balance between state and federal courts⁵⁴ dictate that the federal courts should not

(testimony of John P. Frank). Examples of the delays in question are in Chicago, where the wait on the federal side is 11 months, compared with 37 months on the state side; Brooklyn, where it is 18 months on the federal side, compared with 35 on the state side; Philadelphia, where the figures are 27 versus 47; and Boston, where they are 42 months as opposed to 34 in the federal courts. *See* 124 CONG. REC. H1,559 (daily ed. Feb. 28, 1978) (remarks of Rep. Gephardt); *Hearings*, *supra* note 4, at 238. *Contra* H.R. REP. NO. 893, *supra* note 16, which states that, "the diverting of diversity cases from the federal courts to the State courts will not impose too great a burden on the latter. Essentially, 32,000 cases pending before 400 federal district judges will cause few problems when allocated among 6,000 State judges of general jurisdiction." *Id.* at 3.

⁴⁹ "The remedy is to improve the administration of justice in the Duval Counties around the country—as Texas has since done in Duval County itself—rather than to provide an unbiased forum for those who happen to be from out of state while denying it to those from in the states." *Hearings*, *supra* note 4, at 220 (statement of Charles Alan Wright).

⁵⁰ Shapiro, *supra* note 20, at 329.

⁵¹ See text accompanying notes 57-66 *infra*.

⁵² H.R. REP. NO. 893, *supra* note 16, at 2.

Second, the Federal courts must be freed from the shackles of congestion to do the job they do best—that of adjudicating disputes in traditional Federal subject-matter areas such as copyrights, patents, trademarks, commerce, bankruptcy, antitrust and admiralty; rendering speedy criminal justice for those accused of crimes; protecting the basic civil and constitutional liberties of all citizens; and resolving vital and often recently identified rights . . .

Id. at 4, 5.

⁵³ See text accompanying notes 67-73 *infra*.

⁵⁴ *Hearings*, *supra* note 4, at 147 (testimony of Judge Gignoux, quoting former U.S. Supreme Court Justice Warren): "It is essential that we achieve a proper jurisdictional balance between the Federal and State court systems, assigning

interfere⁵⁵ in matters which are "exclusively within state authority."⁵⁶

For years congestion in federal courts and, in particular, the volume of cases founded on diversity jurisdiction, has been a subject of concern among both judges and legislators. As early as 1954, Justice Frankfurter, in his concurring opinion in *Lumbermen's Mutual Casualty Co. v. Elbert*,⁵⁷ noted with alarm the increases in federal cases based on diversity and stated that the continuance of diversity jurisdiction would necessitate an increase in the number of district judges. "This in turn," he said, "will result, by its own Gresham's law, in a depreciation of the judicial currency and the consequent impairment of the prestige and of the efficacy of the federal courts."⁵⁸ The statistics for recent years reveal that the alarm voiced by Justice Frankfurter in *Lumbermen's* was justified. Between 1963 and 1977 the number of civil cases commenced in federal district courts jumped from 63,630⁵⁹ to 130,567,⁶⁰ an increase of 105%.⁶¹ Between 1974, when there were 103,530 civil cases filed,⁶² and 1977, the case load increased by 26.1%.

The District and Circuit Judges—Appointment Act of 1978,⁶³ passed in response to this court congestion, authorizes the appointment of an additional 111 federal district judges, an increase of 28%.⁶⁴ If this rate of increase in case filings continues, however,

to each system those cases most appropriate in the light of the basic principles of federalism."

⁵⁵ See text accompanying notes 74-81 *infra*.

⁵⁶ *Lumbermen's Mut. Cas. Co. v. Elbert*, 348 U.S. 48, 54 (1954) (concurring opinion of Frankfurter, J.).

⁵⁷ 348 U.S. 48 (1954).

⁵⁸ *Id.* at 59.

⁵⁹ ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 198 (1963). This total includes 19,990 diversity cases. *Id.*

⁶⁰ ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 317 (1977). This total includes 31,678 diversity cases. *Id.*

⁶¹ The total of 130,567 civil cases reflects a 66.8% increase in diversity filings between 1963 and 1977. See notes 59, 60 *supra*.

⁶² ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 383 (1974).

⁶³ Pub. L. No. 95-486, § 1, 92 Stat. 1629 (1978).

⁶⁴ Interestingly, the 28% increase in the number of federal judges roughly corresponds to the rate of increase in civil case filings between 1974 and 1977, which was 26.1%. Hence the number of civil case filings would catch up with the number of new judicial appointments in approximately three years.

the pre-Act level of congestion should reappear in approximately three years,⁶⁵ requiring the appointment of still more federal judges. One obvious method to lessen federal court congestion, therefore, would be to abolish diversity jurisdiction, which currently comprises approximately 25% of all cases filed in federal courts.⁶⁶

Cases brought under diversity jurisdiction are also ill-suited for litigation in federal courts because of the time and resources which they require. Under the doctrine articulated by Justice Brandeis in *Erie Railroad v. Tompkins*,⁶⁷ federal courts must apply a state's substantive law in diversity actions.⁶⁸ *Erie*⁶⁹ requires that the outcome of litigation in federal court, to the extent to which a state's legal rules are applied, should be the same as if the case had been tried in a court of the state in which the federal court sits.⁷⁰ When legal precedent is inadequate, this requirement creates

⁶⁵ See note 64 *supra*.

⁶⁶ In the fiscal year ending June 30, 1977, 31,678 diversity cases were filed in federal court, comprising 24.26% of the 130,567 civil cases filed. See note 61 *supra*.

⁶⁷ 304 U.S. 64 (1938).

⁶⁸ 28 U.S.C. § 1652 (1976) states: "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." Under *Erie* a federal judge is bound to apply the substantive, but not the procedural, rules of the forum state. Quite often the line between "substance" and "procedure" becomes quite fine. A widely accepted definition of "substance" can be found in *Hanna v. Plumer*, 380 U.S. 460 (1965) (concurring opinion of Mr. Justice Harlan):

To my mind the proper line of approach in determining whether to apply a state or a federal rule, whether 'substantive' or 'procedural,' is to stay close to basic principles by inquiring if the choice of rule would substantially affect those primary decisions respecting human conduct which our constitutional system leaves to state regulation. . . . (Citations omitted)

Id. at 475.

⁶⁹ See also *Hanna v. Plumer*, 380 U.S. 460 (1965) (whether service of process should be effected as provided by federal or state rules); *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949) (whether state rule requiring security deposit by plaintiff for defendant's expenses, including legal fees, in stockholder's derivative suit was "procedural" or "substantive" rule); *Ragan v. Merchant's Transfer & Warehouse Co.*, 337 U.S. 530 (1949) (whether federal or state statute of limitations applies); *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945) (whether federal or state statute of limitations applies).

⁷⁰ *Guaranty Trust Co. v. York*, 326 U.S. 99, 108 (1945): "But since a federal court adjudicating a state-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another court of the state. . . ."

a particularly difficult situation for a federal judge, and excessive amounts of judicial resources⁷¹ must be expended to predict the result which a state court would reach.⁷²

The fact that federal judges are permitted to interpret state law also disturbs the constitutional balance in federal-state relations. Not only does litigation of questions of state law in federal court interfere with the precedential⁷³ development of state law within

⁷¹ See *Allstate Ins. Co. v. Employers Assurance Corp.*, 445 F.2d 1278 (5th Cir. 1971), where Judge Clarke artfully described the task which confronts a federal judge in this situation:

In one of those extraordinary bits of diversity mysticism, we must perform the occult multiple feats of divining whether the district court correctly predicted what a Florida court would determine an Illinois court would decide on a question which the courts of Illinois have not yet squarely faced.

Id. An excellent example of the magnitude of this task is found in *Merritt-Chapman & Scott Corp. v. Public Util. Dist. No. 2*, 319 F.2d 94, 103-04 (2d Cir. 1963), where the court was required to determine whether under New York law sovereign immunity permitted attaching a levy on New York funds of a State of Washington public utility district. The court's "opinion contains 71 cites to New York decisions, many more to New York statutes and public documents, 38 to cases from other jurisdictions, 23 to treatises or law review articles; and . . . 'a vast body of decisional law.'" Wright, *supra* note 34, at 323-25. For additional cases which illustrate the task of a federal judge in a diversity case see *Marina Management Corp. v. Brewer*, 572 F.2d 43, 45-46 (2d Cir.), *cert. denied*, — U.S. —, 99 S. Ct. 104 (1978); *Samuelson v. Susen*, 576 F.2d 546, 551 (3d Cir. 1978); *Holt v. Seversky Electronatom Corp.*, 452 F.2d 31, 34 (2d Cir. 1971); *Nolan v. Transocean Air Lines*, 276 F.2d 280 (1960), *rev'd and remanded*, 365 U.S. 293 (1961), *on remand*, 290 F.2d 904 (2d Cir.), *cert. denied*, 368 U.S. 901 (1961); *State Farm Mut. Ins. Co. v. Wainscott*, 439 F. Supp. 840, 841-42 (D. Alaska 1977). See generally H. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 142-43 (1973); Wright, *supra* note 34, at 323-26; *Hearings, supra* note 4, at 205, where during the course of a discussion of the difficulties presented by diversity cases, Judge Friendly remarked sardonically: "You probably hear a great many complaints from federal judges, but I doubt if you have ever heard one say that without diversity he would find that his life did not have sufficient breadth."

⁷² See *King v. Order of United Commercial Travelers of America*, 333 U.S. 153 (1948), where the issue was the manner in which certain language in an insurance contract would be construed by the South Carolina Supreme Court. The federal district court had decided in favor of the beneficiary, but was reversed by the Circuit Court of Appeals. Subsequent to the federal district court decision, two lower state courts reached conflicting conclusions when considering the same issue. The United States Supreme Court withheld opinion on which construction was proper, but specifically held that the Circuit Court of Appeals did not have to follow the decision of the lower state courts. See also *United States Life Ins. Co. v. Delaney*, 328 F.2d 483 (5th Cir.) (*en banc*), *cert. denied*, 377 U.S. 935 (1964), where the Fifth Circuit abstained in a diversity action, in which state law on the point in question was particularly obscure.

⁷³ While a state court is not constitutionally bound by a federal court interpretation of state law, the federal court's decision is likely to be given some

the state court systems,⁷⁴ but it also suggests that state courts dispense an inferior quality of justice.⁷⁵ The sponsors of the anti-diversity legislation argue that perpetuation of diversity jurisdiction only creates disharmony between the federal and state governments and that there are few, if any, bases to believe that state courts are inferior.⁷⁶ In addition, they suggest that if some state courts are, in fact, biased toward the local litigants, the problem is hardly remedied by providing an alternative forum for a small percentage of the cases.⁷⁷

If, as has been stated at the hearings on the anti-diversity legislation,⁷⁸ the original reasons for diversity jurisdiction no longer exist,⁷⁹ federal intrusion can no longer be justified into areas in which the states have a greater interest. Although Justice Frankfurter's concurring opinion in *Lumbermen's Mutual Casualty Co. v. Elbert*⁸⁰ was written long before the current congressional attempt to abolish diversity of citizenship jurisdiction, it best summarizes the argument put forth by the anti-diversity forces:

Can it fairly be said that state tribunals are not now established on a sufficiently "good footing" to adjudicate state litigation that arises between citizens of different States, including the artificial corporate citizens, when they are the only resort for the much larger volume of the same type of litigation between their own citizens? Can the state tribunals not yet be trusted to mete out justice to non-resident litigants; should resident litigants not be compelled to trust their own state tribunals? In any event, is it sound public policy to withdraw from the incentives and energies for reforming state tribunals, where such reform is needed, the

consideration by the state courts in later cases. Some states have enacted statutes which permit certification by the federal court of state cases to the highest state court for decision. See, e.g., FLA. STAT. § 25.031 (1973). For a case in which this certification procedure was employed see *Clay v. Sun Ins. Office, Ltd.*, 363 U.S. 207 (1960); *Sun Ins. Office, Ltd. v. Clay*, 133 So. 2d 735 (Fla. 1961).

⁷⁴ H.R. REP. NO. 893, *supra* note 16, at 4.

⁷⁵ See, e.g., 124 CONG. REC. S31 (daily ed. Jan. 19, 1978) (remarks of Sen. Metzenbaum). See also text accompanying notes 24-38 *supra*.

⁷⁶ See H.R. REP. NO. 893, *supra* note 16, at 2; 124 CONG. REC. S31, note 30 *supra*.

⁷⁷ See, e.g., 124 CONG. REC. H1,558 (daily ed. Feb. 28, 1978) (remarks of Rep. Wiggins); H.R. REP. NO. 893, *supra* note 16, at 4.

⁷⁸ See, e.g., *Hearings*, *supra* note 4, at 208 (testimony of Judge Henry J. Friendly); *id.* at 220 (testimony of Charles Alan Wright).

⁷⁹ *Id.*; but see Shapiro, *supra* note 20, at 330.

⁸⁰ 348 U.S. 48, 59-60 (1954).

interests of influential groups who through diversity litigation are now enabled to avoid state courts?⁸¹

II. CONFLICTS AND UNIFORMITY

By its very nature, air crash litigation involves parties of diverse citizenship.⁸² Therefore, most actions stemming from major air crashes which present complex substantive and procedural problems have traditionally been brought in federal court.⁸³ The main cause of this complexity is that the rights being adjudicated are state-created,⁸⁴ with little uniformity among the various state laws.⁸⁵ The enactment of a federal statute creating a federal cause of action for air disaster cases would eliminate the problems resulting from conflicts among the state laws applied in these situations.⁸⁶

A. *Conflict of Laws*

The ideal courtroom situation, for choice of law purposes, is one in which all plaintiffs and defendants are domiciled in the state in which the disaster occurs.⁸⁷ Assuming no federal statute controls, there is little question of which state's substantive law applies. Air crash litigation, however, typically involves a multitude of parties, including different manufacturers, airlines, gov-

⁸¹ *Id.*

⁸² Under 28 U.S.C. § 1332(c) (1976) a corporation is deemed a citizen of any state in which it has been incorporated and of the state where it has its principal place of business. See 28 U.S.C. § 1332(a) (1976). In *Strawbridge v. Curtiss*, 7 U.S. (1 Cranch) 267 (1806), the Court established the rule that there must be complete diversity between the parties to grant jurisdiction to federal courts.

⁸³ See text accompanying notes 87-143 *infra*.

⁸⁴ Tydings, *supra* note 6, at 311.

⁸⁵ *E.g.*, the Texas wrongful death statute is TEX. REV. CIV. STAT. ANN. art. 4671 (Vernon Supp. 1978-79); in California the applicable statute is CAL. CIV. PROC. CODE § 377 (West Supp. 1979); for New York see N.Y. EST., POWERS & TRUSTS LAW § 5-4.1 (McKinney 1967).

⁸⁶ See text accompanying notes 144-207 *infra*.

⁸⁷ The September 25, 1978 collision in San Diego, of a Pacific Southwest Airlines Boeing 727 and a single-engine Cessna, resulting in the death of at least 150 persons presents a situation close to the one hypothesized. PSA, the nation's largest intrastate airline, is a California domiciliary, as were many of the victims of the crash. Of course, this situation is complicated, to a certain extent, in the cases where passengers were not from California. See *Collision Course*, NEWSWEEK, Oct. 9, 1978, at 48-53; *Death over San Diego*, TIME, Oct. 9, 1978, at 16-20.

ernment employees⁸⁸ and others, who usually are domiciled in different states. Therefore, air disasters, such as the recent crash of a McDonnell Douglas DC-10 at Chicago's O'Hare International Airport in which more than 270 lives were lost,⁸⁹ can result in hundreds of lawsuits scattered throughout the country, requiring the application of a variety of state laws.⁹⁰

State laws applicable to air disaster litigation can conflict on at least the following issues: the interpretation of the doctrine of *res ipsa loquitur*; warranties which are recognized; privity requirements for standing to sue; the duty of care owed by carriers in negligence actions; recovery provisions; damages which are compensable; persons who may benefit; and the mode of distribution.⁹¹ Because the substantive law applied in these cases has not developed uniformly in all states, the parties are in a position to argue for application of that state's law which they find most beneficial.⁹²

To complicate matters further, states are in disagreement on the proper choice of law rule to be applied.⁹³ There are currently

⁸⁸ The litigation arising from the air disaster at Tenerife is an excellent example. In the section 1407 proceedings for 40 of the actions, for example, the court noted that the defendants included: KLM and Pan Am, Boeing, Royal Cruise Lines, the booking agent for the Pan Am flight, the Government of Spain, the insurance underwriter of the airport authority and the surviving pilot and first officer of the Pan Am aircraft. Actions were transferred from the Northern District of California, the Central District of California, the Northern District of Illinois, the District of Alaska, the Eastern District of California, the District of Arizona, the Western District of Washington and the District of Puerto Rico to the Southern District of New York. Two of the actions pending in the Northern District of California were class actions. *In re Air Crash Disaster at Tenerife, Canary Islands, on March 27, 1977*, 435 F. Supp. 927 (J.P.M.D.L. 1977).

⁸⁹ *How Safe?*, NEWSWEEK, June 11, 1979, at 34; *Saving Sense of Paranoia*, TIME, June 11, 1979, at 18.

⁹⁰ The Chicago air crash, for example, claimed the lives of passengers from fifteen states and five foreign countries. Based on data provided in The Washington Post, May 27, 1979, at A20, col. 1. For a discussion of another such incident see *Disaster in the Courts*, *supra* note 6, at 661-62. See also Tydings, *supra* note 6, at 299-300; *Judicial Solution*, *supra* note 6, at 232-33.

⁹¹ See generally *Disaster in the Courts*, *supra* note 6, at 671-74.

⁹² *Id.* at 668.

⁹³ See generally Currie, *Conflict, Crisis and Confusion in New York*, 1963 DUKE L.J. 1, reprinted in B. CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 690, 690-742 (1963); R. LEFLAR, *AMERICAN CONFLICTS LAW* 173-95 (3d ed. 1977); Tydings, *supra* note 6, at 302; *Judicial Solution*, *supra* note 6, at 234-36.

three widely accepted conflicts theories⁹⁴ which, with their variations as applied by individual states, can result in inconsistent determinations of the substantive law to be applied in air crash cases. Until the 1960's all states followed the traditional conflicts doctrine of *lex loci delicti*,⁹⁵ which calls for application of the law of the place where the tort occurred.⁹⁶ A court employing this doctrine, therefore, looks to the law of the place of the crash⁹⁷ or of the place where the tortious act, such as defective manufacture,⁹⁸ has occurred. While *lex loci* results in uniformity and predictability, its critics point out that "the situs of an accident . . . is often merely fortuitous,"⁹⁹ so that the rule ignores other factors or influences which may be present,¹⁰⁰ at times yielding "harsh, unnecessary and unjust results."¹⁰¹

Dissatisfaction with the *lex loci* rule resulted in the emergence,

⁹⁴ These are: (1) *lex loci delicti*, which looks to the law of the jurisdiction where the tort occurred; (2) "significant contacts," in which the court evaluates certain contacts, in order to determine which state has the most significant relationship to a particular issue; and (3) "governmental interest," in which the court compares the policies of the concerned states and the interests of the litigants "to determine the law that most appropriately applies to the issue involved." (Citations omitted). *Reich v. Purcell*, 67 Cal. 2d 551, 554, 432 P.2d 727, 730, 63 Cal. Rptr. 31, 34 (1967). See note 93 *supra*; Bailey & Broder, *Choice of Law—Mass Disaster Cases Involving Diversity of Citizenship*, 38 J. AIR L. & COM. 285 (1972); *Disaster in the Courts*, *supra* note 6, at 670-71.

⁹⁵ This theory was developed most fully by Professor Joseph H. Beale, and incorporated in RESTATEMENT (FIRST) OF CONFLICT OF LAWS (1934); R. LEFLAR, *supra* note 93, at 173. See J. BEALE, CONFLICT OF LAWS (1935).

⁹⁶ See, e.g., *Jimenez Puig v. Avis Rent-A-Car System*, 574 F.2d 37 (1st Cir. 1978); *Griese-Traylor Corp. v. First Nat'l Bank of Birmingham*, 572 F.2d 1039 (5th Cir. 1978); *Tolson v. Pan American World Airways, Inc.*, 399 F. Supp. 335 (S.D. Tex. 1975); *Wartell v. Formusa*, 34 Ill. 2d 57, 213 N.E.2d 544 (1966); *Burke v. Lappin*, 1 Mass. App. Ct. 426, 299 N.E.2d 729 (1973).

⁹⁷ See, e.g., *In re Air Crash Disaster at Boston, Massachusetts on July 31, 1973*, 399 F. Supp. 1106, 1115 (D. Mass. 1975); *Manos v. Trans World Airlines, Inc.*, 295 F. Supp. 1170, 1173 (N.D. Ill. 1969) (only on issue of whether in fact a tort was committed); *Brooks v. Eastern Air Lines, Inc.*, 253 F. Supp. 119, 121 (N.D. Ga. 1966).

⁹⁸ See *Manos v. Trans World Airlines, Inc.*, 295 F. Supp. 1170, 1176 (N.D. Ill. 1969) (referred to place where aircraft manufactured, sold and delivered on breach of warranty claim).

⁹⁹ Tydings, *supra* note 6, at 300.

¹⁰⁰ *Neumeier v. Kuehner*, 31 N.Y.2d 121, 131, 286 N.E.2d 454, 459, 335 N.Y.S.2d 64, 72 (1972) (Breitel, J., concurring).

¹⁰¹ *Griffith v. United Airlines*, 416 Pa. 1, 11, 203 A.2d 796, 801 (1964). See also *Pearson v. Northeast Airlines*, 309 F.2d 553 (2d Cir. 1962), *cert. denied*, 372 U.S. 912 (1963); *Kilberg v. Northeast Airlines*, 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961).

in 1963,¹⁰² of the "significant contacts" or "significant relationship" approach,¹⁰³ which evaluates various contacts, in addition to the place where the tort occurred, "according to their relative importance with respect to the particular issue."¹⁰⁴ In *In re Air Crash Disaster at Boston, Massachusetts on July 31, 1973*,¹⁰⁵ the federal court sitting in Massachusetts was required to choose between a Massachusetts statute,¹⁰⁶ which limited damages to \$200,000, and a Vermont statute,¹⁰⁷ which contained no such limitation. After determining that Vermont had abandoned *lex loci* in favor of the new "significant contacts" rule,¹⁰⁸ the court determined that the following contacts with Vermont were present: the decedents were domiciled in Vermont; their estates were being probated there; the next of kin of decedents, for whose benefit damages were recoverable, resided there; and the decedents purchased their tickets, boarded the aircraft and expected to return there. The crash itself occurred in Massachusetts and the airline did business

¹⁰² *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963). See *Barber Co. v. Hughes*, 223 Ind. 570, 63 N.E.2d 417 (1945); *Auten v. Auten*, 308 N.Y. 155, 124 N.E.2d 99 (1954).

¹⁰³ See generally *Cook, The Logic and Legal Bases of the Conflict of Laws*, 33 YALE L.J. 457 (1924); *Harper, Policy Bases of the Conflict of Laws: Reflections on Rereading Professor Lorenzen's Essays*, 56 YALE L.J. 1155 (1947); *Lorenzen, Territoriality, Public Policy and the Conflict of Laws*, 33 YALE L.J. 736 (1924).

¹⁰⁴ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971). The contacts to be taken into account include: (a) the place where the injury occurred; (b) the place where the conduct causing the injury occurred; (c) the domicile, residence, nationality, place of incorporation and place of business of the parties; and (d) the place where the relationship, if any, between the parties is centered. *Id.* See *Lewis v. Chemetron Corp.*, 448 F. Supp. 211 (W.D. Pa. 1978); General principles governing this determination include "considerations relative to the interests of each state in having its law applied to the issue, the needs and interests of the parties, the needs of judicial administration, the promotion of interstate order and the basic policies underlying the field of law." *In re Air Crash Disaster at Boston, Massachusetts on July 31, 1973*, 399 F. Supp. 1106, 1111 (D. Mass. 1975); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971). See also *Semmelroth v. American Airlines*, 448 F. Supp. 730 (E.D. Ill. 1978); *Manos v. Trans World Airlines, Inc.*, 295 F. Supp. 1170, 1173 (N.D. Ill. 1969) (on issue of damages); *Manos v. Trans World Airlines, Inc.*, 295 F. Supp. 1166, 1168 (N.D. Ill. 1968) (on effect of release).

¹⁰⁵ 399 F. Supp. 1106, 1112 (D. Mass. 1975).

¹⁰⁶ 1972 Mass. Acts ch. 440, § 1 (current version at MASS. ANN. LAWS ch. 229, § 2 (Michie/Law. Co-op 1974)).

¹⁰⁷ VT. STAT. ANN. tit. 14, § 1491 (1974).

¹⁰⁸ 399 F. Supp. at 1108-11.

in both Massachusetts and Vermont.¹⁰⁹

The court then proceeded to evaluate the policies underlying the potentially applicable statutes, determining that the Vermont statute was clearly compensatory, that the Massachusetts statute was punitive and that application of the Massachusetts statute would frustrate Vermont's compensatory policy.¹¹⁰ After noting that Vermont had a strong interest in assuring the compensation of next of kin for tortious deaths of its residents and that Massachusetts had no interest to be furthered by application of its punitive statute,¹¹¹ the court determined that Massachusetts' sole contact, the crash of the aircraft, did not outweigh the numerous contacts and interests which Vermont had in the case.¹¹² Therefore, the court applied Vermont law.

The "significant contacts" approach, however, quickly became a target for criticism, the most common complaint being that courts tended to mechanically count contacts with little additional analysis.¹¹³ One result of this criticism was the emergence of a third approach, the "governmental interest" test,¹¹⁴ in which a

¹⁰⁹ *Id.* at 1112.

¹¹⁰ *Id.*

¹¹¹ Massachusetts had repealed the punitive death statute shortly after the crash and replaced it with a compensatory wrongful death act which did not limit damages. MASS. ANN. LAWS ch. 229, § 2 (Michie/Law. Co-op 1974).

¹¹² 399 F. Supp. at 1112.

¹¹³ See B. CURRIE, *supra* note 93, at 39-40, where the author states, "The [significant contacts] theory provides no standard for determining what 'contacts' are significant, nor for appraising the relative significance of the respective groups of 'contacts' . . . One 'contact' seems to be about as good as another for almost any purpose. The 'contacts' are totted up and a highly subjective fiat is issued to the effect that one group of contacts or the other is the more significant." See also A. EHRENZWEIG, CONFLICT OF LAWS 351, 464 (2d ed. 1962): "[T]he formula is circular since the significance of the relationship is the very question which the conflicts rule has to answer . . . in all these formulas what should be a conclusion reached by the use of a rule of choice of law . . . is offered to us as a premise for the choice."; R. LEFLAR, *supra* note 93, at 183.

¹¹⁴ This approach should not be confused with the "governmental interest" approach espoused by Professor Brainerd Currie. While both require an analysis of a state's concern with respect to any fact-law issue, the Currie approach establishes whether the forum state has an interest, and if it does, will apply the forum state's rule, regardless of the interests of the other states. In choices between non-forum states the Currie approach would apply the rule most like that of the forum state. Currie, *The Verdict of Quiescent Years*, 28 U. CHI. L. REV. 258, 290-94 (1961), reprinted in B. CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 584, 621-26 (1963). The "governmental interest" approach which has been adopted often weighs the competing governmental interests and applies the law of the state whose interest is deemed to be greatest. R. LEFLAR, *supra* note 93, at 185.

court identifies the states or countries which have an interest in a particular issue and then analyzes the relevant substantive laws to determine the underlying public policies.¹¹⁵ When the policies of two states are in competition, the court must weigh the competing interests and then make its determination.¹¹⁶ This analysis must be performed for each issue in the case.

The "governmental interest" approach was utilized in *In re Paris Air Crash of March 3, 1974*,¹¹⁷ a case heard in California, involving four defendants, three of whom were either residents of or had substantial contacts with California.¹¹⁸ In determining the measure of damages, the federal court began its analysis by recognizing that the decedents came from a total of thirty-six jurisdictions.¹¹⁹ It then proceeded to analyze the policies of the various jurisdictions represented, noting that California, the forum, had a definite interest in applying its own law, which would be displaced only if there was a compelling reason for doing so.¹²⁰

The interests of California were identified as follows: (1) compensation of resident survivors; (2) deterrence of tortious conduct of resident defendants; (3) avoidance of the imposition of excessive financial burdens on resident defendants; and (4) provi-

¹¹⁵ *Henry v. Richardson-Merrell, Inc.*, 508 F.2d 28 (3d Cir. 1975); *Moore v. Greene*, 431 F.2d 584 (9th Cir. 1970); *Kasel v. Remington Arms Co.*, 24 Cal. App. 3d 711, 101 Cal. Rptr. 314 (1972); *Reich v. Purcell*, 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967).

¹¹⁶ *Henry v. Richardson-Merrell, Inc.*, 508 F.2d 28 (3d Cir. 1975); *Moore v. Greene*, 431 F.2d 584 (9th Cir. 1970); *Kasel v. Remington Arms Co.*, 24 Cal. App. 3d 711, 101 Cal. Rptr. 314 (1972); *Reich v. Purcell*, 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967). It has been suggested that, not only should competing state interests be analyzed, but also that an approach is needed which is sensitive to all interests, state and federal. See *Craig & Alexander, Wrongful Death in Aviation and the Admiralty; Problems of Federalism, Tempests and Teapots*, 37 J. AIR L. & COM. 3, 13 (1971). The approach advocated in the cited article balances the various state and federal interests without regard to "euphemistic dangers affecting the balance of state-national relationships . . ." and "if this analysis reveals a problem in which the federal government has concern, and in which the application of state law would interfere with that concern, federal law should be applied." *Id.* at 13.

¹¹⁷ 399 F. Supp. 732 (C.D. Cal. 1975).

¹¹⁸ Cases had also been transferred in from other jurisdictions under the multidistrict litigation statute, 28 U.S.C. § 1407 (1976). The court stated that there was "no substantial difference" in the choice of laws concerning liability and damages between the respective transferor states and the forum, thereby avoiding a separate determination for those cases. *Id.* at 749.

¹¹⁹ *Id.* at 741.

¹²⁰ *Id.* at 742.

sion of a uniform rule of liability and damages for those who come under the ambit of California's strict liability law.¹²¹ The court, however, did not analyze the policies of each of the remaining jurisdictions individually. Rather, the court noted that, insofar as the plaintiffs were concerned, the general interest of each of these states in a wrongful-death action was to provide for compensation and to determine the distribution of proceeds to local decedents and beneficiaries.¹²²

The court proceeded to weigh the various interests which it had identified. The court reasoned that in cases where foreign standards would permit a greater recovery than the forum, the forum's interest in protecting resident defendants would prevail, since the rights of plaintiffs in those cases would vest solely because of the fortuitous place of the crash or the residence of the litigants.¹²³ In cases where foreign standards would limit recovery, the court stated that those jurisdictions had no interest in having their law applied, since they had no resident defendants to protect.¹²⁴ Rather, their interests in compensation were satisfied as long as full recovery was allowed under California law.¹²⁵

Choice of laws creates particular problems when suit is brought in federal court. *Erie*¹²⁶ requires the application of the substantive law of the forum state in diversity cases, including its conflicts rule.¹²⁷ Therefore, under the least complicated set of circumstances,

¹²¹ *Id.* at 743. The court later added that "the United States government has as much, or greater, interest in the products which it certifies as airworthy, as any state or any nation . . . to insure that anyone coming within the ambit of strict products liability shall know that its liability for a defect shall be uniform. . . ." *Id.* at 746.

¹²² *Id.* at 743.

¹²³ *Id.* at 744.

¹²⁴ *Id.* at 743.

¹²⁵ *Id.* at 745.

¹²⁶ 304 U.S. 64 (1938); see text accompanying notes 67-70 *supra*.

¹²⁷ See *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 387 (1941). This may not be the case, however, in litigation which stems from a maritime loss. For example, *Scott v. Eastern Airlines, Inc.*, 399 F.2d 14 (3d Cir. 1967), *cert. denied*, 393 U.S. 979 (1968), held that federal choice of law principles should apply if the tort is maritime. See Thomas, *Maritime Aviation Losses and Conflict of Laws*, 45 J. AIR L. & COM. 61, 72 (1979). The author notes, however, that "[s]tate substantive law is not always dispensed [with] in maritime cases. If the matter thought maritime is local in scope so as not to require uniform and harmonious working of the federal maritime legal system, the court may resort to state law." *Id.* at 71.

a federal court must analyze the various choice of laws issues already discussed.¹²⁸ A federal court's task, however, may be complicated significantly. For example, the federal judge may be required to predict a change in the state's conflicts rule,¹²⁹ as was the case in *In re Air Crash Disaster at Boston, Massachusetts*,¹³⁰ where the court determined that Vermont had finally abandoned *lex loci* in favor of "significant contacts."¹³¹

One procedural advantage of federal courts is the ability to consolidate multiple actions through the use of the venue provisions¹³² and the transfer provisions of the Multidistrict Litigation Statute.¹³³ These devices, however, create even more problems for the federal judge, since the transfer constitutes merely a "change of courtrooms."¹³⁴ The transferee court is still required to apply the substantive law, including the choice of law rule, of each original forum state.¹³⁵

In the Boston air crash litigation,¹³⁶ for example, cases were transferred to the federal district court in Massachusetts from district courts in New Hampshire, Vermont, Florida, and New York under the Multidistrict Litigation Statute.¹³⁷ The conflicts doctrine of

¹²⁸ *Disaster in the Courts*, *supra* note 6, at 671.

¹²⁹ See *In re Air Crash Disaster at Boston, Massachusetts* on July 13, 1973, 399 F. Supp. 1106 (D. Mass. 1975); *Manos v. Trans World Airlines, Inc.*, 295 F. Supp. 1170 (N.D. Ill. 1969). See text accompanying notes 71-73 *supra*.

¹³⁰ 399 F. Supp. 1106, 1108-11 (D. Mass. 1975).

¹³¹ Ironically, the federal court's judgment may be repudiated by a subsequent state proceeding, once again causing inconsistency between different courts deciding similar issues. See *Judicial Solution*, *supra* note 6, at 236.

¹³² 28 U.S.C. § 1404(a) (1976).

¹³³ 28 U.S.C. § 1407 (1976). Transfer under this section, however, is solely for purposes of pretrial proceedings, with remand to the transferor court required for trial. This limitation has, on occasion, been circumvented by the transferee court. One manner in which this may be accomplished is by ordering a section 1404 transfer of "common fact" cases for all purposes, subject to the limitation that the actions "might have been brought" in the transferee district. *Disaster in the Courts*, *supra* note 6, at 668. See Speiser, *Dynamics of Airline Crash Litigation: What Makes the Cases Move?*, 43 J. AIR L. & COM. 565, 569-83 (1977); Note, *The Judicial Panel and the Conduct of Multidistrict Litigation*, 87 HARV. L. REV. 1001, 1017-23 (1974) [hereinafter cited as *Multidistrict Panel*]; *Judicial Solution*, *supra* note 6, at 238.

¹³⁴ *Van Dusen v. Barrack*, 376 U.S. 612, 639 (1964).

¹³⁵ See Tydings, *supra* note 6, at 302.

¹³⁶ *In re Air Crash Disaster at Boston, Massachusetts* on July 31, 1973, 399 F. Supp. 1106 (D. Mass. 1975).

¹³⁷ *Id.*

each state required a different analysis in order to determine whether the Massachusetts damage limitation applied. The court found the following: Massachusetts followed *lex loci*; New Hampshire employed an interest analysis test;¹³⁸ Vermont had adopted "significant contacts," abandoning *lex loci*,¹³⁹ Florida's conflicts rule was unclear, but Florida courts would refuse to grant comity to the Massachusetts rule;¹⁴⁰ and New York's rule looked to the domicile of the decedents.¹⁴¹ The final outcome was that the limitation upon recovery would apply to the Massachusetts cases,¹⁴² but not to the New Hampshire, Vermont, Florida and New York cases.¹⁴³

B. *A Proposal for Uniformity*

The present system for air crash litigation engenders a great deal of waste, inefficiency, and even injustice. Judicial resources are wasted in multiple proceedings on identical fact issues, requiring identification and interpretation of numerous state laws,¹⁴⁴ among which there is a great deal of inconsistency.¹⁴⁵ This situation often leads, as in the Boston air crash litigation,¹⁴⁶ to inconsistent damage awards or recovery for some claimants and not for others,¹⁴⁷ despite the fact that all claimants have presented

¹³⁸ *Id.* at 1113.

¹³⁹ *Id.* at 1111.

¹⁴⁰ *Id.* at 1119.

¹⁴¹ *Id.* at 1122.

¹⁴² *Id.* at 1116.

¹⁴³ *Id.* at 1112, 1115, 1119, and 1122.

¹⁴⁴ See text accompanying notes 67-73 *supra*.

¹⁴⁵ See Tydings, *supra* note 6, at 304. The author observes that in litigation arising out of an air crash into Boston Harbor the trials in Pennsylvania alone had required "some 65 days of jury time and over 80 days of judicial time, exclusive of the time spent on appeals." *Id.*

¹⁴⁶ *In re Air Crash Disaster at Boston, Massachusetts* on July 31, 1973, 399 F. Supp. 1106 (D. Mass. 1975).

¹⁴⁷ See *Judicial Solution*, *supra* note 6, at 237. See also *Gabel v. Hughes Air Corp.*, 350 F. Supp. 612 (C.D. Cal. 1972), wherein Judge Peirson M. Hall observed:

It would be a rank injustice to require each of the cases arising out of the 50 deaths to be tried twice, once here and once in the state courts where each defendant would have a chance to and would blame the other. In this forum, conceivably, the United States might be exculpated and in the state forum Air West might be exculpated, thus leaving plaintiffs nothing.

Id. at 624.

identical evidence on the same issues. Furthermore, the modern approaches to choice of laws defy predictable results, and thus add to the waste of judicial resources and inhibit settlements by confusing the parties as to which recovery limitations, if any, apply.¹⁴⁸

One solution to this predicament is the drafting of a set of uniform state laws for air disaster cases. This is far from being a novel idea. The National Commission on Uniform State Laws has recommended such action at least twice.¹⁴⁹ Yet, there is little likelihood that enough of the fifty state legislatures would be willing to abandon their current wrongful-death recovery provisions in favor of such a proposal.¹⁵⁰ Furthermore, even if a uniform state act were adopted, the numerous procedural problems found in multi-state, multi-trial litigation would remain.¹⁵¹

A more comprehensive solution, and one clearly mandated in the face of the bill to abolish diversity of citizenship jurisdiction,¹⁵² is the creation of a federal cause of action with respect to air disasters. Access to federal courts could be provided under 28 U.S.C. § 1331,¹⁵³ eliminating reliance on diversity of citizenship¹⁵⁴ or other jurisdictional devices.¹⁵⁵ In addition, the monumental conflict of laws problems would be eliminated.¹⁵⁶

¹⁴⁸ See Tydings, *supra* note 6, at 304. Since insurers base premiums on the most unfavorable standards, this circumstance also increases the cost of airline liability coverage. *Id.* See also Craig & Alexander, *supra* note 116, at 8.

¹⁴⁹ See HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE FORTY EIGHTH ANNUAL CONFERENCE 68-94 (1938); HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE SIXTY FIFTH ANNUAL CONFERENCE 179-80 (1956).

¹⁵⁰ Tydings, *supra* note 6, at 308.

¹⁵¹ *Id.*

¹⁵² See text accompanying notes 8 and 9 *supra*.

¹⁵³ 28 U.S.C. § 1331(a) (1976) provides:

The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States, except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.

¹⁵⁴ 28 U.S.C. § 1332 (1976). See note 10 *supra*.

¹⁵⁵ See text accompanying notes 205-317 *infra*.

¹⁵⁶ See text accompanying notes 87-143 *supra*.

Congress has the authority to take this action under the powers granted to it by the commerce clause.¹⁵⁷ Moreover, the pervasive statutory and regulatory scheme, including the Federal Aviation Act of 1958,¹⁵⁸ the regulations of the Federal Aviation Administration¹⁵⁹ and the Civil Aeronautics Board,¹⁶⁰ clearly indicates a strong congressional interest in aviation activities.

In 1968 and 1969 Senator Joseph D. Tydings introduced legislation¹⁶¹ for the creation of a federal cause of action in air disaster cases.¹⁶² These bills provided for exclusive original federal court jurisdiction, as well as judicial development of the substantive law to be applied. Although extensive hearings were held, the legislation was never reported out of committee.¹⁶³ Senator Tydings' bills were opposed for a number of reasons.¹⁶⁴ Some opponents saw the bills as an intrusion into an area where the states should be free to innovate.¹⁶⁵ There were also the following substantive objections to these bills: the one-year statute of limitations was felt to be too short; the bill adopted the doctrine of contributory negligence, while critics preferred comparative negligence; and exclusive federal jurisdiction tightened the standards for jury verdicts, requiring unani-

¹⁵⁷ *Braniff Airways v. Nebraska Board of Equalization*, 347 U.S. 590 (1954); U.S. CONST. art. I, § 8, cl. 3. See also Wright, *supra* note 34, at 330, wherein the author states:

Bluntly stated, in major respects the federal government is no longer a government of limited powers. Changes in social reality and in judicial interpretation of several key rubrics of Article I constitutional authority makes it possible for the federal government to legislate pervasively in almost any area; state law, in many of the eddies where it does still govern, is no more secure than a tenancy at will, terminable at Washington's pleasure.

¹⁵⁸ Federal Aviation Act of 1958, Pub. L. No. 85-726, 72 Stat. 731, as amended 49 U.S.C. §§ 1301-1542 (1976).

¹⁵⁹ 14 C.F.R. §§ 1-199.11 (1978).

¹⁶⁰ 14 C.F.R. §§ 200-399.101 (1978).

¹⁶¹ S. 961, 91st Cong., 1st Sess. (1969); S. 3305, S. 3306, 90th Cong., 2d Sess. (1968).

¹⁶² *Hearings on S. 961, Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. (1969); *Hearings on S. 3305, S. 3306 and S. 4089 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 90th Cong., 2d Sess. (1968).

¹⁶³ *Judicial Solution*, *supra* note 6, at 239.

¹⁶⁴ See Sanders, *The Tydings Bill*, 36 J. AIR L. & COM. 550 (1970).

¹⁶⁵ *Id.* at 553. Under the present system "[t]he various independent jurisdictions are free to shape and mold their jurisprudence in accordance with their view of the better rule of law." *Id.*

mity among the twelve person federal jury as opposed to the non-unanimous verdicts permitted in a number of state courts.¹⁶⁶ Finally, it was felt that the bills did not give the federal judiciary sufficient guidance as to the substantive rules to be applied, leaving to the judiciary too much discretion for the formulation of the law, with resulting inconsistencies among the various circuits.¹⁶⁷

On January 15, 1979, Representative George E. Danielson introduced legislation¹⁶⁸ similar to Senator Tydings' proposals of a decade ago. The bill specifically provides for concurrent original federal jurisdiction¹⁶⁹ in the following cases: (1) when the action arises out of or in the course of aviation activity by designated types of aircraft;¹⁷⁰ (2) when the action arises out of aviation activity which results in the death of five or more persons;¹⁷¹ (3) when the action arises under new chapter 174,¹⁷² which governs aviation activity resulting in loss or injury;¹⁷³ or (4) when the action arises under the Federal Tort Claims Act.¹⁷⁴

¹⁶⁶ *Id.* at 554-57.

¹⁶⁷ See Comment, *Federal Courts—Proposed Aircraft Crash Litigation Legislation*, 35 Mo. L. REV. 215, 221-25 (1970) [hereinafter cited as *Aircraft Crash Legislation*].

¹⁶⁸ H.R. 231, 96th Cong., 1st Sess. (1979) [hereinafter cited as H.R. 231]; 125 CONG. REC. H163 (daily ed. Jan. 18, 1979).

¹⁶⁹ H.R. 231, *supra* note 168, at § 1364(a). Compare with the Tydings proposals, *supra* note 161, which provided for exclusive federal jurisdiction. See text accompanying notes 164 and 166 *supra*.

¹⁷⁰ H.R. 231, *supra* note 168, at § 1364(a)(1). The designated aircraft include: (A) large aircraft, *id.* § 1364(a)(1)(A), defined as aircraft of more than 12,500 lbs. maximum certificated takeoff weight, or of a seating capacity of more than 10 persons, *id.* § 1364(c)(1)(B); (B) high performance aircraft, *id.* § 1364(a)(1)(B), defined as a jet or rocket-powered aircraft of more than 6,000 lbs. maximum certificated takeoff weight or turbine-powered aircraft of more than 8,000 lbs. maximum certificated takeoff weight, *id.* § 1364(c)(1)(C); (C) public aircraft, *id.* § 1364(a)(1)(C), defined as including an aircraft being researched, developed, tested, evaluated or manufactured for the United States in addition to any other aircraft included in the term "public aircraft" as defined in 49 U.S.C. § 1301 (1976), H.R. 231 *supra* note 168, at § 1364(c)(1)(E); (D) common carrier aircraft, *id.* § 1364(a)(1)(D), defined as aircraft engaged in the carriage of persons or property as a common carrier for compensation or hire. *Id.* § 1364(c)(1)(A).

¹⁷¹ H.R. 231, *supra* note 168, at § 1364(a)(1).

¹⁷² *Id.* § 1364(a)(3).

¹⁷³ *Id.* § 2751.

¹⁷⁴ *Id.* § 1364(a)(4). See 28 U.S.C. § 1346(b) (1976), the Federal Tort Claims Act, which provides for exclusive rather than concurrent original jurisdiction in federal courts for actions or claims against the United States. See text accompanying notes 208-250 *infra*.

This new bill provides that, subject to certain exceptions, "the rules of such body of law shall be the consensus of decisions of courts of competent jurisdiction in cases or controversies, subject to any other applicable federal law or treaty."¹⁷⁵ This provision, which presumably contemplates the creation of a federal common law¹⁷⁶ for air disaster cases, may not satisfy the arguments of prior critics who felt that Tydings' bills contained insufficient guidance on the rules of law to be applied.¹⁷⁷ Their argument, however, begs the question. For years litigants have found federal judges to be sufficiently competent¹⁷⁸ to decide questions of state law, often where there was little state law precedent for guidance.¹⁷⁹ The major difference in this case, where federal common law is being developed, is that the decision of the federal court would have precedential value.¹⁸⁰

The bill also establishes a number of procedural devices which are designed to streamline air crash litigation. In particular, one provision expands the function of proceedings to which actions are transferred under the Multidistrict Litigation Statute,¹⁸¹ to include, "any or all purposes, as well as for pretrial proceedings."¹⁸² This device would eliminate much of the waste which results when identical issues are tried in multiple proceedings.

The proposed legislation contains more liberal venue provisions than those generally in force in federal courts.¹⁸³ While the venue provisions applicable to federal question¹⁸⁴ cases generally permit

¹⁷⁵ H.R. 231, *supra* note 168, at § 2751(a). The bill does, however, set forth the rule that, "it is the duty of a common carrier to exercise the highest degree of care for the safety of its passengers." *Id.* § 2751(b).

¹⁷⁶ Federal common law is developed in the absence of a controlling federal statute, where there is an overriding national interest deleting a need for uniform results. See note 312 *infra*.

¹⁷⁷ See *Aircraft Crash Litigation*, *supra* note 167, at 223.

¹⁷⁸ See text accompanying notes 27-38 *supra*.

¹⁷⁹ See text accompanying notes 70-73 *supra*.

¹⁸⁰ See note 131 *supra*. While there may initially be a danger of variance among the circuits in the development of the federal common law regarding aviation activities, the inconsistencies most likely would be resolved by the court of final resort. Nevertheless, there would be far more uniformity under the federal common law approach than there is in a system relying on the laws of fifty jurisdictions.

¹⁸¹ 28 U.S.C. § 1407 (1976).

¹⁸² H.R. 231, *supra* note 168, at § 1408.

¹⁸³ 28 U.S.C. § 1391 (1976).

¹⁸⁴ 28 U.S.C. § 1331 (1976).

actions to be brought only in the judicial district where all the defendants reside, or where the claim arose,¹⁸⁵ the new bill would liberalize this rule by also permitting suit to be brought where the plaintiff resides or has his or its principal place of business, as well as at certain other specified places.¹⁸⁶

In addition, the Danielson bill would provide for removal of actions to the federal district court by any party to the action.¹⁸⁷ The current removal statute restricts the option of removal to the defendant.¹⁸⁸ In cases not founded on federal questions, an additional limitation permits removal only if none of the defendants is a citizen of the state in which the action is brought.¹⁸⁹

The new bill also provides, in actions commencing in federal district court, that process other than subpoenas may be served "at any place,"¹⁹⁰ thus circumventing the limitations contained in the Federal Rules of Civil Procedure.¹⁹¹ A subpoena to testify at a hearing or trial also could be served by order of the court "at any place beyond the limits under the Federal Rules of Civil Procedure."¹⁹² Hence, all parties could be brought together in one proceeding for full trial of the issues, without regard to geographic boundaries.¹⁹³

¹⁸⁵ 28 U.S.C. § 1391(b) (1976).

¹⁸⁶ H.R. 231, *supra* note 168, at § 1408(a)(1). The additional places are: (1) the place where the takeoff or landing out of which or in the course of which the claim arose; (2) the place in which occurs the landing made at the end of the aircraft flight out of which or in the course of which the claim arose. H.R. 231, *supra* note 168, at § 1408(a)(1).

¹⁸⁷ This provision would be codified in 28 U.S.C. § 1364, H.R. 231, *supra* note 168, at § 1452.

¹⁸⁸ 28 U.S.C. § 1441 (1976).

¹⁸⁹ 28 U.S.C. § 1441(b) (1976).

¹⁹⁰ H.R. 231, *supra* note 168, at § 2764(1).

¹⁹¹ FED. R. CIV. P. 4(f), which normally limits service of process to the territorial limits of the state in which the district court is held plus a "100 mile bulge" from the place where the action is commenced, to out-of-state locations.

¹⁹² H.R. 231, *supra* note 168, at § 2764(2).

¹⁹³ The effect of the liberalized removal provisions (see text accompanying note 187 *supra*) combined with the consolidation provisions of proposed § 1408 (see text accompanying note 182 *supra*) and the expanded area for service of process (see text accompanying notes 190-192 *supra*) is to facilitate consolidation of all actions, whether commenced in federal court, or in state court, in one judicial proceeding. The ability to transfer an action commenced in a California state court to a federal district court in New York may raise questions of fundamental fairness. Abuse would be minimized, however, by a provision referring to § 1407(a) for factors to be considered. H.R. 231, § 1408(b)(2).

Substantively, the bill would confer a right of action to recover for property loss, for personal injury and for wrongful death arising out of, or in the course of, aviation activity.¹⁹⁴ It would limit eligible beneficiaries in actions for wrongful death and/or personal injury to the decedent's surviving spouse, children, parents or dependent relatives.¹⁹⁵ To determine the priorities of the various beneficiaries, the bill looks to the law of the state where the decedent was domiciled at the time of death.¹⁹⁶ Provision is made for recovery of pecuniary losses, including loss of care, comfort and society, but the bill would specifically exclude damages for pain, suffering or disfigurement.¹⁹⁷ It also would prohibit any limitation on the amount of recovery, except as otherwise provided by treaty or other federal law.¹⁹⁸ Finally, the personal representative of the decedent would be able to initiate actions on behalf of the eligible beneficiaries.¹⁹⁹

Representative Danielson's bill should gain wider acceptance than the earlier bills. First, the bill incorporates many of the improvements suggested for Senator Tydings' bills, including a two-year, rather than a one-year statute of limitations,²⁰⁰ and the adoption of the rule of comparative fault, rather than contributory negligence.²⁰¹ Second, if diversity of citizenship jurisdiction is abol-

Section 1407(a) requires a "determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions." 28 U.S.C. § 1407(a) (1976). *But cf.* Multidistrict Panel, *supra* note 133, at 1008, wherein the authors note that the judicial panel on multidistrict litigation applies these standards in regard to the litigation as a whole, rather than to identical parties who may be hurt or disadvantaged by the transfer. *Id.* Nevertheless, the prevailing interest seems to be judicial savings, and there is an assumption that when these result, the litigants will also realize savings: The effective use of nationwide service of process in interpleader actions under 28 U.S.C. § 2361 (1976) indicates that such a provision could be implemented smoothly in air crash cases with a minimum of constitutional objection.

¹⁹⁴ H.R. 231, *supra* note 168, at § 2752(a)(1).

¹⁹⁵ *Id.* § 2752(b).

¹⁹⁶ *Id.* § 2752(c).

¹⁹⁷ *Id.* § 2752(d). The exclusive language of the bill seems to preclude recovery of these damages in a collateral state proceeding. *See Aircraft Crash Litigation, supra* note 167, at 221.

¹⁹⁸ H.R. 231, *supra* note 168, at § 2752(d).

¹⁹⁹ *Id.* § 2762(a).

²⁰⁰ *Id.* § 2753.

²⁰¹ *Id.* § 2752(a)(1)(A).

ished,²⁰² Congress might see fit to provide an alternative basis for federal jurisdiction over air disaster cases.²⁰³

The proposed legislation would eliminate many of the difficulties currently encountered by all involved in air crash cases. Consolidation of actions would be easily facilitated, eliminating much of the waste which results from multiple proceedings. Furthermore, the Danielson bill would eliminate the choice of law problems currently encountered by federal judges in domestic air disaster cases. Finally, the bill provides for a federal jurisdictional basis, should the current campaign for the abolition of diversity of citizenship jurisdiction succeed.

III. ALTERNATIVE FEDERAL JURISDICTIONAL BASES

When Senator Tydings first introduced a proposal for a federal statutory scheme to govern air disaster cases, one of his arguments was that these new jurisdictional provisions would not result in any unnecessary increase in federal court jurisdiction.²⁰⁴ He noted that the participation of the United States in aviation activities and the diversity of citizenship between the parties to a suit combined to bring most air disaster cases into the federal courts.²⁰⁵ The setting has changed, however, and Congress is now examining ways to reduce federal court congestion, one of which is the abolition of diversity of citizenship jurisdiction. If the anti-diversity bill is enacted and the air crash litigation bill is not, considerable jurisdictional problems may arise, forcing litigants to identify alternative jurisdictional bases for trial in federal court. The following sections will discuss two of the alternative bases for federal jurisdiction over air disaster cases. These are joining the United States as a defendant²⁰⁶ and invoking federal question jurisdiction.²⁰⁷

A. *The United States as a Defendant*

Under the Federal Tort Claims Act,²⁰⁸ the federal district courts

²⁰² H.R. 2202, 96th Cong., 1st Sess. (1979). See text accompanying notes 2-5 *supra*.

²⁰³ See Tydings, *supra* note 6, at 310-11.

²⁰⁴ Tydings, *supra* note 6, at 310.

²⁰⁵ *Id.* at 311.

²⁰⁶ 28 U.S.C. § 1346 (1976).

²⁰⁷ 28 U.S.C. § 1331 (1976).

²⁰⁸ 28 U.S.C. § 1346(b) (1976).

have exclusive jurisdiction over civil actions when the United States is a defendant. The Act is applicable to these cases when "the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."²⁰⁹ In air disaster litigation the United States is often a defendant on grounds such as control tower negligence²¹⁰ or "wrongful approval, certification, inspection, and the like, of the plane, or failure to do so."²¹¹

In these cases, an important issue is whether a federal court, having determined that it has subject matter jurisdiction over the cause of action between the plaintiff and the United States, can take pendent jurisdiction over state claims against the other defendants. In *United Mine Workers v. Gibbs*,²¹² the plaintiff charged that the union had wrongfully pressured his employer to fire him, thus asserting a federal claim under the Taft-Hartley Act²¹³ and a state claim of unlawful conspiracy to interfere with his employment contract. The Supreme Court stated that the federal court had pendent jurisdiction to hear the state claim since both claims "derive from a common nucleus of operative fact"²¹⁴ and the pendent claims were such that the plaintiff "would ordinarily be expected to try them all in one judicial proceeding."²¹⁵ The Court stated further that, in making the determination regarding pendent claims, a trial court should look to "considerations of judicial economy, convenience and fairness to litigants."²¹⁶ According to the Court, one significant constraint, however, is that a trial court should avoid needless decisions of state law, "both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law."²¹⁷

The *Gibbs* criteria are met in air disaster cases where the United States is a defendant under the Federal Tort Claims Act. The

²⁰⁹ 28 U.S.C. § 1346(b) (1976).

²¹⁰ *Moloney v. United States*, 354 F. Supp. 480 (S.D.N.Y. 1972).

²¹¹ *In re Paris Air Crash of March 3, 1974*, 399 F. Supp. 732, 737 (C.D. Cal. 1975).

²¹² 383 U.S. 715 (1966).

²¹³ 29 U.S.C. § 158(a)(2), (b)(4) (1976).

²¹⁴ 383 U.S. at 725.

²¹⁵ *Id.*

²¹⁶ *Id.* at 726.

²¹⁷ *Id.*

"common nucleus of operative fact,"²¹⁸ as required by *Gibbs*, is the air crash itself. Moreover, considerations of judicial economy, convenience and fairness to litigants are met in air disaster cases through the savings which result from a single trial of the combined issues. Federal courts have traditionally recognized the potential for administrative savings through a variety of consolidation devices. The Judicial Panel on Multidistrict Litigation,²¹⁹ for example, has granted practically all requests for a section 1407 transfer.²²⁰ In addition, it would be patently unfair to compel a defendant to litigate multiple actions arising from the same factual occurrence in state and federal courts because some of the claims are federal and some are state-based. If multiple proceedings are held in both state and federal courts, the litigants risk obtaining conflicting results with regard to additional defendants. It is, therefore, more expedient to try all the issues in one judicial proceeding. Moreover, when a federal court has exclusive original jurisdiction pursuant to the Federal Tort Claims Act,²²¹ it is only in federal court that the plaintiff can bring all his claims together.²²² Therefore, in light of considerations of judicial economy, convenience and fairness to litigants, a federal court, in finding that pendent jurisdiction exists over the state claims, is not making needless decisions of state law. There are, of course, occasions where,

²¹⁸ *Id.* at 725.

²¹⁹ See 28 U.S.C. § 1407 (1976).

²²⁰ *E.g.*, *In re Air Crash Disaster at Stapleton International Airport in Denver, Colorado*, on August 7, 1975, 447 F. Supp. 1071 (J.P.M.D.L. 1978); *In re Helicopter Crash in Germany* on September 26, 1975, 443 F. Supp. 447 (J.P.M.D.L. 1978); *In re Air Crash Disaster at Tenerife, Canary Islands*, on March 27, 1977, 435 F. Supp. 927 (J.P.M.D.L. 1977); *In re Air Crash at Pago Pago, American Samoa*, on January 30, 1974, 424 F. Supp. 1075 (J.P.M.D.L. 1977). See *Multidistrict Panel*, *supra* note 133, at 1010.

²²¹ *Aldinger v. Howard*, 427 U.S. 1, 18 (1976); *Transok Pipeline Co. v. Darks*, 565 F.2d 1150 (10th Cir. 1977), *cert. denied*, 435 U.S. 1006 (1978); *Pearce v. United States*, 450 F. Supp. 613 (D. Kan. 1978); *Santoni v. United States*, 450 F. Supp. 608, 612 (D. Md. 1978); *Hipp v. United States*, 313 F. Supp. 1152, 1155 (E.D.N.Y. 1970).

²²² 28 U.S.C. § 1346(b) (1976). Section 1346(b) would apply, since all fifty states have wrongful death statutes, W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 126 at 902 (4th ed. 1971), under which the United States can be liable. At one of the few points in which air disaster litigation was discussed during the 1978 hearings on a bill to abolish diversity of citizenship jurisdiction, Rep. Danielson of California suggested that jurisdiction would remain in federal court in virtually all air crash cases, due to the federal government's activities with respect to aviation. *Hearings*, *supra* note 4, at 76-77.

arguably, the negligence upon which the claim against the United States is based is independent of the incident which has initiated the litigation.²²³ Yet, even in these situations, the policy which dictates that duplication of judicial efforts should be avoided suggests that consolidation is appropriate.²²⁴

One obstacle to the application of pendent jurisdiction is that *Gibbs* requires a substantive federal question before a federal court has power to hear a pendent state claim.²²⁵ In actions under the Federal Tort Claims Act the court applies state law and the application of the Federal Tort Claims Act does not pose a federal question.²²⁶ In *Wheelwright v. United States*,²²⁷ a suit against the United States under the Federal Tort Claims Act, however, the court exercised pendent jurisdiction over state claims against additional defendants where there was no federal question, finding greater significance in the fact that claims against the United States and the additional defendants arose out of the same accident and that they required the same proof concerning liability.²²⁸ Furthermore, in *Aldinger v. Howard*,²²⁹ Justice Rehnquist indicated that actions under the Federal Tort Claims Act might be appropriate for pendent jurisdiction for reasons of judicial economy and convenience, coupled with the fact that federal courts have exclusive jurisdiction in these cases.²³⁰

²²³ The question presented, though related to the plaintiff's original action, may, however, be merely a by-product of the case. See *Kinsella v. Board of Education*, 402 F. Supp. 1155 (W.D.N.Y. 1975); *Hendrickson v. Wilson*, 374 F. Supp. 865, 878 (W.D. Mich. 1973).

²²⁴ Of course, this is discretionary in the district court. See *Kinsella v. Board of Education*, 402 F. Supp. 1155, 1157 (W.D.N.Y. 1975). Where the claim against the United States is remotely connected to the state claims, and the "state claim constitutes the real body of a case, to which the federal claim is only an appendage, the state claim may fairly be dismissed." *United Mine Workers v. Gibbs*, 383 U.S. 715, 727 (1966).

²²⁵ See *Wheelwright v. United States*, 409 F. Supp. 627, 630 (D. Utah 1976); *Lawes v. Nutter*, 292 F. Supp. 890, 891 (S.D. Tex. 1968).

²²⁶ *Ayala v. United States*, 550 F.2d 1196, 1198 (9th Cir.), cert. granted, 434 U.S. 814 (1977), cert. dismissed, 435 U.S. 982 (1978); *Williams v. United States*, 405 F.2d 951, 954 (9th Cir. 1969); *Sanborn v. United States*, 453 F. Supp. 651, 654 (E.D. Cal. 1977); *Mickelic v. United States Postal Serv.*, 367 F. Supp. 1036, 1039-40 (W.D. Pa. 1973).

²²⁷ 409 F. Supp. 627, 631 (D. Utah 1976).

²²⁸ *Id.* If the relief sought or the theory of recovery is different in the two causes of action, however, the court should decline to exercise pendent jurisdiction, even though both claims arise from the same occurrence. *Id.*

²²⁹ 427 U.S. 1 (1976).

²³⁰ *Id.* at 18.

Even though it appears reasonable to conclude that pendent jurisdiction should be exercised over pendent parties, in actions against the federal government under the Federal Tort Claims Act, where there is no independent basis for federal jurisdiction, this has not been clearly established under present case law.²³¹ In *Aldinger* the Supreme Court specifically disapproved of the application of pendent jurisdiction to join a county as a defendant in a civil rights action.²³² In that case, however, the Court limited its opinion to the particular facts before it.²³³ Under those facts, the Court had construed the relevant statute as excluding counties from liability, and it had seen the attempt to utilize pendent jurisdiction as a device for circumventing the legislative intent.²³⁴ The Court pointed out, however, that "[o]ther statutory grants and other alignments of parties and claims might call for a different result."²³⁵ Nevertheless, Justice Rehnquist declined to make "any sweeping pronouncement upon the existence or exercise of such jurisdiction."²³⁶ He chose, instead, to suggest a test by which future courts might decide the matter: "[B]efore it can be concluded that such jurisdiction exists, a federal court must satisfy itself not only that Article III permits it, but that Congress in the statutes conferring jurisdiction has not expressly or by implication negated its existence."²³⁷

Since *Aldinger* a number of courts have applied this test and

²³¹ For cases applying the concept of pendent party jurisdiction in Federal Tort Claims actions, see *Dick Meyers Towing Serv., Inc. v. United States*, 577 F.2d 1023 (5th Cir. 1978), *cert. denied*, 47 U.S.L.W. 3554 (U.S. Feb. 20, 1979) (No. 78-736); *Transok Pipeline Co. v. Darks*, 565 F.2d 1150 (10th Cir. 1977), *cert. denied*, 435 U.S. 1006 (1978); *F.C. Stiles Contracting Co. v. Home Ins. Co.*, 431 F.2d 917, 919-20 (6th Cir. 1970). *Contra* *Ayala v. United States*, 550 F.2d 1196 (9th Cir.), *cert. granted*, 434 U.S. 814 (1977), *cert. dismissed*, 435 U.S. 982 (1978); *Rauch v. United Instruments, Inc.*, 548 F.2d 452 (3d Cir. 1976).

²³² 427 U.S. 1, 19 (1976). The action was brought under 42 U.S.C. § 1983 (1976).

²³³ 427 U.S. at 18.

²³⁴ *Id.* at 16. This construction of the statute, however, was expressly overruled in *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978).

²³⁵ 427 U.S. at 18.

²³⁶ *Id.*

²³⁷ *Id.* Article III of the Constitution requires the identification of "Cases . . . arising under this Constitution, the laws of the United States, and [its] treaties," U.S. CONST. art. III, § 2, a requirement which *Gibbs* interpreted to include cases bearing a "common nucleus of operative fact." 383 U.S. at 725.

found that pendent party jurisdiction is appropriate in Federal Tort Claims actions.²³⁸ In *Pearce v. United States*,²³⁹ the federal district court in Kansas permitted the joining of a private hospital as a party defendant in a claim that the private hospital and a Veterans Administration hospital, to which the plaintiff subsequently had gone, had been negligent in failing to render prompt treatment to the plaintiff for injuries incurred in an automobile accident. Similarly, in *Santoni v. United States*,²⁴⁰ which was decided by the federal district court in Maryland, the court permitted the joining of pendent parties defendant in an action against the United States.

In *Maltais v. United States*,²⁴¹ the plaintiff sued the United States after her husband's fatal fall, in the course of his employment, from the roof of a building owned by the United States. The plaintiff sought to have the court exercise pendent party jurisdiction over seven corporate defendants, for the related nonfederal claims. The federal court for the Northern District of New York found that it had jurisdiction over the pendent parties,²⁴² finding that Congress specifically authorizes such suits in the Federal Tort Claims Act.²⁴³

First, the court noted that the grant of jurisdiction to the federal courts under the Act is exclusive, but includes the power to adjudicate "any set off, counterclaim or other claim or demand whatever on the part of the United States against any plaintiff."²⁴⁴ Second, because of the relationship between the parties, the court stated that the claims against all the defendants were intertwined, resulting in the single incident which caused the death of the plaintiff's husband.²⁴⁵ Third, it found that there was no circumvention of congressional intent, no doing "indirectly what Congress [had] determined should not be done directly."²⁴⁶ The court stated

²³⁸ *Pearce v. United States*, 450 F. Supp. 613, 618-20 (D. Kan. 1978); *Santoni v. United States*, 450 F. Supp. 608, 611-12 (D. Md. 1978); *Maltais v. United States*, 439 F. Supp. 540, 547-50 (N.D.N.Y. 1977).

²³⁹ 450 F. Supp. 613 (D. Kan. 1978).

²⁴⁰ 450 F. Supp. 608 (D. Md. 1978).

²⁴¹ 439 F. Supp. 540 (N.D.N.Y. 1977).

²⁴² *Id.* at 547.

²⁴³ *Id.* at 547-48.

²⁴⁴ *Id.* at 547 (emphasis in original).

²⁴⁵ *Id.* at 548.

²⁴⁶ *Id.*

that since the Federal Tort Claims Act permits the United States to implead a party who may have been liable to the United States for all or part of a plaintiff's claim, it was very likely that had the plaintiff not named the additional defendants in the complaint, they still would have joined in the suit.²⁴⁷ Finally, the court found that Congress intended to make the United States accountable for its torts without undue delay, thus requiring a single federal forum for the resolution of all Federal Tort Claims actions and "securing a 'just, speedy, and inexpensive determination.'"²⁴⁸ The court found no violation of article III, determining that all actions were within the "one constitutional case"²⁴⁹ based on considerations of judicial economy, convenience and fairness to all litigants.²⁵⁰

If, in fact, the congressional intent under the Federal Tort Claims Act is to provide a single federal forum for the resolution of claims against pendent parties defendant as well as the United States, as the *Maltais* court appears to indicate, this congressional intent is arguably just as strong in air disaster cases. It is reasonable to conclude that claims against the United States and additional defendants, arising out of a single air disaster, are intertwined and should be adjudicated together. Therefore, joining the United States as a defendant should enable plaintiffs to obtain federal jurisdiction over their claims against all parties in an air disaster case.

B. Federal Question

If a plaintiff asserts a federal right in his complaint, a federal court may exercise jurisdiction over that claim.²⁵¹ In the case of

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *Id.* at 546, quoting from *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966). See note 237 *supra*.

²⁵⁰ *Id.* at 550. The court ruled, however, that this was an initial determination, made on a sparse record, and that facts subsequently brought out might compel dismissal. *Id.*

²⁵¹ U.S. CONST. art. III; 28 U.S.C. § 1331 (1976). The guidelines used to determine whether or not plaintiff's claim asserts a cause of action that "arises under" the Constitution, laws, and treaties of the United States, were set out in *Gully v. First Nat'l Bank*, 299 U.S. 109 (1936). These are:

- 1) A right or immunity created by the Constitution or laws of the United States must be an essential element of the plaintiff's cause of action;
- 2) The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one con-

air disaster litigation, however, the traditional remedies are state-created.²⁵³ Nevertheless, at least one federal court has recognized a "clearly articulated federal right in . . . plaintiffs to enforce rights arising from their decedents' deaths when flying in planes which allegedly are unsafe."²⁵³ This right is derived from the pervasive statutory scheme of the Federal Aviation Act of 1958.²⁵⁴

Federal regulatory statutes often contain no explicit provision for private rights of action when those statutes are violated. Federal courts, however, have at times inferred a private right of action from the underlying purposes of a statute. For example, in *J. I. Case v. Borak*,²⁵⁵ the Supreme Court found an implied right of action for violation of section 14(a) of the Securities Exchange Act of 1934,²⁵⁶ which governs proxy solicitation. It found that one of the chief purposes of the Act was the protection of investors,²⁵⁷ pointing out that the legislative history of the Act showed that "it was intended to 'control the conditions under which proxies may be solicited, with a view to preventing the recurrence of abuses which . . . [had] frustrated the free exercise of the voting rights of

struction or effect and defeated if they receive another;

- 3) A genuine and present controversy, not merely a possible or conjectural one, must exist with reference thereto;
- 4) The controversy must be disclosed upon the face of the complaint, unaided by the answer or by the petition for removal.

Id. at 112, 113.

²⁵² See note 85 *supra*.

²⁵³ *In re Paris Air Crash of March 3, 1974*, 399 F. Supp. 732, 748 (C.D. Cal. 1975); *Gabel v. Hughes Air Corp.*, 350 F. Supp. 612 (C.D. Cal. 1972). *Contra Peninsula Airport Comm'n v. National Airlines, Inc.*, 436 F. Supp. 850 (E.D. Va. 1977); *Yelinek v. Worley*, 284 F. Supp. 679 (E.D. Va. 1968); *Moungey v. Brandt*, 250 F. Supp. 445 (W.D. Wis. 1966); *Moody v. McDaniel*, 190 F. Supp. 24 (N.D. Miss. 1960).

²⁵⁴ 49 U.S.C. §§ 1301-1552 (1976).

²⁵⁵ 377 U.S. 426 (1964).

²⁵⁶ Securities Exchange Act of 1934, ch. 404, § 14(a), 48 Stat. 895 (1934) (current version codified in 15 U.S.C. § 78n(a) (1976)) provided:

It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of any national securities exchange or otherwise to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect to any security (other than an exempted security) registered on any national securities exchange in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

²⁵⁷ *J. I. Case v. Borak*, 377 U.S. 426, 432 (1964).

stockholders.’²⁵⁸ The Court reasoned that “[p]rivate enforcement of the proxy rules provides a necessary supplement to Commission action”²⁵⁹ in order to achieve the objectives of the legislation. Finally, the Court announced a policy of affirmative enforcement of regulatory rules: “[w]e, therefore, believe that under the circumstances here it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose.”²⁶⁰

More recently, in *Cort v. Ash*,²⁶¹ the Supreme Court addressed the case of a shareholder of Bethlehem Steel Corporation who had filed a derivative suit against the company’s board of directors for violations of a federal statute²⁶² which prohibits corporations from making contributions in connection with specific federal elections. The Court articulated a four-part test to determine whether a private right of action can be implied from a federal statute, declining to find that one existed in this case.²⁶³ In the first part of the test Justice Brennan examined the purposes of the statute to determine who was intended to benefit from the statute. He found that “the legislation was primarily concerned with corporations as a source of aggregate wealth and therefore of possible corrupting influence, and not directly with the internal relations between the corporations and their stockholders.”²⁶⁴ Stockholders, therefore, were not the intended beneficiaries of the statute.

In the second part of the test he examined the statute’s legislative history for signs of congressional intent to create a private

²⁵⁸ *Id.* at 431.

²⁵⁹ *Id.* at 432.

²⁶⁰ *Id.* at 433.

²⁶¹ 422 U.S. 66 (1975).

²⁶² 18 U.S.C. § 610 (1976).

²⁶³ 422 U.S. at 78. The elements of the *Cort* analysis are:

- (1) Is the plaintiff one of the class for whose especial benefit the statute was enacted? . . .
- (2) Is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . .
- (3) Is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . .
- (4) Is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on Federal Law?

Id.

²⁶⁴ 422 U.S. at 82.

right of action in favor of shareholders and found no such indication.²⁶⁵ In the third part of the test, Justice Brennan attempted to determine whether recovery of damages for the statutory violation would be consistent with the congressional purpose underlying the legislation. He found that an award of damages would not "cure the influence which the use of corporate funds in the first instance may have had on a federal election"²⁶⁶ and, therefore, would not further the congressional purpose. In the final part of the test, Justice Brennan questioned whether the cause of action was one traditionally relegated to state law and was in an area in which the states, rather than the federal government, had a primary interest. Justice Brennan stated that since the corporation was a creature of state law, the federal court should leave identification and enforcement of the shareholder's rights to the state.²⁶⁷

A federal court must apply the *Cort* analysis to determine whether, in an air disaster case, a private right of action can be implied from the Federal Aviation Act of 1958.²⁶⁸ The first condition of the *Cort* analysis is that the plaintiff must be "one of the class for whose especial benefit the statute was enacted."²⁶⁹ In *Gabel v. Hughes Air Corp.*,²⁷⁰ a case decided before *Cort*, the district court referred to the language of the Federal Aviation Act to demonstrate that the overwhelming congressional interest in the legislation was safety.²⁷¹ After citing over twenty subdivisions of that legislation, the court concluded that the intended beneficiaries of this pervasive statutory scheme dealing with safety were the passengers of aircraft.²⁷² This point is not disputed, even by those who argue against an implied cause of action²⁷³ for violation of safety

²⁶⁵ *Id.*

²⁶⁶ *Id.* at 84.

²⁶⁷ *Id.*

²⁶⁸ 49 U.S.C. §§ 1301-1552 (1976). A plaintiff, of course, cannot argue for an implied right of action unless he can identify a violation of the provisions of the Act or the regulations promulgated pursuant to the Act dealing with safety, and assert that the violation has caused the crash out of which the suit arises.

²⁶⁹ 422 U.S. at 78.

²⁷⁰ 350 F. Supp. 612 (C.D. Cal. 1972).

²⁷¹ 350 F. Supp. at 617. See also *In re Paris Air Crash of March 3, 1974*, 399 F. Supp. 732, 748 (C.D. Cal. 1975).

²⁷² 350 F. Supp. at 617.

²⁷³ See *Aviation Tort Litigation*, *supra* note 6, at 1091. See also Pillai, *Negative Implication: The Demise of Private Rights of Action in the Federal Courts*,

provisions of the Act. It is clear, however, that courts will not imply a private cause of action solely because the intent of a statute is to benefit a particular class of individuals.²⁷⁴

The second part of the test in *Cort* requires a court to determine whether there is "any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one."²⁷⁵ There are rarely indications of such legislative intent with regard to any federal regulatory statute.²⁷⁶ Judge Peirson M. Hall, in *Gabel v. Hughes*,²⁷⁷ found that Congress implicitly intended to create a private remedy for violation of the Federal Aviation Act. Judge Hall found that violations of the safety provisions of the Act were tantamount to tortious conduct. He stated further that because the Act, in effect, defined certain conduct as tortious, a suit based on that legislation was within the statute conferring jurisdiction on federal courts for suits arising out of the laws of the United States,²⁷⁸ in spite of the fact that a state common law rule may have previously permitted suit for the same tortious conduct.²⁷⁹ In addition, it has been suggested²⁸⁰ that the Act itself, although specifically providing for the retention of existing common law and statutory remedies, contemplates the need for enforcement by private suit.²⁸¹

The third part of the *Cort* test requires that the private remedy implied be consistent with the underlying purposes of the legislative scheme. At first glance, this part appears to be substantially similar to the second part of the *Cort* test, which requires legislative intent to provide a remedy. It recognizes, however, that while the

47 CIN. L. REV. 1 (1978), where the author suggests that the test for implication of a private action is merely a "self confirming vindication of the Burger Court's distaste for implied actions." *Id.* at 21. The Burger Court failed to find an implied private right of action in *Cort v. Ash*, 422 U.S. 66 (1975).

²⁷⁴National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453, 457-58 (1974).

²⁷⁵*Cort v. Ash*, 422 U.S. 66, 78 (1975).

²⁷⁶Pillai, *supra* note 273, at 24.

²⁷⁷350 F. Supp. 612 (C.D. Cal. 1972).

²⁷⁸28 U.S.C. § 1331 (1976).

²⁷⁹350 F. Supp. 612, 621 (C.D. Cal. 1972). *See also* Fitzgerald v. Pan American World Airways, 229 F.2d 499, 502 (2d Cir. 1956); Reitmeister v. Reitmeister, 162 F.2d 691, 694 (2d Cir. 1947).

²⁸⁰*See Judicial Solution*, *supra* note 6, at 250.

²⁸¹Another point of view, however, is that existing state remedies were considered adequate by Congress, and that there was no intent to provide an independent federal remedy. *Aviation Tort Litigation*, *supra* note 6, at 1101, 1105-06.

remedy in question was not considered by Congress, it may still advance the goals of the statutory scheme. The Federal Aviation Act centralizes administrative regulation of aviation activity in federal agencies, and, thereby, furthers at least two congressional interests articulated in the Act—safety²⁸² and sound economic conditions.²⁸³ The Act, therefore, establishes uniform regulation of aviation activities, preventing dispersal of regulation with its resulting conflicts and confusion.²⁸⁴ Arguably, the existence of uniform federal regulation enables carriers to easily identify the responsibilities required of them by the Act.²⁸⁵ Likewise, the existence of federal rights, enforceable in federal courts, arguably advances congressional interests in the economic stability of the air transport industry, by providing a convenient forum for litigation of the multiple claims which arise out of one incident. One example is the savings of litigation expenses, realized through the consolidation of actions.²⁸⁶

Federal courts have in the past implied a private right of action under the Federal Aviation Act when they believed that the recognition of such a cause of action would further the underlying purposes of the statute. For example, in *Fitzgerald v. Pan American*

²⁸² E.g., 49 U.S.C. §§ 1421(a), 1422(a)(b), 1423, 1429 (1976).

²⁸³ 49 U.S.C. § 1302(b) (1976).

²⁸⁴ Another argument, however, is that the state remedies provide a deterrent to potential violations, which is as effective as a federal remedy would be. "Certainly pilots do not exercise more or less care depending upon whether the state over which they are flying limits wrongful death recovery, or does not provide for contribution and indemnity." *Aviation Tort Litigation*, *supra* note 6, at 1099.

²⁸⁵ H.R. REP. NO. 2360, 85th Cong., 2d Sess. 3-4, 7 (1958). In *Bratton v. Shiffren*, 585 F.2d 223 (7th Cir. 1978), *petition for cert. filed*, 47 U.S.L.W. 3685 (U.S. Mar. 5, 1979) (No. 78-1398) a private right of action was found in favor of travelers and retail travel agencies who sought to recover tour deposits on a charter package, partly because the funds were deposited in a bank whose duty was governed by federal law. After noting that state courts attempting to define the duties arising in that case would necessarily have to refer to the federal regulations governing the agreements between the principals, the court stated that it would be "highly undesirable and inappropriate for the federal court to permit inconsistent interpretations of the provisions by relegating plaintiffs to the courts of the various states, the rules of which, perhaps, could even be applied to defeat congressional goals." The court then stated its belief that uniformity was required in the interpretation of the federal regulatory scheme, which was quite complex, and, therefore, that this interpretation should be undertaken by federal courts. 585 F.2d at 232.

²⁸⁶ Consolidation may be accomplished through 28 U.S.C. § 1404 (1976) and 28 U.S.C. § 1407 (1976). See text accompanying notes 42-46 *supra*.

World Airways,²⁸⁷ the court held that the implication of a remedy in suits involving air carrier discrimination furthers the policy behind the statutory proscription of discriminatory practices.²⁸⁸ Because of racial prejudice, the plaintiffs in that case were not permitted to reboard an airplane at the end of a temporary stop in Hawaii on a flight from California to Australia. The court found that the part of the Act prohibiting discrimination²⁸⁹ was "for the benefit of persons, including passengers, using the facilities of air carriers"²⁹⁰ and that "[a]lthough the Act does not expressly create any civil liability, we can see no reason why the situation is not within the doctrine which, in the absence of contrary implications, construes a criminal statute, enacted for the protection of a specified class, as creating a civil right in members of the class, although the only express sanctions are criminal."²⁹¹

Furthermore, in *Moragne v. States Marine Lines, Inc.*,²⁹² the Supreme Court found a clear public policy in state and federal provisions for wrongful death and provided such a remedy in a maritime case, although the applicable maritime statute did not provide for recovery for wrongful death. *Moragne*, even though a pre-*Cort* case, suggests the existence of a federal policy to provide for wrongful death, regardless of whether it is specifically articulated in a federal statute. This same policy suggests that a federal wrongful-death cause of action could be implied from provisions of the Federal Aviation Act in air disaster cases.²⁹³

The final part of the *Cort* test asks whether "the cause of action is one traditionally relegated to state law, in an area basically the concern of the states, so that it would be inappropriate to infer a cause of action based solely on federal law."²⁹⁴ *Moragne*, which was

²⁸⁷ 229 F.2d 499 (2d Cir. 1956).

²⁸⁸ *Id.*

²⁸⁹ Civil Aeronautics Act of 1938, ch. 601, § 404(b), 52 Stat. 993 (1938) (current version at 49 U.S.C. § 1374 (1976)).

²⁹⁰ 229 F.2d at 501.

²⁹¹ *Id.*

²⁹² 398 U.S. 375 (1970).

²⁹³ See Craig & Alexander, *supra* note 116, at 44-45. The authors, however, rely on federal preemption to enable a federal common law provision to supersede the state remedy. Hence, *Cort v. Ash*, 422 U.S. 66, 78 (1975), in asking whether the cause of action is one traditionally available under state law, may tend to confine *Moragne* to the specific facts therein.

²⁹⁴ *Cort v. Ash*, 422 U.S. 66, 78 (1975).

decided before *Cort*, permitted a wrongful-death claim under federal maritime law, because recognition of such a claim furthered a "general rule of American law"²⁹⁵ favoring recovery for wrongful death. The Court reached this decision despite the fact that federal maritime law did not expressly permit a claim for wrongful death and that wrongful-death claims were traditionally relegated to state law.²⁹⁶ Therefore, it is possible, in spite of the fact that wrongful death is a cause of action "traditionally relegated to state law,"²⁹⁷ that wrongful death in maritime cases fits into a category of federal interests for which it is not inappropriate to infer a federal cause of action. Yet *Cort* does not identify, or even speak to such a possibility. If *Moragne* stands for the proposition that federal interest in maritime regulation is so predominant that a federal maritime wrongful-death claim must be recognized, regardless of the *Cort* tests, the federal interest in aviation suggests similar deference.

The pervasive federal interest in aviation was recognized in *Kohr v. Allegheny Airlines, Inc.*,²⁹⁸ which involved a collision between a passenger airliner and a smaller aircraft. The Seventh Circuit, confronted with an extremely difficult conflict of laws question, chose to apply a federal rule of contribution and indemnity, rather than the rules of the individual states.²⁹⁹ The main justification offered for this result was that the federal interest in aviation is so pervasive that "there is no perceptible reason why federal law should not be applied to determine the rights and liabilities of the parties involved."³⁰⁰ The state's rights, in comparison with the "dominant federal interest," were slight. Therefore, the federal rule was applied.³⁰¹

A more recent case, however, may have severely limited the viability of this approach. In *Miree v. DeKalb County*³⁰² the plaintiffs sued in a diversity action to recover as third party beneficiaries of a contract between the county, which maintained the airport at

²⁹⁵ 398 U.S. at 393.

²⁹⁶ *Id.*

²⁹⁷ *Cort v. Ash*, 422 U.S. 66, 78 (1975).

²⁹⁸ 504 F.2d 400 (7th Cir. 1974), *cert. denied*, 421 U.S. 978 (1975).

²⁹⁹ *Id.* at 404.

³⁰⁰ *Id.*

³⁰¹ *Id.*

³⁰² 433 U.S. 25 (1977).

which an air crash occurred, and the FAA. The Supreme Court, in an opinion written by Justice Rehnquist, rejected an argument that federal common law³⁰³ should be applied to determine whether the plaintiffs had standing to sue,³⁰⁴ stating that the substantial interest of the United States in regulating aircraft travel and promoting air travel safety was insufficient to bring federal common law into play under the facts of that case.³⁰⁵ The Court then declined to consider an argument that the Airport and Airway Development Act³⁰⁶ provided an implied right of action to recover for death or injury due to violations of this statute, noting that the petitioners had failed to plead, argue, or brief the point in the lower courts.³⁰⁷ Nevertheless, Justice Rehnquist hinted that this argument would not have been favored, stating "[t]he fact that this asserted basis of liability is so obviously an afterthought may be some indication of its merit, . . ."³⁰⁸

Chief Justice Burger, however, in his concurring opinion, refused to close the door completely on an implied right of action: "I am not prepared to foreclose, at this point, the possibility that there may be situations where the rights and obligations of private parties are so dependent on a specific exercise of congressional regulatory power that 'the Constitution or Acts of Congress 'require' otherwise than that state law govern of its own force.'"³⁰⁹ He added that there would be times, although infrequent, when federal courts would be required to recognize "federal judicial competence to declare the governing law in an area comprising issues substantially related to an established program of government operation."³¹⁰ He concluded, however, by noting that, although the issue was close, the cause of action asserted by the plaintiffs was not sufficiently related to the purpose of the federal Airport and Airway Development Act.³¹¹

³⁰³ See note 312 *infra*.

³⁰⁴ 433 U.S. at 32-33.

³⁰⁵ *Id.*

³⁰⁶ Airport and Airway Development Act of 1970, Pub. L. No. 91-258, 84 Stat. 219 (1970) (codified in 49 U.S.C. §§ 1701-1743 (1976)).

³⁰⁷ 433 U.S. at 33-34.

³⁰⁸ *Id.*

³⁰⁹ *Id.* at 34.

³¹⁰ *Id.* at 35, quoting *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 593 (1973).

³¹¹ *Id.*

Essentially, the matter at issue is the federal court's competence to fashion rules of law in the face of applicable state law. Where there is an overriding federal interest³¹² sufficiently related to the plaintiff's cause of action, a state's interest is minimal and a federal rule should apply.³¹³ Therefore, while the cause of action for wrongful death may be one "traditionally relegated to state law," there are cases in which the overriding federal interest in aviation compels the formulation of a federal remedy. In those situations it is not "inappropriate" to infer a cause of action based solely on federal law. While the Court in *Miree*³¹⁴ may have raised the standards to justify such a finding, its reluctance to base its holding on the question of an implied right of action indicates that it is not prepared to prohibit categorically a right of action inferred from the federal government's pervasive regulation of aviation activities.³¹⁵

The existence of an implied private right of action for wrongful death in the provisions of the Federal Aviation Act³¹⁶ would enable

³¹² See *Ivy Broadcasting Co. v. American Tel. & Tel. Co.*, 391 F.2d 486 (2d Cir. 1968). In *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943) an endorsement on a check drawn on the United States Treasury was forged. Clearfield Trust Company, who accepted the check as an agent for the purpose of collection, stamped the check "Prior Endorsement Guaranteed." In the resulting litigation the question arose on the matter of which law to apply. The Court was quick to state that the rights and duties connected with commercial paper issued by the United States were not subject to local law. Hence, *Erie* did not apply. In the interest of uniformity federal law must be applied. In the absence of an appropriate act of Congress it is for the federal courts to fashion the rule of law according to their own standards. This is what is known as the federal common law.

³¹³ Cf. *Rosdail v. Western Aviation, Inc.*, 297 F. Supp. 681 (D. Colo. 1969) (in the absence of any compelling national interest or need for national uniformity a court should not imply a private cause of action); *Yelinek v. Worley*, 284 F. Supp. 679 (E.D. Va. 1968) (implying a civil remedy for damages would be foreign to the purpose of the Federal Aviation Act).

³¹⁴ In *Miree* the Court found that there was no overriding national interest in the contractual right of the plaintiffs. The landmark case which draws this distinction is *Bank of America v. Parnell*, 352 U.S. 29 (1956), where the cause of action involved United States bonds. The parties were private parties, and the issue was whether the respondent had taken the bonds in good faith, without knowledge or notice of defect in title. The Court held that, while the nature of the rights and obligations created by commercial paper of the United States government is controlled by federal law, the question of the case, proof of good faith, involved a private, essentially local transaction governed by local law.

³¹⁵ There are, however, strong indications that future courts will be restrictive in their approval of implied rights of action in air activities. See *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1 (1977). See note 273 *supra*.

³¹⁶ 49 U.S.C. §§ 1301-1552 (1976).

litigants to employ the federal question jurisdictional basis in air disaster cases³¹⁷ and to escape the effects of an anti-diversity bill. This access to federal courts ultimately would result in savings and convenience for the litigants. It also would engender efficient use of judicial resources through the availability of devices which enable consolidation of multiple causes of action.

CONCLUSION

Although the abolition of diversity jurisdiction would reduce the congestion in federal courts, it would also eliminate the traditional means of bringing air disaster cases under federal jurisdiction. Abolition of diversity jurisdiction would deprive litigants of the procedural advantages of the federal courts that are particularly useful in large-scale air disaster litigation. The preservation of diversity jurisdiction, however, would perpetuate the numerous problems caused by the lack of uniformity in states' laws. One solution to all these problems is the creation of a federal statutory scheme to govern the litigation of air disaster cases. If Congress approves an anti-diversity bill and fails to provide a federal cause of action for air disaster cases, it is possible that air disaster litigants may be able to obtain access to federal courts by joining the United States as a defendant or arguing for an implied right of action under the Federal Aviation Act. Nevertheless, there is no guarantee that these alternative jurisdictional devices will be available in every air disaster case. In the absence of diversity jurisdiction or an express statutory federal jurisdictional grant for air disaster cases, future aviation disasters of the magnitude of the O'Hare incident will have additional disruptive effects on our court system.³¹⁸

³¹⁷ See *Fitzgerald v. Pan American World Airways*, 229 F.2d 499 (2d Cir. 1956); *Gabel v. Hughes Air Corp.*, 350 F. Supp. 612 (C.D. Cal. 1972).

³¹⁸ The optimal solution, then, is as advocated by Judge Henry J. Friendly:

[A] federal act as to deaths of passengers caused by interstate carriers, thereby rescuing the courts from problems as to limitations on recovery under some states' death acts that have recently plagued them and are far from solved, and avoiding the seeming injustice that the estate of one passenger may recover without limit whereas that of the man sitting next to him could only get a small sum.

Friendly, *In Praise of Erie—And the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 418 (1964).

Comments and Case Notes

