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Comment

LIABILITY OF THE OWNER OF AN AIRCRAFT UNDER THE FEDERAL AVIATION ACT OF 1958

WILLIAM D. ELLIOTT

The trend in aviation litigation reveals an attempt to hold the owner of a private aircraft vicariously liable in aviation wrongful death cases. The desire to have the suits litigated in a federal forum has occurred, in part, because of the variousness of state remedies and the belief that justice demands uniform recoveries. Accordingly, plaintiffs have attempted to persuade the federal judiciary to fashion a federal common law of aviation torts to hold the non-negligent aircraft owner vicariously liable for the negligence of the pilot. Attention has therefore been focused on the power of the federal courts to fashion a federal common law of aviation torts.

This inquiry into the distribution of power between the federal and state judicial systems goes to the heart of federalism and is fraught with dangers. Because of the delicate problems of federal-state relations, the courts should demonstrate a true understanding of the historical basis of the federal system and illuminate a clear path for future courts to follow. The courts should avoid the alluring temptation to use misleading dicta or cliches from earlier precedent to support a result. In addition, opinions should fully explain their deliberation and rational choice. Unfortunately, the courts have allowed the path to become overgrown with misleading notions of implied cause of action and federal preemption. This comment will attempt to clear away some of the underbrush by suggesting an approach to the problem of whether the federal courts should create a federal common law of aviation torts in general, and specifically whether federal or state law should govern the liability of owners of private aircraft. With respect to vicarious liability of aircraft owners, federal judicial lawmaking in aviation tort suits is inconsistent with principles circumscribing the lawmaking powers of the federal judiciary.
I. LIABILITY OF OWNERS OF AIRCRAFT

"There is a strong and growing tendency . . . to ask, in view of the exigencies of social justice, who can best bear the loss."

A. Historical Basis

The federal government is one of limited authority; the colonies delegated only specified portions of the sovereignty they possessed to the national government. Consequently, the states are the source and arbiter of the rights and obligations that govern day-to-day relations except when the Constitution, treaties or statutes of the United States otherwise require.

Furthermore, the federal judiciary was conceived as an organ of limited powers within a government of limited powers. The limited role of the federal judiciary, however, is rooted deeper than even the separation of powers doctrine because the national powers are exercised "against the background of the total corpus juris of the states . . . ."

Although it has been argued that the Constitution established a broad charter that conferred authority on the federal courts to decide controversies without reference to state law, certain areas are not within the concern of the federal judiciary. Accordingly, there has been much discussion over the years in an attempt to delineate more clearly those areas in which the federal judiciary is permitted to legislate without trespassing onto the areas of traditional state responsibility. In general, the lawmaking powers of

5 See note 3 supra.
6 HART & WECHSLER 435.
7 Broh-Kahn, Amendment by Decision—More on the Erie Case, 30 Ky. L.J. 1, 20-33 (1941) (e.g. diversity and admiralty).
the federal courts' are limited by the perimeters of the separation of powers doctrine.\footnote{8} One of the more important cases articulating the role of the federal courts vis-a-vis the state courts is Erie R.R. v. Tompkins.\footnote{9} Erie's implication is that certain matters are beyond the lawmaking competence of the federal judiciary. Although the case limited the power of federal courts to fashion a federal common law,\footnote{10} the federal common law has continued to expand into areas traditionally and historically thought to be solely within the bounds of state courts.\footnote{11} The generally articulated theory has been that the federal

\footnote{8} "There is no liberty, if the power of judging be not separated from the legislative and executive powers. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be the legislator. Were it joined with the executive power the judge might behave with all the violence of an oppressor." B. Montesquieu, The Spirit of the Laws 216 (3d ed. 1898).

\footnote{9} When the framers of the Constitution established the three separate branches of government in the first three articles, the reasons were several: prevent abuses of authority; provide a means of achieving that purpose by creating checks and balances; and as an institution, the concept of separation of powers had to be integrated with many other elements to make the federal government. The nature of these aspects, however, was not clearly or consistently conceived by the framers and clarification and delineation was a necessary element of the growth of the institution. Thus there are two areas of potential conflict: between the judicial and legislative and between the federal and state judicial systems.

\footnote{10} 304 U.S. 64 (1938).

\footnote{11} "Federal law is generally interstitial in nature. It rarely occupies a legal field completely, totally excluding all participation by the legal systems of the states." HART & WECHSLER 435.

"Were we bereft of the common law, our federal system would be impotent. This follows from the recognized futility of attempting all-complete statutory codes, and is apparent from the terms of the Constitution itself." D'Oench Duhme & Co. v. FDIC, 315 U.S. 447, 465, 470 (1942) (Jackson, J., concurring).


judicial lawmaking authority has survived *Erie* in those limited areas in which the presence of federal concerns necessitate application of federal decisional law.  

Unfortunately, the courts have inadequately articulated the analysis in the area of federal-state relations. As a result, courts have subsequently seized upon loose dicta as controlling. These inadequately reasoned opinions fail to furnish a guide for future courts to help them decide whether there is a sufficient federal concern to

to establish different rates for repeated and unrepeated messages is governed by federal law; *O'Brien v. Western Union Tel. Co.*, 113 F.2d 539 (1st Cir. 1940) (liability for failure to transmit a telegraph message plus transmission of defamatory one is governed by federal law); *Illinois Steel Co. v. Baltimore & O.R.R.*, 320 U.S. 508 (1944) (federal law governs interpretation of bill of lading prescribed by ICC); *Northern States Power Co. v. Minnesota*, 447 F.2d 1143 (8th Cir. 1971) (waste discharge from nuclear reactor plant is governed by federal law); *noted in 13 Bos. Corp. Ind. & C.L. Rev* 813 (1972); *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957) (collective bargaining is governed by the federal common law); *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943) (commercial paper issued by the federal government is governed by federal law); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964) (international law is governed by federal common law).

In addition, it has been urged that the entire field of securities regulation be governed by federal law, 1 L. Loss, *Securities Regulation* 90-105 (1961). But because the federal courts draw their law from many areas, when federal common law is imposed into a new area, there are great initial difficulties in discovering what the content of the law will be. For example, the federal courts build their common law from: (i) the old pre-*Erie* federal common law; *National Metropolitan Bank v. United States*, 323 U.S. 454, 457 (1945); *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367-68 (1938); (ii) “considerations of equity and convenience,” *Board of Comm’rs v. United States*, 308 U.S. 343, 350-51 (1939); (iii) “principles of established credit in jurisprudence;” *D’Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 472 (1942) (Jackson, J. concurring); (iv) general contract law; *Priebe & Sons, Inc. v. United States*, 332 U.S. 407, 411 (1947); *United States v. Eastern Airlines, Inc.*, 366 F.2d 316, 321 (2d Cir. 1966); or, (v) on principles drawn from an array of state and federal sources; see *O’Brien v. Western Union Tel. Co.*, 113 F.2d 539, 541 (1st Cir. 1940). Thus the federal common law will be uncertain and almost impossible to predict.

warrant application of the federal common law. Some of the post-
Erie techniques used by the Supreme Court to create a federal
common law are: (i) the implication of a private cause of action
from a statute intended to provide other sanctions; (ii) a sponta-
neous generation as in the case of interstate controversies or
government contracts; (iii) a construction of a jurisdictional grant
as a command to fashion federal law; and (iv) the normal filling of
statutory interstices. These decisions do not mesh into a logical
pattern; they are not unlike nebulae, floating in the celestial sea of
the federal common law.

This confusion could be avoided, or at least minimized, if the
courts, when deciding whether federal or state law should be used,
would presume that state law controls. An affirmative showing that
the application of federal law is consistent with the nature of the
federal system should be required before the state law presumption
could be rebutted.

B. The Search for Solvent Defendants

The impetus behind recent developments in aviation tort litiga-
tion has been a desire on the part of plaintiffs to litigate in a federal
forum thereby avoiding state courts. To understand this desire it is
necessary to analyze the state remedies for holding the owner of
an aircraft vicariously liable.

The notion that the owner of the aircraft should respond in
damages to persons injured through the fault or negligence of the
pilot has its roots in the common law principle that a master
should be compelled to respond in damages for injuries resulting
from the negligent acts of his servant committed in the course of
employment. Through the years the courts have modified various

14 Friendly, In Praise of Erie—and of the New Federal Common Law, 39

15 "If there were . . . a transcendental body of law outside of any particular
State but obligatory within it unless and until changed by statute, the Courts of
the United States might be right in using their independent judgment as to what
it was. But there is no such body of law." Black & White Taxicab & Transfer
Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 532-34 (1928)
(Holmes, J).

16 Durso v. A.D. Cozzolino, Inc., 128 Conn. 24, 20 A.2d 392 (1941); Psota
v. Long Island R.R., 246 N.Y. 388, 159 N.E. 180 (1927); See Laski, The Basis
of Vicarious Liability, 26 YALE L.J. 105, 108 (1916) [hereinafter cited as Laski];
See generally, W. Prosser, The Law of Torts §§ 69-74 (4th ed. 1971) [here-
inafter cited as Prosser].
aspects of a master's liability by gradually and deliberately expanding the principle of respondeat superior to include wilful torts; in addition they have included a large number of solvent defendants. These modifications have been made with a view towards illuminating the "nebulous concepts underlying the doctrine that in some instances an individual, himself innocent, must make amends for another's torts."

Although many theories have been advanced to explain the basis for the master's vicarious liability "the true basis of vicarious liability is . . . not . . . the irksome fiction of identity, but rather . . . what is socially desirable and expedient." Consequently, the courts in "deliberately allocating the risk" have reasoned that the loss should be placed on the one most able to bear it.

Throughout the evolution of modern transportation, the view has developed that the owner of the particular mode of transportation system should bear the responsibility for damages arising out of its negligent operation because that owner "may spread the risk [of liability] through insurance and carry the cost thereof as part of the costs of doing business." This postulate is the underpinning of "the deep pocket theory."

17 Doyle v. Cleaning Co., 31 S.W.2d 242 (Mo. App. 1930) noted in 44 Harv. L. Rev. 642 (1931).


19 Id.

20 Many of the early theories covered a broad range of ideas: (i) "formulation of identity" (Holmes), (ii) someone ought to respond for the damages caused (Baty), (iii) hold the master liable, then he would be more careful in the selection of his servants (Pothier), (iv) master is liable because of a failure of him to do his own work (Bacon), and (v) the master set the forces in motion (Lord Brougham). Id.

The more contemporary theories are: (i) the master has fictitious control over the behavior of the servant, (ii) the master "set the whole thing in motion," and is responsible for what happened, (iii) the master selected the servant and should therefore suffer for the servant's wrongs rather than innocent strangers who had no opportunity to protect themselves. Prosser § 69 at 459.


22 Prosser at 459; Baty, Vicarious Liability 154 (1916). The master is responsible for his employee "because in a social distribution of profit and loss, the balance of least disturbance seems thereby best to be obtained." See note 16 supra citing Laski; Cf. Baty, The Law of Master and Servant 330 (1929); Smith, Frolic and Detour, 23 Colum. L. Rev. 444, 456 (1923).

One mode of transportation, the automobile, has significantly contributed to the explosive development of vicarious liability tort principles. Drawing from the common law, the principle was early established that the owner was held liable for the negligent control of an automobile only if the servant was operating it in the course of employment.14 This principle has been both the genesis and the guide for courts to create fictions expanding the responsibility of automobile owners.15 Some of the more common fictions employed have been: (i) owner's right of control of the operation of the automobile creates an agency relationship,16 (ii) automobile is a dangerous instrumentality,17 and (iii) a presumption that the driver is the servant of the owner.18 These artificial bridges, however, are at best merely rationalizations for "what is socially desirable and expedient" in "the search for the deeper pocket."

Similar fictions have been relied on by courts in placing the responsibility for damages arising out of the operation of the aircraft upon the owner.19 Looking to the common law, the courts, as in the automobile cases, developed the principle that vicarious liability of an aircraft owner cannot be imposed absent a master/servant or principal/agent relationship between the owner and the operator of

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15 Typical of these fictions is the "family purpose doctrine," wherein the head of the family, who maintains an automobile for the general use, pleasure and convenience of the family is liable for the negligence of another family member having the authority to drive the vehicle. The doctrine is based on grounds of public policy. Jennings v. Campbell, 142 Neb. 354, 6 N.W.2d 376 (1942); Steele v. Age's Admr., 223 Ky. 714, 26 S.W.2d 563 (1930), noted in 21 Ky. L.J. 483 (1930); Turner v. Hall's Admr., 252 S.W.2d 30, 32 (Ky. 1952); see also Note, 5 N.C.L. Rev. 253 (1927). For a list of the states accepting and rejecting this doctrine see 60 C.J.S. Motor Vehicles § 433(1) at 961 nn.71, 72. See also Prosser § 73 at 483.


17 Southern Cotton Oil Co. v. Anderson, 80 Fla. 441, 86 So. 692 (1920).


the aircraft\(^{20}\) because aircraft ownership is insufficient to predicate liability for injuries caused by the negligence of the operator.

The prominent theory employed both by courts and legislatures during the infancy of aviation was that aviation was an ultra-hazardous activity.\(^{21}\) As a result, strict liability was imposed upon aircraft owners.\(^{22}\) The courts compared aviation liability to the liability laws in the early days of the horseless carriage and required that all those who participated observe the highest degree of care.\(^{23}\)

For obvious reasons of advancing technology leading to greater safety, the notion of aviation as being ultrahazardous has diminished in modern times.\(^{24}\) Consequently, the weight of authority recognizes


The common law doctrine that an extraordinary hazard will subject the responsible person to absolute liability was infused into fault liability by Rylands v. Fletcher, L.R. 3 H.L. 330 (1868); see generally Hoebee v. Howe, 98 N.H. 168, 97 A.2d 223 (1952).

3 Restatement of Torts § 519 (1938) makes one who carries on an ultrahazardous activity liable to another whose person, land or chattel he injures through his performance of the ultrahazardous activity. See Vold, Strict Liability for Aircraft Crashes and Federal Landings, 5 Hastings L.J. 1 (1953).


\(^{24}\) Wood v. United Air Lines, Inc., 32 Misc. 2d 955, 223 N.Y.S.2d 692 (Sup. Ct. aff’d 226 N.Y.S.2d 1022) (1962). “In light of the technical progress achieved in the design construction, operation and maintenance of aircraft generally, . . . flying should no longer be deemed to be an ultrahazardous activity, requiring the imposition of absolute liability for any damage or injury caused in
that aviation is no longer ultrahazardous." Thus regular negligence principles apply.

C. Statutory Developments

The statutory framework relating to automobiles was thought not to be applicable to aircraft, perhaps because aviation had not developed to the extent of the automobile. Thus, legislation dealing solely with aviation was enacted. In 1922, the Commission on Uniform State Laws promulgated the Uniform Aeronautics Act making an aircraft owner absolutely liable for damages and stripping him of all defenses." Probably because the Act was ahead of its time, it was dropped from the active list of Uniform Laws at the National Conference in 1945, accordingly the states began to look to concepts other than the rationale underlying the Uniform Act.

State statutes addressing the liability of non-negligent aircraft


Incredibly, this view that aviation is ultrahazardous is still observed by the American Law Institute, 3 Restatement of Torts § 520 (1938), Comment b. See also Orefice v. Albert, 237 So. 2d 142 (Fla. 1970) wherein the court noted that an airplane is a dangerous instrument thus making a non-negligent co-owner liable to third persons for the negligence of the other co-owner.


At the time the statute was enacted twenty-three states adopted it, but after it was dropped from the active list the number of states keeping the Act dropped to eighteen including: Arizona, Delaware, Idaho, Indiana, Maryland, Michigan, Minnesota, Missouri, Nevada, New Jersey, North Carolina, North Dakota, South Carolina, South Dakota, Tennessee, Vermont, Wisconsin, and Wyoming. Id. But see United States v. Praylou, 208 F.2d 291 (4th Cir. 1953), cert. denied, 347 U.S. 934 (1954) which quoted section 5 of the Uniform Aeronautics Act and held for strict liability.
owners for the operator's negligence have taken three basic forms. The first substantially follows the operation of aircraft definition in the Federal Aviation Act of 1958. The second grouping makes registration of the aircraft in the name of the owner prima facie evidence that the owner was responsible for the conduct of the operator at the time of the accident. The third type of statute compels the aircraft owner to respond in damages when the operator acts with the express or implied permission of the owner thereby resulting in the operator's liability.

Analysis of the diverse state remedies available to plaintiffs reveal the reasons why they desire to litigate in a federal forum. Plaintiff attorneys contend that the multifarious state law, both decisional and statutory, relating to an aircraft owner's liability has engendered inequities because of inconsistent recoveries in different states. Thus plaintiffs have been attempting to persuade the federal

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41 Federal Aviation Act of 1958 § 101(26), 49 U.S.C. § 1301(26) (1970) provides: "Operation of aircraft' or 'operate aircraft' means the use of aircraft for the purpose of air navigation and includes the navigation of aircraft. Any person who causes or authorizes the operation of aircraft, whether with or without the right of legal control (in the capacity of owner, lessor or otherwise) of the aircraft, shall be deemed to be engaged in the operation of aircraft within the meaning of this chapter."


43 CAL. PUBLIC UTILITIES CODE § 21404 (West Supp. 1970) (§ 21404.1 was added in 1968 to make the aircraft owner liable for a permittee pilot's negligence, subject to limitations of 15,000 dollars for one person or 30,000 dollars for one accident); Mich. Comp. Laws § 259.180a (1967); N.Y. Gen. Bus. Law § 251 (1968).

In addition, there are other statutes falling outside the bounds of these three classifications that either require proof of negligence to hold the aircraft owner liable, Ariz. Rev. Stat. Ann. § 2-207 (1956); create a presumption of negligence, Md. Ann. Code Art. 1A § 9 (1957); or retain the absolute liability feature of the Uniform Act for only forced landings, Wyo. Stat. Ann. § 10-33 (Supp. 1971).
courts to create a federal common law of aviation torts thereby eliminating the diverse state laws by providing one uniform law of recovery.

II. THE UTILITY OF A FEDERAL COMMON LAW OF AVIATION TORTS

"The People repeatedly subjected, like Pavlov's dogs, to two or more inconsistent sets of directions, without means of resolving the inconsistencies, could not fail in the end to react as the dogs did. The society, collectively, would suffer a nervous breakdown."  

A. McCord v. Dixie Aviation Corporation

In their desire to achieve a uniform law of recovery in air crash litigation against the owners of aircraft via the federal common law, plaintiffs have used various tactics. One recent method has been to urge that the owner of the aircraft is vicariously liable for the negligence of the operator because the definition of operation of an aircraft under the Federal Aviation Act of 1958 includes the owner. Therefore, since the owner is by definition operating the airplane he should be held responsible in damages irrespective of state law and the absence of an agency relationship.

In McCord v. Dixie Aviation Corp., two surviving passengers brought a cause of action against the owner of a crashed aircraft alleging that the pilot's negligence in operating the aircraft was imputed to the owner under the definition of operator under the Federal Aviation Act of 1958. Plaintiffs reasoned that the owner of the aircraft had the most assets to reach and that as a matter of public policy it would be convenient, logical and consistently even-handed to impute the deceased pilot's negligence to the owner; the owner had the "deeper pocket." The Tenth Circuit, relying on

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45 450 F.2d 1129 (10th Cir. 1971).
46 See note 41 supra.
47 450 F.2d 1129 (10th Cir. 1971).
Rogers v. Ray Gardner Flying Service,40 and Rosdail v. Western Aviation, Inc.41 refused to imply a cause of action under the definitional section of the Federal Aviation Act; to use the federal common law to fashion a cause of action in tort subjecting aircraft owners and lessors to liability constitutes "abusive judicial law-making."51

The triology of McCord, Rogers and Rosdail involve comparable facts; in each case the plaintiffs made substantially the same arguments and the courts reached the same result, i.e., the federal common law cannot be relied upon to hold the owner of an aircraft vicariously liable for the negligence of the pilot. The similarity, however, ends here.

Rosdail v. Western Aviation, Inc.,52 the first case of the triology, concerned the issue of whether the definitional section of the Federal Act raised an implied cause of action. Subsequently, the issue in Rogers v. Ray Gardner Flying Service,53 was whether the Federal Aviation Act preempted state law. The Fifth Circuit in Rogers used language relating to preemption, but cited Rosdail, a case concerned with implied cause of action, and thereby confused the two notions. McCord also refused to extend the federal common law to aviation torts, but added to the confusion by relying on both Rogers and Rosdail by reasoning in terms of public policy. Consequently, while these three cases arrive at the same result, they use seemingly disparate reasoning.

The delicate problems of federal-state relations demand that courts fully articulate the reasoning of their decisions and avoid the great temptation to seize upon dicta and go beyond the reasons for the earlier decisions. Hence, it is imperative for decisions to reflect a true understanding of the federal system.

Apart from its deficiencies, however, the Tenth Circuit's opinion in McCord is potentially significant in three ways: (i) it establishes that federal aviation tort law will have to emanate from Congress and not from the courts via "judicial inventiveness;"54 (ii) it repre-

40 435 F.2d 1389 (5th Cir. 1970), cert. denied, 401 U.S. 1010 (1971).
51 450 F.2d at 1131 (emphasis supplied).
52 435 F.2d 1389 (5th Cir. 1970), cert. denied, 401 U.S. 1010 (1971).
54 Hill at 1029 n.31.
sent a desire to have the search for solvent defendants take place in the state court systems rather than at the federal level, and (iii) it reinforces the historical nature of the federal system that state substantive solutions should be utilized when feasible.  

Nevertheless, an improved method of analysis can be used. As a general proposition, there should be a rebuttable presumption that state law controls when there is a question of whether state or federal law applies.

B. Proposal: Presumption in Favor of Applying State Law

1. Areas in which the Presumption Does Not Exist

Before analyzing the reasons for the presumption in favor of applying state law, the threshold determination should be whether the particular controversy falls into an area in which the presumption does not exist. These areas are primarily: (i) Congress delegating the lawmaking authority to the courts, (ii) national sovereignty dictating a nationwide solution, and (iii) the federal courts exercising their traditional functions of the judiciary in formulating remedies.

Of these areas the notion of Congressional delegation of the lawmaking authority has been the most difficult for the courts to grasp. Confusion arises because Congress rarely delegates its lawmaking power expressly. Unfortunately, the desire on the part of the courts to create a federal common law has been so great that whenever "Congress . . . has manifested, be it ever so lightly, an intention to that end," courts have found this authorization. The courts should look for meaningful evidence of Congressional intent in the legislative history or statute. The court must look to affirmative and clear evidence before it can infer that Congress intended to interfere with a state right by finding a federal cause of action.

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56 Wechsler, The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government, 54 Colum. L. Rev. 543, 545 (1954).
59 Hill at 1038.
The intent to create a federal cause of action has been implied in two types of situations, jurisdictional statutes and statutes that preempt state law in certain areas. Of the two, the second type of statute has created more confusion. For example, in Textile Workers Union v. Lincoln Mills, the Supreme Court held that section 301 of the Labor Management Relations Act of 1947 empowered the federal courts to fashion a federal common law of labor contracts, thereby preempting state law. Lincoln Mills is symptomatic of the other opinions interpreting statutes that preempt state law.


62 E.g., O’Brien v. Western Union Tel. Co., 113 F.2d 539, 541 (1st Cir. 1940) (Communications Act of 1934 preempts state law governing liability of a carrier for transmission of a defamatory telegram).

63 353 U.S. 448 (1957).


65 See, e.g., Pennsylvania v. Nelson, 350 U.S. 497 (1956). The analysis of the Supreme Court in Lincoln Mills comes within the ill-defined “preemption doctrine.” This doctrine is a judicially applied doctrine based on U.S. Const. art. VI, § 2—the supremacy clause—that elevates federal law above that of the states. Swift & Co., Inc. v. Wickham, 382 U.S. 111, 120 (1965). Traditionally, judicial inquiry begins with a determination of whether Congress enacted the legislation pursuant to a constitutionally delegated power. Then under the traditional analysis, the court considers various principles to determine whether Congress has expressly or impliedly preempted the field of regulation in question. See Hines v. Davidowitz, 312 U.S. 52, 62-66 (1940). The situations in which the Congressional declaration is either unequivocal or express that federal authority is exclusive presents no problem. See Campbell v. Hussey, 368 U.S. 297 (1961). The confusion arises in those situations in which Congress has neither explicitly prohibited dual regulation of federal and state nor unequivocally declared the exclusivity of federal authority that the confusion arises. Some of the frequently but confusing articulated factors in the preemption doctrine are: (i) pervasive federal scheme; Pennsylvania v. Nelson, 350 U.S. 497, 502-04 (1956); Pennsylvania R.R. v. Public Services Comm’n, 250 U.S. 566, 569 (1919), (ii) subject matter requires uniform national standards; San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 241-44 (1959); Guss v. Utah Labor Relations Bd., 353 U.S. 1, 10-11 (1957), (iii) state law impedes Congressional purpose; Hines v. Davidowitz, 312 U.S. 52, 67 (1940), or (iv) compliance with federal and state regulation is a physical impossibility; Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963); Northern States Power Co. v. Minnesota, 447 F.2d 1143, 1146 (8th Cir. 1971), noted in 13 Bos. Col. Ind. & C.L. Rev. 813 (1972). Contrast Francis v. Southern Pacific Co., 333 U.S. 445 (1948); (Supreme Court held that liability of interstate passengers traveling on free pass was to be determined without reference to state law) with Regents of the Univ. System v. Carroll, 338 U.S. 586, 594-602 (1950) (The Court held that even though the
The Court groped for the slightest shred of evidence that Congress intended for federal law to govern. Mr. Justice Douglas, in writing for the majority even conceded that "[t]he legislative history of [section] 301 is somewhat cloudy and confusing." But the Court's appraisal of Congressional intent was neither justified by the language of the statute nor the legislative history. In enacting section 301, Congress merely wished to allow the unions to sue in states not normally according this privilege to unincorporated associations. Moreover, because this narrower view would not have disturbed large portions of the law it should have been chosen.

Similar to Textile Workers Union v. Lincoln Mills, other courts have become misguided in the search for illusive legislative intent and implied a cause of action from federal regulatory statutes. This process began as early as 1916 with the conventional statutory interpretation of looking to the text and history of the statute assisting the courts. Apart from this traditional form of analysis, however, two distinct theories have evolved to justify the implication of a cause of action; either the statute sets an express standard of conduct or provides evidence of a standard within the framework of an existing cause of action, or else the statute declares certain

Federal Communications Commission had authority to regulate radio license transfers, construction of contracts transferring radio stations or its property is governed by state law.) In Francis, the Court failed to inquire into Congressional intent. In addition, it is unrealistic to argue in that situation that the federal regulatory scheme would be hampered by the application of the state law. In Regents, on the other hand, the Court made a careful inquiry into Congressional intent to preempt. See Note, The Competence of Federal Courts to Formulate Rules Remedies of Decision, 77 Harv. L. Rev. 1084, 1090-91 (1964).

63 353 U.S. at 452.


69 353 U.S. 448 (1957).


72 Id. at 286. This view is more frequently seen in negligence actions. See Thayer, Public Wrong and Private Action, 27 Harv. L. Rev. 317 (1914).
behavior to be unlawful, necessitating the creation of a new cause of action to give meaning to the statute.\textsuperscript{79}

These theories are benchmarks at best and the cases cannot be categorized easily. For example, there is a split of authority with respect to whether to imply a private cause of action under the Federal Aviation Act of 1958.\textsuperscript{80} Some of the reasons the courts have used to imply the cause of action under the Federal Aviation Act include public policy, lack of adequate state or administrative remedy and the criminal sanctions create civil liability. In Fitzgerald v. Pan American World Airways, Inc.\textsuperscript{79} the Second Circuit reasoned that violation of the criminal sanctions in the Act gave rise to civil liability as well. But in Town of East Haven v. Eastern Airlines, Inc.,\textsuperscript{80} a case not involving violation of a criminal sanction, the federal district court allowed the implied cause of action citing Fitzgerald as authority. Since the controlling factor in Fitzgerald enabling the court to imply the cause of action was the violation of the criminal part of the statute, it was improper for the court in Town of East Haven to extend Fitzgerald beyond its intended meaning. Sosa v. Young Flying Service\textsuperscript{79} also implied a cause of

\textsuperscript{79} This second theory allows greater judicial power since no closely related duty is required. Id.


\textsuperscript{79} 229 F.2d 499 (2d Cir. 1956).

\textsuperscript{80} 282 F. Supp. 507 (D. Conn. 1968).

\textsuperscript{79} 277 F. Supp. 554 (S.D. Tex. 1967).
action under the Act, yet the opinion is devoid of reasoning or analysis. Thus the courts show a lack of direction. While both Neiswonger v. Goodyear Tire & Rubber Co. and Fitzgerald allowed a private cause of action, Moungey v. Brandt a suit for injuries sustained in an aircraft collision denied it and directly repudiated Neiswonger and Fitzgerald. The Moungey court declared that the broad implication doctrine was unneeded and unfounded.

A second area in which the reasons for the presumption do not exist is when national sovereignty dictates a nation-wide solution. For example, it is essential to the federal union that disputes among the states be settled. Thus controversies regarding apportionment of interstate water, validity and construction of interstate compacts or interstate boundary disputes have been adjudged appropriate in a federal forum. In addition, the federal judiciary is singularly qualified to settle those situations when the United States must act in a unified fashion for international purposes. In these situations, state solutions to the problems are totally inappropriate and constitutionally improper.

Finally, the third area in which the reasons for the presumption do not exist is when the federal judiciary exercises the traditional judicial function of formulating remedies. In this situation the main concern is providing remedial law repairing the breaches of federal duties. Also, the sovereign has a strong interest in having federal remedies apply consistently from state to state.

In this area two distinct functions of the federal courts have evolved. The courts have created remedies when the basic statute does not so provide and further developed already existing remedies.
Confusion has resulted because the courts and commentators have mistakenly labeled both situations as raising an "implied cause of action." The need for a logical rationale in the area of the federal common law should not be obscured by mistaken reliance on labels.

2. Reasons for the Presumption

One reason for this presumption is that the federal common law should not override policies important to a state. Examples of areas in which states have particularly strong policies are family relationships, property law and torts. When there is a danger that federal law will conflict with these strong and traditional state policies then the presumption in favor of applying state law is strongest.

A second reason is that there are innate advantages to state-by-state solution of areas of controversy. The state solutions can closely match the problems that are particularly unique to local conditions. Third, the historic nature of the federal system requires the application of state solutions when feasible. Since the central government is one of limited and delegated powers then the generality of power is entrusted to the states and should remain there.

87 See note 56 infra. See also Note, Implying Civil Actions from Federal Regulatory Statutes, 77 Harv. L. Rev. 285 (1965).
91 McCord v. Dixie Aviation Corp., 450 F.2d 1129 (10th Cir. 1971).
93 Wechsler, The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government, 54 Colum. L. Rev. 543, 545 (1954).
3. Overriding the Presumption

In this proposed method of analysis, if the court concludes that there is adequate justification and clear and affirmative evidence to override the presumption, then the federal court could apply the federal common law. Three main considerations that would best justify the rebutting of the presumption are: (i) the need for a uniform rule instead of the diverse state rules; (ii) the need for encouragement of federal policies; and (iii) protection of federal policies from interference by the states.

The need for a uniform federal rule instead of the various state rules is frequently proffered in arguing for a federal common law. There are two aspects to the promotion of uniformity. First, in certain situations there is a need for a federal law having the same meaning in each of the states. Although this need is important, it is not a talisman; courts should look for additional justifications to promote a uniform federal rule. Second, there is a need for a uniform federal rule enabling the federal government to efficiently administer its activities. If inconvenience to the federal government is to be avoided, then the national government should administer its activities from one source rather than looking at the laws of the fifty states. The need for avoiding federal inconvenience


"In differing contexts the need for uniformity may be so pressing that sole responsibility for establishing it, or for working out the context of the needed regulation, cannot feasibly be entrusted to a legislature." Hart 530.


Clearfield Trust Co. v. United States, 318 U.S. 363, 367 (1943) (need for uniform federal common law rule because of pervasive nature of federal commercial paper) but see text at note 121 infra; United States v. Chester Park Apts., Inc., 332 F.2d 1 (8th Cir. 1964) (federal common law controlled since some states held illegal the large scale mortgage of the government).
also appears to be overstated.\footnote{96} 

Occasionally, the courts have become infatuated with uniformity\footnote{97} absent adequate justification.\footnote{98} If the two aspects to the promotion of uniformity are not present, then there should be an affirmative legislative justification for the court to fashion a uniform federal rule; otherwise there is a violation of the separation of powers doctrine and the federal judiciary is exceeding its intended historical function. The better approach, however, is to resist the alluring temptation for uniformity simply for uniformity's sake.\footnote{99}

Just as the importance of uniformity is overstated in many cases, likewise the attainability of uniformity is often ignored.\footnote{100} The obstacles to decisional uniformity are formidable. For example, just as the state court decisions are not binding outside the state, within the federal system, decisions of the federal district courts are not binding on each other.\footnote{101} In addition, while the circuit court opinions are binding upon the federal district courts within the respective circuits,\footnote{102} they are not binding upon the other circuits.\footnote{103} Moreover, some state courts treat the federal court rulings as binding and thus will follow its interpretation of the federal common law,\footnote{104} but others may not.\footnote{105} To further add to the potential lack of uniformity in a federal decisional rule, state courts are not bound by the interpretation of the local circuits.\footnote{106} These problems cannot be feasibly solved by the Supreme Court, which lacks the time and resources to erect common law principles in every situation.\footnote{107}

\footnote{96} Many commentators would argue to the contrary, see, e.g., Note, Exceptions to Erie v. Tompkins; The Survival of Federal Common Law, 59 Harv. L. Rev. 966, 970 (1966).


\footnote{100} See note 97 supra at 813.


\footnote{103} E.g., Burton v. United States, 272 F.2d 473 (9th Cir. 1960).

\footnote{104} E.g., Handy v. Goodyear Tire & Rubber Co., 230 Ala. 211, 160 So. 530 (1935).


Even assuming that the choice can be made in favor of a uniform federal rule instead of the diverse state rules the problem is not ended. Will parallel or partially parallel remedies continue to be available under the state law? Also, even if parallel judicial remedies are permitted, complicated questions of jurisdiction and procedure arise if the state court remedy is sought to be enforced in the federal court.

Despite these problems associated with attaining uniformity of law, the trend continues toward uniformity. It is hoped that the courts will begin to at least articulate fully their reasoning in casting the selection in favor of federal or state law to reflect the deliberation and rationale choice.

The second consideration rebutting the presumption is the need for the encouragement of federal policies. The only logical forum to litigate any controversy regarding federal policies is the federal system. Assuming the Congress has properly authorized the courts to further a federal policy without violating the strictures of the separation of powers doctrine, federal judges will probably allow

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113 See note 96 supra. See also Teamsters Local 174 v. Lucas Flour Co., 369 U.S. 95 (1962); Note, 50 TEXAS L. REV. 183, 195 (1971).

Whatever lack of uniformity this [decision] may produce between . . . different states is attributable to our federal system, which leaves to a state, within limits permitted by the Constitution, the right to pursue local policies diverging from those of its neighbors." Klaxon Co. v. Stentor Elec. Mfg. Co., Inc., 313 U.S. 487, 496 (1941) (Reed, J.).

The typical argument for a federal common law of aviation torts results because of the alleged inequities resulting from various state laws. For example, New York allows unlimited recovery in wrongful death cases, while Massachusetts limits recovery to $15,000. Moreover, the cases arising out of New York have shown deliberate favoritism to New York residents. This problem is explored in Keeffe & DeValerio, Dallas, Dred Scott and Eyrie Erie, 38 J. AIR L. & COM. 107, 123 (1972). See also Kennedy, Counterclaims, Cross-claims and Impleader in Federal Aviation Litigation, 38 J. AIR L. & COM. 325 (1972) for problems relating to contribution and indemnity under non-uniform state laws.

the government to pursue its objectives on a broader scale than would state court judges. In addition, a more sympathetic reception of federal policies will occur in the federal judiciary. Unfortunately, the courts have become confused between the need to encourage a federal policy and overriding state law simply because the United States is a party to the lawsuit. There is a clear distinction between the two situations and the courts should avoid being misled.

The third consideration justifying overriding state law is the need to protect federal policies from interference by the states. Obviously, if state courts have the responsibility for furthering federal policy in appropriate situations, then there is a strong likelihood that undesirable conflicts could arise thereby impeding federal policy. Thus, the alternative is to rely on the federal judiciary.

4. Distinguished Mere Presence of Federal Government

The presumption in favor of applying state law is rebutted when Congress delegates the lawmaking power to the judiciary. Since in every situation of this type there is a federal statute in the area, an easy mistake would be to develop a federal common law simply because of the presence of the federal government. This mistake was made in Clearfield Trust Co. v. United States when the Supreme Court held that the rights and duties of the United States with respect to commercial paper are governed by the federal common law. Although the Court stated that since the authority of the United States to issue checks is not governed by state law then neither should state law govern the rights and duties arising out of the issuance. While the main basis of the decision was the presence of the federal government, the Court did not explain why the

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116 Id.


118 United States v. Yazell, 382 U.S. 341 (1966) is an example of the Court properly drawing this distinction. But see United States v. 93,970 Acres of Land, 360 U.S. 328 (1959).


121 See text at note 57 supra.


123 318 U.S. 363 (1943).

124 Id. at 366.
United States should be treated different from any other drawee in the various states.

Typically, the justification for this approach is the unique competence of the federal judiciary to declare the governing law for problems that bear a substantial relation to the federal government. But the mere presence of the federal government is simply a rationalization rather than a reason why federal law should displace state law. This analysis loses sight of the historical basis of the federal system, i.e., all federal actions are taken interstitially and against the background of the existing state law.

III. CONCLUSION

"[T]he tendency of the law must always be to narrow the field of uncertainty."

In aviation tort litigation cogent analysis, providing a clear method to determine whether state law should apply, is necessary. First, the court should make a determination with respect to whether the controversy is in an area in which the presumption does not exist. The presumption would be absent for aviation tort suits if Congress had delegated its lawmaking authority to the federal judiciary. The Federal Aviation Act, however, does not furnish any affirmative evidence of intent to displace state law, and the contrary is expressly stated. Since the Act is not a jurisdictional statute, nor does it preempt state law, it does not fall within either of the two types of statutes that can be said to imply a Congressional judgment that the federal common law should apply. To hold otherwise requires clear and convincing evidence of a Congressional judgment; this evidence does not exist.

Second, national sovereignty does not dictate a nationwide solution. In aviation tort litigation there is no dispute among the

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157 Hart & Wechsler 435.
160 Hill 1038.
states nor is there a need for the United States to act in a unified fashion for international purposes.

Third, the Federal Aviation Act does not create any federal tort duties requiring the federal judiciary to formulate federal remedies. The duties arising out of tort litigation have been traditionally established by the state, thus the remedies should be formulated in the state judicial system.

If a court concludes that the controversy does not fall within the areas wherein the reasons for the presumption are absent, then the court should presume state law applies. This presumption is reasonable because state law traditionally governs tort suits. Then the court should look to those reasons that would justify the overriding the presumption; of the three reasons, the need for a uniform tort law in aviation litigation is the most persuasive factor. Although the need for a uniform aviation tort liability law is frequently urged, this is inadequate to justify the federal courts to fashion a federal common law. First, there is no federal law, except for the Federal Tort Claims Act, concerned with tort litigation that needs to have uniform interpretation in the states. Plaintiffs in the triology of McCord, Rogers and Rosdail urged that the definition of operation of aircraft of the Federal Aviation Act of 1958 is the vehicle to fashion a federal common law. The Act, particularly the definitional sections, does not apply to tort litigation. Second, in aviation torts there is no need for a uniform rule enabling the federal government to administer its activities. Whether the litigation is in the federal or state forum would not affect the administration of the federal government. Third, the state's interest in litigating tort suits is not outweighed by any federal interest in having all aviation claims uniformly settled.

Plaintiffs who continue to argue that there can be no justice emanating from the diverse state remedies should seek relief from Congress in the form of a federal aviation act. Regardless of the advantages of a Congressionally legislated solution, as a practical matter,

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131 See note 95 supra.
134 Craig & Alexander 39.
it does not appear that Congress will provide that legislation soon. Until that day, however, plaintiffs will have to be satisfied with the state remedies. The imagination and intelligence needed to achieve the goal of fair compensation to aircraft crash victims and equitable allocation of the cost to the industry—a goal of substantive law in air crash litigation—should not be enervated by assumptions concerning the value of doctrinal uniformity. Rather, these qualities imply a discernment to see that a solution is consistent with the underpinnings of the federal system, while at the same time producing substantive law that will produce the best possible compensation and risk allocation. With respect to aviation tort litigation, “abusive judicial lawmaking” and “judicial inventiveness” do not provide the answer.

135 See Note, Admiralty Tort Jurisdiction and Aircraft Accident Cases: Hops, Skips and Jumps Into Admiralty, 38 J. AIR L. & COM. 53, 63 n.64 (1972).