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## Airlines Aren't Just Carrying Passengers and Cargo Anymore—They're Also Carrying the Burden of the American Conflict of Laws System

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**AIRLINES AREN'T JUST CARRYING PASSENGERS AND  
CARGO ANYMORE—THEY'RE ALSO CARRYING THE  
BURDEN OF THE AMERICAN CONFLICT  
OF LAWS SYSTEM**

KAYLEE KNOWLTON HENSON\*

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## I. INTRODUCTION

**T**O DATE, NO SINGLE WORK has proposed a federal, uniform approach for conflicts of law aviation cases. Some authors and experts have proposed federal regulation over the entire conflict of laws issue;<sup>1</sup> others have argued against it.<sup>2</sup> This Comment proposes an approach much narrower for aviation-specific cases. Particular interstate aviation cases should be regulated by a uniform approach to conflict of laws, federally regulated under Congress's Commerce Clause power, which would ensure a decrease in forum shopping and an increase in predictability. This approach strives to treat like cases alike by providing litigants and their attorneys with predictability in the pretrial process. As one writer stressed, "[a]lthough aviation cases represent only a small fraction of tort cases generally, they constitute a remarkably large percentage of the historic choice of law cases."<sup>3</sup>

This Comment begins by summarizing the current conflict of laws system in the United States and three major issues accompanying the current system that leave conflict of laws rules in the hands of state legislatures to determine. The Comment then moves to conflict of laws in aviation cases specifically, and it explains the unique nature of the aviation industry and why such

<sup>1</sup> See, e.g., Michael H. Gottesman, *Adrift on the Sea of Indeterminacy*, 75 IND. L.J. 527, 528–29 (2000); James A.R. Nafziger, *Choice of Law in Air Disaster Cases: Complex Litigation Rules and the Common Law*, 54 LA. L. REV. 1001, 1003, 1014 (1994).

<sup>2</sup> See, e.g., Robert J. Witte, . . . *Or Would You Rather Have What's Behind Door Number Two? Uniform Choice of Law Proposals: Big Deal of the Day or Just Another Zonk?*, 59 J. AIR L. & COM. 617, 619, 640 (1994).

<sup>3</sup> 2 LEE S. KREINDLER, AVIATION ACCIDENT LAW § 16.01[5] (Justin T. Green ed., rev. ed. 2019); see also Michael S. Gill, *Turbulent Times or Clear Skies Ahead?: Conflict of Laws in Aviation Delict and Tort*, 64 J. AIR L. & COM. 195, 218 (1998).

regulation is needed in this field of law. Thereafter, this Comment discusses Congress's power under the Commerce Clause and asks whether federal regulation is in fact a viable and constitutional solution to current conflict of laws issues. The Comment then discusses the realities and potential implications of applying a uniform, federal standard to aviation cases with conflict of laws issues, and it explores why aviation cases specifically are in such need of reform. Finally, the Comment analyzes potential opposition and challenges regarding federal regulation of conflict of laws, and it suggests their flaws and proposes alternative views to address these concerns.

## II. AMERICA'S CURRENT CONFLICT OF LAWS SYSTEM

“Perhaps no legal subject has caused more consternation and confusion among the bench and bar than choice of law.”<sup>4</sup> No matter its high level of complication, the choice of law analysis is often determinative of the outcome of a case.<sup>5</sup> Choice of law:

[C]oncerns the rights of persons within the territory and dominion of one sovereignty by reason of acts, public or private, done within the territory of another sovereignty, and is based on the broad general principle that one sovereignty or forum will respect and give effect to the laws of another so far as can be done consistently with its own interests.<sup>6</sup>

Conflicts of laws<sup>7</sup> are “difference[s] between the laws of two or more jurisdictions with some connection to a case, such that the

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<sup>4</sup> Gregory E. Smith, *Choice of Law in the United States*, 38 HASTINGS L.J. 1041, 1041 (1987).

<sup>5</sup> *Id.* at 1042.

<sup>6</sup> H. Norman Kinzy, *Current Aviation Decisions in Conflict of Laws*, 41 J. AIR L. & COM. 311, 311 (1975) (citing 15A C.J.S. *Conflict of Laws* § 1(2) (1967); 12 TEX. JUR. 2D *Conflict of Laws* § 1 (1960)).

<sup>7</sup> To clarify, “conflict of laws” is used interchangeably in this Comment with “choice of law.” See Smith, *supra* note 4, at 1041 n.1 (Choice of law “is the phrase generally used to describe that branch of the subject of conflict of laws which deals with the processes by which courts select the substantive law governing particular cases. The term ‘conflict of laws’ is often used synonymously with ‘choice of law’ . . . . Literally, however, the former term is broader than the latter, and includes within its domain such topics as domicile, establishment of jurisdiction, and enforcement of judgments. Choice of law describes only the process courts use to determine the applicable law in a case which concerns more than one jurisdiction.”).

outcome depends on which jurisdiction's law will be used to resolve each issue in dispute."<sup>8</sup>

The question presented by these types of cases is a unique one—which law will apply?<sup>9</sup> Cases stemming from one primary jurisdiction often leave no doubt as to what law will apply.<sup>10</sup> However, where a plane crash occurs, for example, in State A, the plaintiff is from State B, and the defendant is from State C, which law will apply is an immediate concern, regardless of the jurisdiction in which a suit is brought. These multijurisdictional cases can, and often do, get complicated quickly, just on the initial question of what law applies.<sup>11</sup> Most states have choice of law rules that follow essentially two steps: (1) the court applies its jurisdiction's choice of law rule; and (2) the court applies the substantive law of the state to which the choice of law rule points.<sup>12</sup> Following the previous example, if the suit is brought in State B (plaintiff's home state), the State B court looks to its own choice of law rule to determine what substantive law to apply. If State B's choice of law rule is that the law of the place of the accident applies in tort cases, for instance, State B then applies the substantive law of State A (the place where the accident occurred) to the case.

Conflicts of law cases are further complicated by the numerous choice of law approaches used by courts under state law.<sup>13</sup> States have adopted a number of various approaches to conflicts of law cases, which can lead to different outcomes in similar cases, merely due to an inconsequential change in facts.<sup>14</sup> For example, under the Restatement (First) of Conflict of Laws and in states that have adopted this approach, courts use the law of the *lex loci delicti* (place of the wrong).<sup>15</sup> Yet, the approach promoted by the Restatement (Second) of Conflict of Laws and

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<sup>8</sup> *Conflict of Laws*, CORNELL L. SCH. LEGAL INFO. INST., [https://www.law.cornell.edu/wex/conflict\\_of\\_laws](https://www.law.cornell.edu/wex/conflict_of_laws) [<https://perma.cc/7U89-VGUA>] (last visited Nov. 11, 2019).

<sup>9</sup> See Elliott E. Cheatham, *Characterization in the Conflict of Laws*, 55 HARV. L. REV. 164, 165 (1941) (reviewing A.H. ROBERTSON, *CHARACTERIZATION IN THE CONFLICT OF LAWS* (1940)).

<sup>10</sup> See Nafziger, *supra* note 1, at 1004.

<sup>11</sup> *Id.* at 1006 (highlighting that “[w]ithin the federal system, any of the more than 50 bodies of choice-of-law rules and procedures” could apply to these multijurisdictional cases).

<sup>12</sup> Cheatham, *supra* note 9, at 166.

<sup>13</sup> See generally Smith, *supra* note 4.

<sup>14</sup> See *id.* at 1043–50 (explaining each of the different conflict of laws approaches and applications).

<sup>15</sup> See Gill, *supra* note 3, at 218–19.

adopted by other states endorses the “most significant relationship” test, which applies the law of the state that has the most significant relationship to the facts of the case.<sup>16</sup> In addition to a number of other approaches adopted by other states,<sup>17</sup> these different approaches lead to different outcomes for relatively similar cases.<sup>18</sup>

Continuing the example from above, State B will apply the law of the place of the accident to this plaintiff, but what about a plaintiff from State D (Plaintiff Two) involved in the same accident? If Plaintiff Two brings suit in State D regarding the same accident, but State D applies the “most significant relationship” test, Plaintiff Two’s recovery possibilities, and likely the outcome of his entire case, will change merely because of a negligible fact—he lives in a different state than the first plaintiff.<sup>19</sup>

With states applying different choice of law approaches to the same or similar cases,<sup>20</sup> “the parties cannot know what law governs their conduct until after they have acted. The resulting uncertainty is unfair, and it discourages desirable interstate activity.”<sup>21</sup> Many legal scholars have written knowledgeable and innovative articles on solutions to this discrepancy and the unfair treatment of different plaintiffs due to mirror differences in their cases.<sup>22</sup> This inconsistency in like cases often leads to forum shopping, unpredictable outcomes, and different results for similarly situated plaintiffs, as discussed below.<sup>23</sup>

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<sup>16</sup> See *id.* at 224–25.

<sup>17</sup> See *id.* at 222, 226–37 (introducing and analyzing several of the other choice of law approaches).

<sup>18</sup> See Kimberlee S. Cagle, *The Role of Choice of Law in Determining Damages for International Aviation Accidents*, 51 J. AIR L. & COM. 953, 998 (1986) (“[U]nder the present law, similarly situated passengers suffering identical injuries on the same flight can recover vastly different damage amounts.”).

<sup>19</sup> It is important here to emphasize the problem to avoid confusion. It is not that the plaintiffs are from different jurisdictions that leads to unfair discrepancy in the results but rather the different jurisdictional applications of conflict of laws rules to the plaintiffs.

<sup>20</sup> See Cagle, *supra* note 18, at 987–89.

<sup>21</sup> Larry Kramer, *On the Need for a Uniform Choice of Law Code*, 89 MICH. L. REV. 2134, 2137 (1991).

<sup>22</sup> See, e.g., *id.*

<sup>23</sup> See, e.g., Cagle, *supra* note 18, at 989 (“[C]hoice of law analysis can lead to widely divergent damage awards. Even among similarly situated passengers, the damage awards can be strikingly disparate.”).

## A. FORUM SHOPPING

Forum shopping can be innocently described as “the exercise of the plaintiff’s option to bring a lawsuit in one of several different courts.”<sup>24</sup> Yet, another definition sheds more light on the issues behind and common abuse of forum shopping: “[s]uch occurs when a party attempts to have his action tried in a particular court or jurisdiction where he feels he will receive the most favorable judgment or verdict.”<sup>25</sup> With broad avenues for establishing jurisdiction over a defendant and proper venue for a case, allowing plaintiffs to essentially handpick where to bring suit gives plaintiffs an advantage in a case from the time suit is filed. As one author bluntly stated, “[h]orizontal (state-state) forum shopping is a serious problem.”<sup>26</sup> The United States Second Circuit Court of Appeals explained that the forum shopping problem

stems from the fear that a plaintiff will be able to determine the outcome of a case simply by choosing the forum in which to bring the suit . . . raising the fear that applying the law sought by a forum-shopping plaintiff will defeat the expectations of the defendant or will upset the policies of the state in which the defendant acted (or from which the defendant hails).<sup>27</sup>

Professor Earl Martz further highlighted prevalent issues with forum shopping:

The American system . . . envisions a set of fora in which it would be fair for the defendant to be forced to litigate. The plaintiff has the power to choose any forum within that set as the venue for the lawsuit. If the plaintiff chooses a court that is not within the set of fair fora, the defendant has the right to veto the plaintiff’s choice, but the defendant generally does not have the right to designate the specific court that will hear the lawsuit. The key question is not whether the plaintiff has chosen the forum that would be most appropriate to hear the lawsuit; instead, the only issue is whether the court selected by the plaintiff is included in the set of fair fora.<sup>28</sup>

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<sup>24</sup> Friedrich K. Juenger, *Forum Shopping, Domestic and International*, 63 TUL. L. REV. 553, 554 (1989).

<sup>25</sup> *Forum Shopping*, BLACK’S LAW DICTIONARY (5th ed. 1979).

<sup>26</sup> See Nafziger, *supra* note 1, at 1013.

<sup>27</sup> *Sheldon v. PHH Corp.*, 135 F.3d 848, 855 (2d Cir. 1998) (quoting *Olmstead v. Anderson*, 400 N.W.2d 292, 303 (Mich. 1987)).

<sup>28</sup> Earl M. Martz, *Choice of Forum and Choice of Law in the Federal Courts: A Reconsideration of Erie Principles*, 79 KY. L.J. 231, 249 (1991) (citations omitted).

Simply put, it is fundamentally unfair to allow plaintiffs to “shop” for the court which would allow the most favorable outcome rather than the court that is most appropriate to hear the suit.<sup>29</sup>

Admittedly, the forum shopping problem, also rooted in many other American judicial rules (jurisdiction, venue, etc.), is not choice of law specific.<sup>30</sup> Yet, its effects are well apparent in the choice of law realm.<sup>31</sup> It has been proposed that the main purpose of the creation of the conflict of laws system was to prevent forum shopping. However, that has proven to be a moot goal given the manipulation by plaintiffs and “home-town justice” taken by courts.<sup>32</sup> Further, the current conflicts system has been attributed as a leading cause in the forum shopping problem in the United States.<sup>33</sup> Inappropriate forum shopping is promoted by the current state of the conflict of laws system. Without a “clear, uniform, and neutral” context for the applicable law to be chosen, “modern U.S. conflicts doctrine encourages plaintiffs to practice forum shopping on the basis of other factors,” and “[w]hen plaintiffs see conflicts doctrine existing in many states that is not clearly contrary to their substantive interests, that they detect is malleable, and that tends generally to be pro-recovery,” they choose those forums.<sup>34</sup>

## B. UNPREDICTABILITY

Because of the forum shopping problem and various approaches used by states, unpredictability has surfaced as another

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<sup>29</sup> It seems appropriate here to distinguish between “forum shopping” and a plaintiff deciding where to file suit among a list of appropriate jurisdictions. “Forum shopping,” as used here, denotes “a litigant who . . . unfairly exploits jurisdictional or venue rules to affect the outcome of a lawsuit.” Juenger, *supra* note 24, at 553. This is not to be confused with a litigant who chooses between jurisdictions, each of which is a valid venue, as such a choice is an essential part of the American judicial system.

<sup>30</sup> *Id.* at 557–60 (noting that other features of the American judicial system, such as personal jurisdiction, recognition rules, and venue, also encourage forum shopping).

<sup>31</sup> See Ralph U. Whitten, *U.S. Conflict-of-Laws Doctrine and Forum Shopping, International and Domestic (Revisited)*, 37 TEX. INT’L L.J. 559, 564 (2002).

<sup>32</sup> Juenger, *supra* note 24, at 559.

<sup>33</sup> Christopher A. Whytock, *The Evolving Forum Shopping System*, 96 CORNELL L. REV. 481, 495 (2011) (explaining how the “choice-of-law revolution” led to a “strong bias in favor of” courts applying the forum’s law).

<sup>34</sup> Whitten, *supra* note 31, at 564.

issue under the current conflict of laws rules in America.<sup>35</sup> “Even when only one choice-of-law approach applies in a case, it may not provide the necessary measure of predictability, uniformity, and ease of administration in a complicated, high-stake aviation case.”<sup>36</sup> While the current rules should, in theory, provide litigants and courts with consistency and predictability, scholars often stress the “unpredictable (and sometimes unprincipled) outcomes generated by [conflict of laws] rules, and the fact that their content may vary from state to state.”<sup>37</sup> This has led to difficulty “predict[ing] what a court will do when faced with choice of law issues, and each case seems to demand an ad hoc determination.”<sup>38</sup> The modern-day, American conflict of laws system has been regarded as producing “almost totally unpredictable results.”<sup>39</sup>

The importance of predictability is clear. “Predictability in conflicts law is as important as it is in substantive law.”<sup>40</sup> As one scholar stressed the importance of predictability: “Outcome prediction has always been a vital part of practicing law. Clients of all types rely on their attorneys to provide accurate assessments of the potential legal consequences the clients face when making important decisions.”<sup>41</sup> A lawyer should be able to “assess the merits” of a case “to evaluate the likelihood of success.”<sup>42</sup> Without clear predictability in the judicial system, especially with already complicated conflicts of law cases, lawyers are unable to provide clients with adequate representation and accurate assessment of cases.<sup>43</sup>

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<sup>35</sup> See Cagle, *supra* note 18, at 999 (“Currently, choice of law analysis provides no uniformity among damage awards to similarly situated passengers.”).

<sup>36</sup> Nafziger, *supra* note 1, at 1009.

<sup>37</sup> See, e.g., John F. Coyle, *Rethinking the Commercial Law Treaty*, 45 GA. L. REV. 343, 346 (2011).

<sup>38</sup> Shirley A. Wiegand, *Fifty Conflict of Laws “Restatements”: Merging Judicial Discretion and Legislative Endorsement*, 65 LA. L. REV. 1, 4 (2004).

<sup>39</sup> Michael Bogdan, *Conflict of Laws in Air Crash Cases: Remarks from a European’s Perspective*, 54 J. AIR L. & COM. 303, 343 (1988).

<sup>40</sup> EUGENE F. SCOLES ET AL., *CONFLICT OF LAWS* 106 (3d ed. 2000).

<sup>41</sup> Mark K. Osbeck, *Lawyer as Soothsayer: Exploring the Important Role of Outcome Prediction in the Practice of Law*, 123 PENN ST. L. REV. 41, 101 (2018).

<sup>42</sup> *Id.* at 47.

<sup>43</sup> See *id.* at 46–47.

## C. INCONSISTENCY AND NOT TREATING LIKE CASES ALIKE

The Equal Protection Clause of the United States Constitution,<sup>44</sup> as former Chief Justice Rehnquist observed, “embodies a general rule that States must treat like cases alike . . . .”<sup>45</sup> Yet, due to the variations in conflict of laws approaches across state lines and forum favoritism practiced by courts under the current conflict of laws system in the United States, like cases are not treated alike.<sup>46</sup> Allowing each state to have its own conflict of laws approach means that, especially in aviation cases, factors typically out of the control of litigants, such as the location of a plane crash or flight pattern, can become outcome determinative for cases. This leads to plaintiffs involved in the same or similar events possibly having different case results merely because of the forum.<sup>47</sup>

Forum favoritism, on the other hand, also leads to inconsistency in case outcomes, even for similarly situated litigants. As one author put it, “[e]scape devices—such as characterization, renvoi, and the public policy reservation—enabled judges to apply forum law in spite of rigid choice-of-law rules . . . .”<sup>48</sup> Further, another scholar concluded that “there is theoretical and empirical support for the proposition that modern choice-of-law theories inevitably tend to hold against defendants in general and out-of-state defendants in particular.”<sup>49</sup> Allowing judges to avoid established rules and practice forum favoritism creates predictability issues as well as fundamental unfairness in case outcomes.<sup>50</sup>

These issues—forum shopping, unpredictability, and inconsistency—are three of the main problems with the current conflict of laws system in America. While these problems exist throughout the conflicts system as a whole, there are particularly concerning implications for aviation cases specifically that show the necessity of federal regulation of the conflict of laws system for aviation cases.

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<sup>44</sup> See U.S. CONST. amend. XIV, § 1.

<sup>45</sup> *Vacco v. Quill*, 521 U.S. 793, 799 (1997).

<sup>46</sup> See *Cagle*, *supra* note 18, at 998–99.

<sup>47</sup> See *id.*

<sup>48</sup> See *Juenger*, *supra* note 24, at 559; see also *Nafziger*, *supra* note 1, at 1014 (“courts would do well to minimize exceptions to the rules of preference. They are the most troublesome feature”).

<sup>49</sup> Michael E. Solimine, *An Economic and Empirical Analysis of Choice of Law*, 24 GA. L. REV. 49, 89 (1989).

<sup>50</sup> See, e.g., *Nafziger*, *supra* note 1, at 1014.

#### D. A UNIFORM APPROACH—OVERCOMING VARIABILITY ISSUES

If each state applied the same conflict of laws approach, choice of law issues would be more predictable and arguably fairer, especially in the context of uncontrollable accidents and insignificant differences in cases. The problem, however, is that getting all states to agree on one approach to conflict of laws would be nearly impossible.<sup>51</sup> Instead, a more practical solution to this problem would be federal regulation. Congress creating one approach for multistate aviation cases would allow clearer application of the law and more predictability.

##### 1. *Limiting Forum Shopping*

As discussed above, forum shopping is a prevalent issue within the conflict of laws system, and “[i]t is simply not fair that one party gets to choose, after the fact, what legal regime will govern the parties’ dispute.”<sup>52</sup> Yet, this problem could be limited by a uniform approach to the conflicts system. A single approach used by all states would limit forum shopping in an obvious way. Plaintiffs could no longer consider the choice of law rules in different forums in deciding where to bring suit. If a plaintiff knows one uniform conflict of laws approach will be used regardless of where suit is brought, the strategic and sometimes outcome-determinative advantage that plaintiffs have in choosing forum is limited to more appropriate forums, versus a forum that merely meets jurisdictional requirements and has a plaintiff-friendly choice of law approach.

##### 2. *Providing Predictability*

A uniform approach would also bring predictability to complicated conflicts of law cases. In aviation cases specifically, consumers and airlines alike, as possible litigants for events occurring in the process of a flight, would know up-front what the conflict of laws rule would be for any possible suit. “The variety, ambiguity, and instability of the rules and principles that underlie modern choice of law processes in the United States pose particular problems in air disaster cases.”<sup>53</sup> The proposed single approach in aviation conflicts of law cases would provide

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<sup>51</sup> A prime example of this would be the state of the conflict of laws system currently. Even with Restatement guidance, courts in different jurisdictions are unable to provide a uniform approach across state lines.

<sup>52</sup> Gottesman, *Adrift on the Sea of Indeterminacy*, *supra* note 1, at 529.

<sup>53</sup> Nafziger, *supra* note 1, at 1009.

predictability to cases that are often decided by uncontrollable factors.<sup>54</sup> Parties should, and do, want to “know what the law requires of them.”<sup>55</sup> As one author explained, when activity is interstate in nature, it “requires knowing which state’s law will govern. . . . [I]f the criteria for choosing law are so amorphous that parties can’t tell which state’s law will apply, or if that choice will vary depending on the plaintiff’s post hoc forum selection, then the defendant-actor cannot know what law to obey.”<sup>56</sup> Providing predictability to these aviation cases allows parties to be attentive of the possible laws to which they could be subjected. “Federal law would eliminate costly uncertainty and create uniformity. . . . lead[ing] to a quick and efficient resolution of mass disaster cases.”<sup>57</sup>

### 3. *Treating Like Cases Alike*

A uniform approach would not only reduce forum shopping and provide predictability to future litigants but also provide another level of fairness to aviation conflicts of law cases by treating like cases alike, which former Chief Justice Rehnquist explained is a requirement of the Equal Protection Clause.<sup>58</sup> Providing one conflict of laws approach to all cases, particularly those with similarly situated litigants, prevents inapplicable factors such as a plaintiff’s home state or the fortuitous location of a plane crash from automatically changing the outcome of a case.

It has been stated that “[t]he right to a fair and impartial trial in a civil case is as fundamental as it is in a criminal case.”<sup>59</sup> Ensuring that improper forum shopping is eliminated, predictability is established, and like cases are treated alike promotes a fair trial for litigants in conflicts of law cases. As explained by one scholar:

[T]he choice of law rules the state courts have applied in the absence of federal command have become chaotic producers of waste and unfairness; and . . . [relaxed constraints on] state court jurisdiction and state court application of forum law have intensi-

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<sup>54</sup> See Gill, *supra* note 3, at 238.

<sup>55</sup> Gottesman, *Adrift on the Sea of Indeterminacy*, *supra* note 1, at 528.

<sup>56</sup> *Id.*

<sup>57</sup> *In re Air Crash Disaster at Stapleton Int’l Airport*, 720 F. Supp. 1445, 1455 (D. Colo. 1988).

<sup>58</sup> See *Vacco v. Quill*, 521 U.S. 793, 799 (1997); *cf.* Cagle, *supra* note 18, at 999.

<sup>59</sup> *Roberts v. CSX Transp., Inc.*, 688 S.E.2d 178, 181 (Va. 2010) (citations omitted).

fied the forum shopping and forum-preference in selection of law that lie at the heart of the present problem.<sup>60</sup>

This statement highlights that protection from these issues is necessary for justice to be served appropriately in conflicts of law cases, and these safeguards would be most effectively accomplished through one conflict of laws approach across all states.

### III. CONFLICT OF LAWS IN AVIATION CASES—THE NEED FOR ONE CONFLICT OF LAWS APPROACH

Problems with the conflicts system are exceedingly evident in the field of aviation due to the inherent multistate nature of the industry. “The most common issues [arising out of claims from air disasters] are liability, survivability of actions after the death of a tortfeasor or victim, compensatory damages for injury, loss of life or loss of property, damages for pain and suffering, and punitive damages.”<sup>61</sup> Airlines carry passengers from all over the world on flights starting in one state, flying over numerous others, and landing in a completely different state, causing the airline to potentially be subject to the laws of any of the states involved in the flight. As Chief Judge Desmond commented in one famous conflicts of law case:

An air traveler from New York may in a flight of a few hours’ duration pass through several of those commonwealths [that have laws differing from those of New York]. His plane may meet with disaster in [a] State he never intended to cross but into which the plane has flown because of bad weather or other unexpected developments, or an airplane’s catastrophic descent may begin in one State and end in another. The place of the injury becomes entirely fortuitous.<sup>62</sup>

Further, “[t]he applicable law is indeed fortuitous because there is no uniform law of aviation liability among the several states.”<sup>63</sup> If an airline conducts a flight from Los Angeles, California, to New York City, New York,<sup>64</sup> it is subject to the possibility that the laws of California, New York, or any other state it may fly over

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<sup>60</sup> Michael H. Gottesman, *Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes*, 80 GEO. L.J. 1, 2 (1991).

<sup>61</sup> Nafziger, *supra* note 1, at 1004.

<sup>62</sup> *Kilberg v. Ne. Airlines, Inc.*, 172 N.E.2d 526, 527 (N.Y. 1961); see Harold E. McKee, *Aviation Law—Problems in Litigation Arising from Aircraft Disasters*, 37 NOTRE DAME L. REV. 194, 194 (1961).

<sup>63</sup> McKee, *supra* note 62, at 14.

<sup>64</sup> The flight from JFK to LAX is the busiest flight within North America. Tamara Hardingham-Gill, *World’s Most Popular Airplane Journey Revealed*, CNN

could apply to a conflicts of law case. With so many different approaches used by different states, these airlines and their passengers are unable to fairly predict which laws may apply if something were to go wrong on the flight due to the many different variables involved with conflicts of law cases. Even the increase in air travel over the last decade has not led to any significant reforms to ensure uniformity among the conflict of laws in aviation litigation.<sup>65</sup>

Advocating for a federal conflict of laws approach is not novel on its own. As one author has explained, “[w]hatever the procedural posture of a case, and however neutral the forum may be, judges should appreciate the need for a multijurisdictional perspective that discourages horizontal forum-shopping and maximizes legitimate expectations of parties and systemic integrity.”<sup>66</sup> Indeed, legal scholars have proposed various suggestions for reform.<sup>67</sup> Yet, the concept of federal legislation under the Commerce Clause for aviation cases specifically is a new area for legal exploration. However, in order to give a thorough and accurate analysis of federal regulation behind conflict of laws in aviation, it is important to consider those articles previously written about uniform conflict of laws proposals and their critiques.

Some scholars have proposed general federal action to regulate all conflict of laws issues, since the analysis concerns the interests of multiple states.<sup>68</sup> Others have proposed federal recommendations on a uniform conflict of laws approach under a format similar to that of the Uniform Commercial Code or even possibly the need for a new Restatement.<sup>69</sup> Some scholars have restricted conflict of laws reform and have only advocated for the change within federal courts,<sup>70</sup> while other approaches

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TRAVEL, <https://www.cnn.com/travel/article/worlds-busiest-flight-routes/index.html> [<https://perma.cc/7KVX-TB2M>] (last updated Sept. 13, 2018).

<sup>65</sup> Cagle, *supra* note 18, at 953 (discussing international air travel but still providing applicable research on the domestic conflict of laws system).

<sup>66</sup> Nafziger, *supra* note 1, at 1014.

<sup>67</sup> See, e.g., *id.* at 1010–11.

<sup>68</sup> See, e.g., Witte, *supra* note 2, at 622. See generally Donald T. Trautman, *The Relation Between American Choice of Law and Federal Common Law*, 41 L. & CONTEMP. PROBS. 105 (1977).

<sup>69</sup> See, e.g., LEA BRILMAYER, CONFLICT OF LAWS: FOUNDATIONS AND FUTURE DIRECTIONS 185–89 (1991) (exploring the idea of a new Restatement of Conflict of Laws); Kramer, *supra* note 21, at 2134, 2146–49 (endorsing an approach similar to the Uniform Commercial Code); see also Nafziger, *supra* note 1, at 1014; Witte, *supra* note 2, at 622 (explaining various suggestions to improve the current conflict of laws system in America).

<sup>70</sup> See, e.g., Gottesman, *Draining the Dismal Swamp*, *supra* note 60, at 19.

push for congressional regulation of the entire system,<sup>71</sup> similar to but more broad than the approach proposed in this Comment. While one proposal explores a similar application for a uniform approach, it advocates such uniformity under a different source of congressional authority—the Full Faith and Credit Clause.<sup>72</sup> These approaches vary in many ways, but there is one common theme: recognition of a problem with the current state of the conflict of laws system in America.<sup>73</sup> And at the same time, they miss one key feature explored here: aviation-specific issues and a need for reform in this particular area of the law.

However, one scholar, Willis L.M. Reese, put forth an extreme set of rules written particularly for choice of law issues in aircraft accidents.<sup>74</sup> This proposal applies strictly to aviation accidents, and it provides these plaintiffs with a great amount of flexibility within the choice of law rules.<sup>75</sup> These rules allow for plaintiffs to “maximize recovery,”<sup>76</sup> but they have been met with some harsh criticism due to inconsistencies within them.<sup>77</sup> While this system promotes a unique application of choice of law rules in aviation cases, it also misses a few important issues: (1) federal regulation of the law as a strong source of authority behind the rules; and (2) the importance of predictability and uniformity in the conflict of laws system.<sup>78</sup> Reese’s extreme, conservative rules fit the same aspirations of this Comment—providing a conflict of laws approach to aviation cases specifically—but they fail to consider the prevalent issues of modern-day conflict of laws or to provide an approach broad enough to encompass those aviation cases which do not result from an accident.<sup>79</sup>

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<sup>71</sup> See, e.g., *id.*

<sup>72</sup> See Witte, *supra* note 2, at 640.

<sup>73</sup> See, e.g., Kramer, *supra* note 21, at 2146–49.

<sup>74</sup> See generally Willis L.M. Reese, *The Law Governing Airplane Accidents*, 39 WASH. & LEE L. REV. 1303 (1982).

<sup>75</sup> See Gill, *supra* note 3, at 236.

<sup>76</sup> *Id.* at 237.

<sup>77</sup> See *id.* at 236.

<sup>78</sup> Reese argues these are not of “particular significance” to the choice of law in tort. Willis L.M. Reese, *American Choice of Law*, 30 AM. J. COMP. L. 135, 135 (1982); see also Gill, *supra* note 3, at 236.

<sup>79</sup> Compare Reese, *The Law Governing Airplane Accidents*, *supra* note 74, and Reese, *American Choice of Law*, *supra* note 78 and accompanying text, with *infra* Section VI (analyzing the proposed approach for conflicts of law cases regarding aviation).

#### IV. DOES CONGRESS HAVE THE POWER TO FEDERALLY REGULATE AVIATION CONFLICTS OF LAW CASES?

After establishing the need for uniform regulation of conflict of laws rules in aviation cases, one must now turn to the plausibility of this actually occurring. In order to avoid constitutional challenges, the question must be asked—does Congress possess the authority to federally legislate rules for aviation conflicts of law cases? Simply put, because aviation is, by its very nature, “interstate commerce,” legislative authority is granted by the Commerce Clause of the Constitution,<sup>80</sup> and Congress can apply a universal approach to conflict of laws in multistate aviation cases. But to establish such a rule in an area of the law historically governed at the state level,<sup>81</sup> a constitutional analysis of the application of a uniform conflict of laws approach must be undertaken.

##### A. THE COMMERCE CLAUSE

The Commerce Clause vests in Congress the right “[t]o regulate commerce with foreign Nations, and among the several States . . . .”<sup>82</sup> Broadly speaking, “to regulate” means “to make regular.”<sup>83</sup> Thus, Congress has the power to make rules specifying “how to do a particular activity.”<sup>84</sup> “Commerce” has been defined by scholars narrowly as “the trade or exchange of goods (including the means of transporting them)”<sup>85</sup> or broadly as “gainful activities.”<sup>86</sup> Under each of these definitions,<sup>87</sup> and

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<sup>80</sup> See U.S. CONST. art. I, § 8, cl. 3.

<sup>81</sup> See Donald T. Trautman, *Toward Federalizing Choice of Law*, 70 TEX. L. REV. 1715, 1716–17 (1992) (referencing Justice Story’s view of conflict of laws and Justice Brandeis’s opinion in *Kryger v. Wilson*, 242 U.S. 171 (1916)).

<sup>82</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>83</sup> Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 139 (2001) (citing 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (J.F. Rivington et al. eds., 6th ed. 1785)).

<sup>84</sup> Randy E. Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 ARK. L. REV. 847, 863 (2003).

<sup>85</sup> See, e.g., Barnett, *The Original Meaning of the Commerce Clause*, *supra* note 83, at 146.

<sup>86</sup> See, e.g., Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control over Social Issues*, 85 IOWA L. REV. 1, 20–21 (1999).

<sup>87</sup> Use of both of these definitions highlights the point that aviation falls under both; however, some scholars argue that these are mutually exclusive definitions, and that one overrides the other. See Barnett, *The Original Meaning of the Commerce Clause*, *supra* note 83, at 102–05.

others offered, the word “commerce” almost always has some economic meaning.<sup>88</sup> The Commerce Clause grants Congress the power to “regulate . . . among the several States,” meaning “‘between state and state’ or between persons in one state and persons in another.”<sup>89</sup> “In sum, Congress has power to specify rules to govern the manner by which people may exchange or trade goods from one state to another” and “to remove obstructions to domestic trade erected by states . . . .”<sup>90</sup>

Further, Congress’s power to authorize regulation under the Commerce Clause can be divided into three general categories: (1) regulation of “the channels of interstate commerce”; (2) regulation and protection of “the instrumentalities of interstate commerce, and persons or things in interstate commerce”; and (3) regulation of “activities that substantially affect interstate commerce.”<sup>91</sup> This general understanding of congressional power under the Commerce Clause can now be applied to rules for interstate aviation cases generally.

#### B. FROM THE COMMERCE CLAUSE TO CHOICE OF LAW REGULATION IN MULTISTATE AVIATION CASES

For Congress to validly exercise its power under the Commerce Clause, the activity regulated must, in fact, be interstate commerce under one of the three general categories given above.<sup>92</sup> Interstate commerce “does not . . . consist in transportation simply. It includes the purchase and sale of articles that are intended to be transported from one State to another—every species of commercial intercourse among the States and with foreign nations.”<sup>93</sup>

While interstate travel via planes and trains typically falls within the realm of the Commerce Clause,<sup>94</sup> standing alone, the

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<sup>88</sup> See, e.g., Barnett, *The Original Meaning of the Commerce Clause*, *supra* note 83, at 146.

<sup>89</sup> *Id.* at 137 (highlighting the difference between this definition and “commerce that ‘concerns’ more than one state, or even commerce between persons of same state that somehow ‘concerns’ other states”).

<sup>90</sup> *Id.* at 146.

<sup>91</sup> See *Gonzales v. Raich*, 545 U.S. 1, 16–17 (2005) (first citing *Perez v. United States*, 402 U.S. 146, 150 (1971) (for all three categories); and then citing *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37, 57 (1937) (for category three)).

<sup>92</sup> See *id.*

<sup>93</sup> *United States v. E.C. Knight Co.*, 156 U.S. 1, 22 (Harlan, J., dissenting).

<sup>94</sup> Diane McGimsey, *The Commerce Clause and Federalism After Lopez and Morrison: The Case for Closing the Jurisdictional-Element Loophole*, 90 CALIF. L. REV. 1675, 1692 (2002). See generally *Perez*, 402 U.S. at 150 (aircraft); *S. Pac. Co. v. Arizona*, 325

presence of conflict between multiple states is not enough to satisfy the requirements for federal legislation under the Commerce Clause.<sup>95</sup> Rather, some form of commerce must be involved. Typically, interstate aviation cases involve the purchase and sale of a ticket used for access to transportation across state lines. This is enough to fall under the Commerce Clause dominion. Aviation involving multistate interaction sits neatly within the second general category of the Commerce Clause power: regulation and protection of the “instrumentalities of interstate commerce, and persons or things in interstate commerce.”<sup>96</sup> Not only are planes and people traveling interstate “instrumentalities of interstate commerce” but they are also “persons or things in interstate commerce.”

Congressional power to regulate interstate aviation conflict of laws issues is further demonstrated by an analysis of Congress’s Commerce Clause power as applied to the aviation realm. The federal government is already a very visible and dominant force in the aviation industry.<sup>97</sup> As Justice Jackson emphasized, planes “move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands. . . . Its privileges, rights and protection . . . [are] owe[d] to the Federal Government alone and not to any state government.”<sup>98</sup> Because this type of interstate activity falls under the power of Congress by the nature of being “commerce among the several States which Congress may regulate,”<sup>99</sup> Congress has the power to create rules for aviation suits that involve multistate commerce, which will inform judges and attorneys of the conflict of laws procedure for these cases.

Also, the purchase and sale of tickets, the economic conduct inherent to interstate aviation, and the aviation industry’s “gainful activity” all qualify as “commerce” under its precise defini-

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U.S. 761 (1945) (railroad cars); *Hous., E. & W. Tex. Ry. Co. v. United States (Shreveport Rate Cases)*, 234 U.S. 342 (1914) (railroad rates).

<sup>95</sup> *Cf. Raich*, 545 U.S. at 16–17 (explaining the three categories under which an activity must fall into to be considered a regulatable activity under the Commerce Clause).

<sup>96</sup> *See id.* (meeting the criteria laid out in the decision).

<sup>97</sup> Examples of federal involvement under the Commerce Clause include: federal licensing of airmen, federal control of air traffic control, and federal licensing and registration of aircrafts. *See* Edward A. Harriman, *Federal and State Jurisdiction with Reference to Aircraft*, 2 J. AIR L. & COM. 299, 303–04 (1931).

<sup>98</sup> *Nw. Airlines v. Minnesota*, 322 U.S. 292, 303 (1944) (Jackson, J., concurring).

<sup>99</sup> *See supra* notes 82–98 and accompanying text.

tion. In fact, common carriers and commercial transportation easily fit into multiple categories of commerce, as they are “integral to the sale and production of goods”; “a service provided for a fee”; and “a means of transacting commerce.”<sup>100</sup> Further, aviation meets the standard of “among the several states” because flights from one state to another, or even business transactions between persons from different states in the aviation industry, qualify as activity “‘between state and state’ or between persons in one state and persons in another.”<sup>101</sup>

While the Supreme Court has recently limited Congress’s ability to regulate under the Commerce Clause, there is no evidence that such limitations would stop Congress from being able to regulate aviation-specific conflict of laws issues.<sup>102</sup> In fact, when the Supreme Court limited the scope of the Commerce Clause in *United States v. Lopez*, it specifically endorsed the continuation of congressional regulation of interstate activity via planes and trains.<sup>103</sup> As one scholar explained, the Supreme Court “has left the essence of Congress’s power to regulate multistate commercial transactions intact.”<sup>104</sup> Congress maintains “the right to regulate any person or entity involved in the business of transportation (e.g., ships, railroads, trucks, and airplanes) because (1) providing transportation for a fee is ‘commerce,’ and

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<sup>100</sup> Nelson & Pushaw, *supra* note 86, at 108–09 (explaining categories of a wide range of subjects that “commerce” covers).

<sup>101</sup> See Barnett, *The Original Meaning of the Commerce Clause*, *supra* note 83, at 137. Congressional Commerce Clause authority over aviation is further supported by other examples of aviation legislation by Congress. See generally Harri-man, *supra* note 97.

<sup>102</sup> See Whitten, *supra* note 31, at 584 (first citing *United States v. Morrison*, 529 U.S. 598, 613 (2000) (summarizing the opinion as “holding the federal Violence Against Women Act beyond the power of Congress under the Commerce Clause on the grounds that gender-motivated crimes of violence are not economic activity”); and then citing *United States v. Lopez*, 514 U.S. 549, 558–59, 561–62 (1995) (which held that “the federal Gun-Free School Zones Act [was] beyond the power of Congress under the Commerce Clause because no economic activity was involved, but recognizing the legitimacy of Congress regulating the use of channels of interstate commerce, the instrumentalities of interstate commerce, and activities that substantially affect interstate commerce, and also recognizing the power of Congress to provide for a jurisdictional element in a statute that would ensure a case-by-case inquiry that a particular activity in fact affects interstate commerce”)).

<sup>103</sup> See *Lopez*, 514 U.S. at 558 (“Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities.”) (citing *Perez v. United States*, 402 U.S. 146 (1971); *Shreveport Rate Cases*, 234 U.S. 342 (1914); *So. Ry. Co. v. United States*, 222 U.S. 20 (1911)).

<sup>104</sup> Whitten, *supra* note 31, at 584.

(2) even intrastate transit often affects commerce among the states, as the Court has long recognized.”<sup>105</sup>

### C. ANOTHER ROUTE: THE DORMANT COMMERCE CLAUSE

Congressional authority also includes the “power to . . . remove obstructions to domestic trade erected by states” under the Dormant Commerce Clause.<sup>106</sup> While there is some lack of clarity and increased controversy regarding the Court’s application of the Dormant Commerce Clause, it is still a tool to be used today.<sup>107</sup> This power could quite possibly include federal regulation of conflict of laws issues in aviation cases due to the obstructions to trade caused by the problems behind the complicated conflict of laws system. If Congress chose not to use the Commerce Clause to invoke its authority over aviation choice of law cases, the Dormant Commerce Clause might provide another route.

Specifically, “[t]he ‘Dormant Commerce Clause’ refers to the prohibition, implicit in the Commerce Clause, against states passing legislation that discriminates against or excessively burdens interstate commerce.”<sup>108</sup> States cannot burden trade, which may be a way around any Commerce Clause issues over federal regulation of aviation conflict of laws. “[A] state cannot impose an unreasonable burden on [interstate commerce]. . . . This implicit or ‘dormant’ limitation on the authority of the states to enact legislation affecting interstate commerce . . . precludes state regulation in certain areas ‘even absent congressional action.’”<sup>109</sup> Thus, under the Dormant Commerce Clause, a state cannot do anything that may impose a “substantial bur-

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<sup>105</sup> Nelson & Pushaw, *supra* note 86, at 119 (citing *Gibbons v. Ogden*, 22 U.S. 1 (1824)).

<sup>106</sup> Barnett, *The Original Meaning of the Commerce Clause*, *supra* note 83, at 146.

<sup>107</sup> Compare Note, *Functional Analysis, Subsidies, and the Dormant Commerce Clause*, 110 HARV. L. REV. 1537, 1537–38 (1997) (explaining some of the controversy and the clarity issues with the Dormant Commerce Clause), and Jeremy R. Jehangiri, Note, *The Dowling Thesis Revisited: Professor Dowling and Justice Scalia*, 49 S.D. L. REV. 867, 876–78 (2004) (emphasizing the Supreme Court’s use of a balancing approach to the Dormant Commerce Clause), with Daniel Francis, *The Decline of the Dormant Commerce Clause*, 94 DENV. L. REV. 255, 257, 272 (2017) (suggesting using the Dormant Commerce Clause might be slipping away with the passing of time).

<sup>108</sup> *Commerce Clause*, CORNELL L. SCH. LEGAL INFO. INST., [https://www.law.cornell.edu/wex/commerce\\_clause](https://www.law.cornell.edu/wex/commerce_clause) [<https://perma.cc/546M-FJHU>] (last visited Nov. 12, 2019).

<sup>109</sup> 8 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW § 1439(1) (11th ed. 2019) (first citing *S.-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 87–88 (1984); and

den[ ] on interstate [and foreign] commerce” unless authorized by Congress.<sup>110</sup>

With respect to aviation cases and interstate carriers generally, the Supreme Court has held that “[a] state cannot fix rates or otherwise regulate interstate carriers that cross state borders, or even those carriers operating entirely within the borders of the state, where they carry goods in the flow of interstate commerce and hence, constitute local links in the chain of commerce.”<sup>111</sup> Thus, if the courts or Congress were to determine that the current conflict of laws system poses such a burden on the airline industry that it amounts to a substantial burden on interstate commerce,<sup>112</sup> Congress may be able to regulate the industry to avoid the burden imposed by extreme variations in conflict of laws approaches.

While it might be a stretch to use the Dormant Commerce Clause as the grounds for enacting federal conflict of laws regulation, the system of conflict of laws in the United States, as currently regulated by the individual states, can still arguably be described as burdening interstate commerce. This burden is highlighted by the three prevalent issues of the current conflict of laws system in aviation cases.<sup>113</sup>

#### D. BUT IS THIS STATE TERRITORY?

Choice of law rules and the application of those rules have been historically treated as state law.<sup>114</sup> Yet, federal regulation may be necessary and is indeed allowed when state interests are at war.<sup>115</sup> As the Supreme Court explained, “controversies concerning rights in interstate streams . . . have been recognized as presenting federal questions.”<sup>116</sup> While either federal or state

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then quoting *Ferguson v. Friendfinders, Inc.*, 115 Cal. Rptr. 2d 258, 262 (Ct. App. 2002)).

<sup>110</sup> *Wunnicke*, 467 U.S. at 98.

<sup>111</sup> WITKIN, *supra* note 109, § 1439(2) (citations omitted).

<sup>112</sup> *Cf. Morgan v. Virginia*, 328 U.S. 373, 385–86 (1946) (regarding state law requiring segregation on a carrier); *S. Pac. Co. v. Arizona*, 325 U.S. 761, 769–73 (1945) (regarding the state law limiting the number of train cars on trains traveling through Arizona). Each of these cases involved the Supreme Court analyzing restrictions on a form of transportation to determine whether the state laws amounted to “substantial burden” on interstate commerce.

<sup>113</sup> *See supra* notes 24–50 and accompanying text.

<sup>114</sup> *See Trautman, Toward Federalizing Choice of Law, supra* note 81, at 1716.

<sup>115</sup> *Cf. id.* at 1737 & n.98 (explaining the federal role to regulate where “state interests collide”) (citing *Hinderlider v. LaPlata River Co.*, 304 U.S. 92 (1938)).

<sup>116</sup> *Hinderlider*, 304 U.S. at 110.

regulation of conflict of laws in the aviation industry may be appropriate and constitutional, Congress's choice to regulate this field would override any state regulation in one broad sweep.<sup>117</sup> Under the Supremacy Clause of the Constitution, state courts would be obligated to enforce the federal regulation, "in the absence of a valid excuse," even if they disagree with the substance of such regulation.<sup>118</sup> To clarify, state courts would have no procedural issue applying federal law to state court cases, as explained by the Supreme Court:

Federal law is enforceable in state courts not because Congress has determined that federal courts would otherwise be burdened or that state courts might provide a more convenient forum—although both might well be true—but because the Constitution and laws passed pursuant to it are as much laws in the States as laws passed by the state legislature. The Supremacy Clause makes those laws "the supreme Law of the Land," and charges state courts with a coordinate responsibility to enforce that law according to their regular modes of procedure. "The laws of the United States are laws in several States, and just as much binding on the citizens and courts thereof as the State laws are. . . . The two together form one system of jurisprudence, which constitutes the law of the land for the State; and the courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent."<sup>119</sup>

The Supreme Court has stressed that as a fundamental principle of federalism, state courts have a mutual duty to apply, uphold, and enforce federal law.<sup>120</sup> This idea is fundamental to the Supremacy Clause and the scope of government general authority, as explained by Alexander Hamilton in *The Federalist Papers*: "The judiciary power of every government looks beyond its own local or municipal laws . . . and as parts of one whole, the inference seems to be conclusive, that the State courts would have a concurrent jurisdiction in all cases arising under the laws of the Union . . . ."<sup>121</sup>

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<sup>117</sup> See U.S. CONST. art. VI, cl. 2.

<sup>118</sup> See, e.g., *Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 382 & n.12 (2012).

<sup>119</sup> *Howlett v. Rose*, 496 U.S. 356, 367 (1990) (citing *Clafin v. Houseman*, 93 U.S. 130, 136–37 (1876)).

<sup>120</sup> See *id.* at 372–73.

<sup>121</sup> THE FEDERALIST No. 82, at 132 (Alexander Hamilton) (Edward Gaylord Borne ed., 1901); see also *Howlett*, 496 U.S. at 368–69.

Congress has even expressed an interest in federal regulation of conflict of laws issues.<sup>122</sup> While states have held the grasp on conflict of laws regulation in America since the creation of the states themselves,<sup>123</sup> federal regulation of this area of the law for aviation cases is practical, constitutional, and quite possibly becoming primed for legislative action.

## V. SOME PUSHBACK

It has been shown and is fair to say that, while the current conflict of laws system has received its share of critique and suggestions, it is not alone in that respect. As mentioned, a uniform system for all conflict of laws is not novel and has been explored in many avenues by different choice of law scholars and practicing attorneys.<sup>124</sup> This means that the idea has also received some scrutiny by those with different suggestions or with opposing views that the current system should stay in place. These objections to a federally regulated, uniform set of conflict of laws rules are explained and rebutted in this Section.

### A. NATIONAL SUGGESTION RATHER THAN FEDERAL REGULATION

Some scholars have suggested Uniform Commercial Code or restatement-style rules should be adopted by each state individually, rather than a single piece of federal, binding legislation.<sup>125</sup> A large number of choice of law scholars promote the American Law Institute as the most appropriate group to take on such a complicated task and provide work that is applicable and promotes state interests.<sup>126</sup> A third restatement on conflict of laws, some argue, would provide the most comprehensive, broad, and easily applicable conflict of laws solutions.<sup>127</sup> As Lea Brilmayer explains in her conflict of laws textbook: “[Restatements] can cover a broad enough range of topics to link issues on which some states stand to benefit with issues on which the others do

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<sup>122</sup> See Solimine, *supra* note 49, at 90 (“Indeed, Congress seems increasingly interested in choice of law problems”). *But see* Lea Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392, 424 (1980).

<sup>123</sup> See Trautman, *Toward Federalizing Choice of Law*, *supra* note 81, at 1716.

<sup>124</sup> See *supra* notes 51–60 and accompanying text.

<sup>125</sup> See, e.g., Kramer, *supra* note 21, at 2134, 2144 & n.23, 2147.

<sup>126</sup> See *id.* at 2147–48 (“Most choice of law scholars assume that the ideal body to resolve choice of law problems is the American Law Institute, which has provided the twentieth century’s most widely used approaches to choice of law.”).

<sup>127</sup> See BRILMAYER, *supra* note 69, at 185.

. . . [and] can be drafted to cover a wide enough range of contingencies to give clear guidance.”<sup>128</sup>

However, this approach would only work if all states were to enact the restatement or similar guidance as their own laws. States are not required to adopt the restatement or any other form of legal explanations.<sup>129</sup> Uniform laws, on the other hand, would provide greater authority and certainty that each state would be bound by the newly established rules.<sup>130</sup> Further, as pointed out by Professor Kramer in his critique of a restatement-like approach to conflict of laws reform, the function of a restatement is “to *restate* the law, to identify ‘as nearly as may be the rules which our courts will apply today.’”<sup>131</sup> While the American Law Institute may have the experience, time, and experts available to craft a delicately stated conflict of laws approach, its lack of mandatory authority over the states and its function in only “restating” the law would hinder the effectiveness of new conflict of laws rules.

#### B. LEAVE IT TO THE STATES

Although one author recognized that the current “choice of law system in the United States is far from ideal,” he claimed that getting the “legislative and judicial decisionmakers” involved would be “ventur[ing] into the unknown.”<sup>132</sup> Rather than take a proposed solution and work to make the system more efficient and just, Witte settled on “hold[ing] on to what they’ve got” and keeping the system as-is.<sup>133</sup> Yet by doing this, Witte is not able to overcome his own critiques of the current conflict of laws system in America. As he explained: “Each state seems to apply a different standard in a different fashion. This leads to claims of forum shopping, unpredictability, uncertainty, bias toward state interests, and nonuniformity—just to name a few of the problems.”<sup>134</sup> Another critic explained the situation a little differently, exposing some of the main problems with the cur-

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<sup>128</sup> *Id.*

<sup>129</sup> See Suzanne Ehrenberg & Susan Valentine, *Lecture Notes for Restatements of the Law*, CHI-KENT C. L. (1999), <http://www.kentlaw.edu/academics/lrw/tutorials/restate.htm> [<https://perma.cc/27GH-RU7J>].

<sup>130</sup> See Kramer, *supra* note 21, at 2148.

<sup>131</sup> See *id.* (quoting William Draper Lewis, *History of the American Law Institute and the First Restatement of the Law: “How We Did It,”* in RESTATEMENT IN THE COURTS 19 (perm. ed. 1945)).

<sup>132</sup> Witte, *supra* note 2, at 658–59.

<sup>133</sup> *Id.* at 659.

<sup>134</sup> *Id.* at 658.

rent system, while actually advancing the notion that things are better left untouched: “No system is perfect, but it could be worse. Although the simplification of choice of law is a worthwhile goal, the result could possibly be more complex. It’s like the monster in the closet: if you leave it alone, you’ll be O.K.”<sup>135</sup>

Yet, as this Comment and others have noted, the issues that have risen from the current conflict of laws system are too worrisome and prevalent, especially in the field of aviation, to overlook.<sup>136</sup> Turning a blind eye and allowing the states to sort it out, as it has been done for years, is not effective and comes as a loss to potential litigants. Providing uniform conflict of laws rules for aviation cases through federal regulation will ensure the certainty and predictability that the current system cannot offer and begin a new era of a fairer conflict of laws system for litigants and a more consistent and employable system to be applied by the courts.

### C. IS CONGRESS STANDING IN ITS OWN WAY?

As analyzed above, Congress has a strong argument for its power to federally legislate aviation choice of law rules—so why have they not done so? While some may try to fight using Commerce Clause power for such regulation, it would likely hold up in a court of law. Yet, interested parties, such as greedy plaintiffs (and their attorneys), federalism activists, and individual states, may be to blame for the lack of congressional action in this area. Without support from constituents and the industry in general, Congress is unlikely to make any changes and is, in a sense, standing in its own way of passing any sort of uniform regulation for conflict of laws in aviation.

Plaintiffs like choosing their own forums, and more specifically, they like having a handful of jurisdictions from which to choose.<sup>137</sup> Plaintiff’s counsel may base an entire case strategy around choice of law and trying to prevent removal to a less-

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<sup>135</sup> *Id.* (interviewing a Department of Justice attorney).

<sup>136</sup> *See, e.g.,* Kramer, *supra* note 21; *supra* section II.A–C.

<sup>137</sup> *See* Albert R. Abramson, *Where to Sue in Aviation Products Liability Cases*, 40 J. AIR L. & COM. 369, 370–71 (1974); *see, e.g.,* *Aviation Accidents Frequently Asked Questions*, RAPOPORT WEISBERG & SIMS P.C., <https://www.rapoportlaw.com/Practice-Areas/Aviation-Accidents/Aviation-Accidents-FAQ.shtml#file-lawsuit> [<https://perma.cc/N68G-86YC>] (last visited Nov. 12, 2019) (considering damage caps and “the broadest range of damages for the individual injuries suffered” as factors to determine where to file an aviation accident suit).

favorable jurisdiction.<sup>138</sup> If Congress were to pass a uniform approach to the choice of law rules for aviation cases, this would take away a large amount of the control plaintiffs have in the outcome of a case. The men and women of Congress would have to balance this possible concern of the plaintiffs and plaintiffs' attorneys in their representative areas before advocating for a plan that may take away what some may call plaintiffs' rights (but what could interchangeably be referred to as improper forum shopping) in choosing a venue (and likely also the laws that govern the case).

Another concern that would likely be raised if Congress were to push for federal regulation of choice of law in aviation cases (and is a frequent rebuttal to congressional regulation in any industry): federalism concerns by both the common person and individual states wanting to hold onto power in the choice of law realm. With states having long regulated the choice of law field,<sup>139</sup> it would be natural for Congress to face some pushback for taking these procedures away from the states. Such arguments may contend that Congress's power to regulate in such a way is not provided for under the Commerce Clause. However, Congress would likely overcome any constitutional federalism challenges based on the Commerce Clause, as discussed above, since aviation and, more specifically, economically driven aviation activities, have endured through other Commerce Clause limitations.<sup>140</sup> Other federalism challenges, however, may stand a chance to at least be heard by the Supreme Court of the United States.<sup>141</sup>

## VI. APPLICATION OF ONE CONFLICT OF LAWS APPROACH TO AVIATION CASES

### A. ONE CHOICE OF LAW APPROACH, FEDERALLY REGULATED, FOR AVIATION-SPECIFIC CASES

So, what would a singular, uniform, federally regulated conflict of laws approach look like for aviation cases? With so many different approaches used and the controversy surrounding

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<sup>138</sup> See generally Abramson, *supra* note 137 (explaining strategy and litigation tips for finding the best plaintiff-friendly venue in aviation cases).

<sup>139</sup> See Trautman, *Toward Federalizing Choice of Law*, *supra* note 81, at 1716.

<sup>140</sup> See *supra* notes 83–105 and accompanying text.

<sup>141</sup> See Paul Boudreaux, *A Case for Recognizing Unenumerated Powers of Congress*, 9 N.Y.U. J. LEGIS. & PUB. POL'Y 551, 561–62 (2006) (explaining the Supreme Court's greater acceptance of federalism concerns in the modern era).

which is truly the “best,”<sup>142</sup> an entirely separate paper, or perhaps book, would be needed to explore which approach is indeed the most suitable and appropriate for conflicts of law cases, especially when narrowing the application to aviation-specific cases. This does not hinder the argument for a uniform application, regardless of the approach chosen, assuming it is a well-researched, established approach, like one of the five methodologies.<sup>143</sup> Having uniformity and predictability in conflict of laws in aviation cases will provide better results generally than the current system of scattered approaches throughout the country.<sup>144</sup>

Practically speaking, applying one conflict of laws approach to all cases involving interstate aviation suits in an effort to maximize state and litigant interests will not be easy,<sup>145</sup> but it will likely lead to success for the goals of forum shopping deterrence, predictability in cases, and treating like cases alike. While it is true that litigants will never be able to completely predict or know the outcome of their case beforehand, offering a uniform approach to conflicts issues will allow more accurate case analysis to be conducted on behalf of the litigants.<sup>146</sup> This change to the procedural process for cases with conflicts of laws may take some time for courts to become comfortable applying; however, with so many courts applying the same standard to interstate aviation cases, there will likely be a quick accumulation of legal analysis by scholars as well as thorough explanation of applications in case opinions. As Professor Kramer explained, “[a] centralized decisionmaking body can consider a wide array of problems simultaneously, make necessary or appropriate issue linkages, and produce a complete system of rules. States may

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<sup>142</sup> See Craig Peyton Gaumer, *Conflicts, the Constitution, and the Internet*, 86 ILL. B.J. 502, 502 (1998) (“There are basically five conflict-of-law methodologies: (1) the traditional or Restatement (First) approach; (2) the ‘most significant contact’ or Restatement (Second) approach; (3) the government-interest approach; (4) the Leflar approach; and (5) the forum approach. Some states use variations or combinations of these approaches.”).

<sup>143</sup> *Id.*

<sup>144</sup> However, one author notes that some scholars have suggested that a “federalized version of the Restatement (Second) of Conflict of Laws” would be the front-runner for Congress’s pick of an approach to federalize. Linda S. Mullenix, *Federalizing Choice of Law for Mass-Tort Litigation*, 70 TEX. L. REV. 1623, 1627–28 (1992).

<sup>145</sup> See Kramer, *supra* note 21, at 2146–47.

<sup>146</sup> See Osbeck, *supra* note 41, at 46–47.

then sign onto this system . . . [and] each state's use of such a code could be made contingent on . . . other states."<sup>147</sup>

#### B. WHY AVIATION?

This Comment has focused on the need for federal regulation of conflict of laws rules for aviation while only focusing on why this regulation should be aviation specific. As mentioned before, the nature of most interstate aviation cases entails a variety of uncontrollable factors for which potential litigants have no say in and sometimes no awareness of.<sup>148</sup> Additionally, the nature of the aircraft industry increases the complexity of suits because aircraft are mobile and the industry employs a "relatively large number of prospective defendants in multiple jurisdictions who are directly associated with the design, construction, operation and maintenance of aircraft, aircraft engines, and component parts." An even larger number of possible plaintiffs also move from jurisdiction to jurisdiction.<sup>149</sup> Tragedies involving air travel "often involve a confusing myriad of methodologies because of consolidated claims initially filed in multiple courts by multiple plaintiffs and multiple defendants from multiple jurisdictions."<sup>150</sup> These complex cases raise equally complex choice of law issues.<sup>151</sup>

These issues are most easily illustrated in the form of an example. For instance, a flight from Los Angeles, California, to New York City, New York, may fly over a number of states. A passenger may not realize that they are subject to multiple state laws, much less know which state they may even be flying over. If two separate plaintiffs are on two planes from California to New York on the same day and Plaintiff A's plane flies on a more northern flight pattern compared to Plaintiff B's flight, which lies slightly to the south, each of these plaintiffs may be subject to different state laws and different choice of law approaches in each of these states. It would be unfair, should some drastic, suit-causing event occur on both planes, that one plaintiff would have an advantage to win their suit merely because the plane took a route that entailed submitting to laws of one list of states,

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<sup>147</sup> Kramer, *supra* note 21, at 2147.

<sup>148</sup> See Cagle, *supra* note 18, at 975 ("The notion of fortuity is particularly relevant in aviation accident cases. During a flight a traveler may pass through several states, or a plane may crash in a state the passenger never intended to cross.").

<sup>149</sup> See Nafziger, *supra* note 1, at 1006.

<sup>150</sup> *Id.* at 1005.

<sup>151</sup> See *id.*

while the other plaintiff has subjected itself to a different list of state laws. It would also be unfair to apply an entirely different conflicts approach for another plaintiff on Plaintiff A's flight merely due to the state the plaintiff is from or another fortuitous factor. To let these types of uncontrollable and fortuitous factors play into the substantive issues in a trial is an inequitable and imbalanced form of "justice."<sup>152</sup>

More practically speaking, however, are two main effects that the aviation industry that would see if federal regulation was enacted: (1) a decrease in airline lawsuit complication and speculation; and (2) an increase in aviation industry efficiency. First, plaintiffs would not have to worry about what choice of law rules they would be subject to just by stepping onto an airplane in one state and getting off the same airplane in another. Having one choice of law approach across the entire country would provide plaintiffs with some form of stability in bringing a case, as the plaintiff would know how the choice of law rules would be applied beforehand. Second, this predictability would allow airlines and air travel companies to work more efficiently without worrying about subjecting itself to unfavorable conflict of laws rules. Under one uniform approach to these rules, these companies would know up-front what laws by which it would need to abide and can appropriately operate without having to plan to avoid bad state laws.

Could this approach be applied more broadly to include all common carriers traveling through the interstate system? Quite possibly, yes. Litigants typically have little or no knowledge of, and likely no control over, the states and laws to which they are subject while traveling via airplane. Conversely, travel on land is more predictable and plaintiffs can determine the states through which they may travel and easily avoid them, most of the time.<sup>153</sup>

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<sup>152</sup> See *supra* note 98 and accompanying text; cf. Cagle, *supra* note 18, at 988–99.

<sup>153</sup> This is a very generalized statement and should not be taken too literally. The author understands that traveling to some destinations requires travel through particular areas that one cannot simply avoid. It is also noted that the average litigant has no understanding, or even initial care, to research and determine favorable and undesirable state laws for their next road trip route.

## VII. CONCLUSION

The idea that all victims of one air disaster should be treated alike is not a new proposition,<sup>154</sup> but the federal regulation introduced in this Comment could be the start toward more consistent aviation choice of law cases. Aviation cases do not deserve special treatment in this area because it is a profitable, leading industry in the United States, but rather quite the opposite. Airlines and air travelers are at a uniquely high risk of unfair bias and unpredictable application of law due to the complicated and unpredictable nature of the current conflict of laws system. This is amplified by the generally unpredictable nature of the aviation industry (uncontrollable flight patterns, accidental injuries caused in fortuitous locations, etc.).<sup>155</sup>

After reading this Comment, it should be evident that Congress holds the power and is best suited to provide the solution to this problem within the current American legal system. Because aviation is, by its very nature, interstate commerce, under the federal government's Commerce Clause authority, Congress can and should apply a universal approach to conflicts of laws in multistate aviation cases to bring predictability, simplicity, and uniformity to conflict of laws issues in these cases. While drafting and passing legislation for the enactment of this Comment's proposed approach is not an easy task, it is necessary and vital to ensuring justice is served in this particular line of cases. In fact, "[a]viation tort law in the United States has been instrumental in highlighting the shortcomings of the traditional contacts-based approaches to conflict of laws."<sup>156</sup>

In an effort to reduce forum shopping, provide predictability, and treat like cases alike in the interests of justice, Congress should adopt a uniform approach for conflicts of law cases regarding interstate aviation activity. While some critics have voiced negative opinions regarding the application of a federally regulated, uniform approach to conflict of laws in interstate aviation cases, that disapproval is trumped by the need for conflict of laws reform in the United States. As demonstrated in this Comment, the current system is not working, especially not for multijurisdictional aviation cases.

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<sup>154</sup> See 2 C.G.J. MORSE, TORTS IN PRIVATE INTERNATIONAL LAW 323 (R.H. Graveson ed., 1978) (advocating for "the notion that all victims of one air disaster should be treated alike"); see also Gill, *supra* note 3, at 238.

<sup>155</sup> Cf. Gill, *supra* note 3, at 238.

<sup>156</sup> *Id.*

As one district judge explained over thirty years ago, the “choice of law problems inherent in air crash and mass disaster litigation cry out for federal statutory resolution. We urge Congress to pursue enactment of uniform federal tort law to apply to liability and damages in the context of commercial airline disasters and other mass torts.”<sup>157</sup> Enough time has since passed. More problems have surfaced. Courts are struggling to apply the law, and the litigants are suffering as a result. There is one solution, as proposed in this Comment, that will be most effective in bringing change to aviation litigation—federal regulation of conflict of laws issues. Congress can change the landscape for conflict of laws rules in aviation litigation under the Commerce Clause, and it should do so soon.<sup>158</sup>

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<sup>157</sup> *In re Air Crash Disaster at Stapleton Int'l Airport*, 720 F. Supp. 1445, 1454 (D. Colo. 1988).

<sup>158</sup> In fact, there is already movement toward “creating uniform substantive rules to deal with air transport.” See Gill, *supra* note 3, at 238.