Comments

Federalism in Flight: Preemption Doctrine and Air Crash Litigation

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I. INTRODUCTION

Somewhere over Pennsylvania, U.S. Air Flight 427 malfunctions.[1] One of thousands of parts known collectively as a Boeing 737 stops working.[2] A catastrophic chain of events follows. All 132 people aboard are suddenly thrown sideways as the aircraft surges to the left. Another instant, and they are upside-down. The plane pitches earthward. Seconds later, the ground is a spinning blur. With debris hurtling throughout the cabin, few passengers notice. Then it ends. U.S. Air Flight 427 scatters itself over the soil outside of Pittsburgh. There are no survivors.[3]

Compare the U.S. Air disaster with the following. In the skies above Orlando, a Learjet 35 strains against the decreasing outside pressure.

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1. Blake Morrison, *Tragedy's Bottom Line: When a Plane Crashes, Lawyers Embark on a Painstaking and Often Gruesome Exercise to Decide Who Should Pay for Lost Lives*, USA TODAY, Jan. 5, 2000, at 1A.

2. Hearings conducted by the National Transportation Safety Board have concluded that a faulty valve located in the aircraft's rudder was primarily responsible for the crash, *see* Chris Fusco, *Four USAir Suits Settled*, CHICAGO DAILY HERALD, Nov. 4, 1999, at 15.

3. The facts of USAir Flight 427 are condensed from Morrison, *supra* note 1, at 1A.

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Tens of thousands of feet over Gainesville, something ruptures. Within seconds, all of the air within the skin of the aircraft vents into the surrounding skies. The passengers suddenly find themselves exposed to conditions more severe than those on Mount Everest. Death takes seconds. The depressurized plane, however, flies like a phantom clipper, crossing nearly half the nation before running out of gas and pointing downward toward the center of the earth. All aboard – including pro-golfer Payne Stewart – are lost.[4]

The victims of each accident experienced similar desperation and trauma in their final moments. However, the first air disaster brought the largest single-victim airline settlement of all time: 25 million dollars was awarded to one victim's spouse.[5] Any lawsuit brought as a result of the second tragedy might not survive a motion to dismiss.[6] The reason is a complex interplay between federal and state aviation law known as federal preemption.

This Note presents federal preemption in the context of domestic air accident litigation.[7] It discusses the reasons Congress did not, and should not, remove flight from supplementary regulation by the states. The first part will give an aerial view of preemption doctrine.[8] The second part will explain why a finding of preemption is against the weight of Supreme Court precedent, the intent of Congress, and the goals of federal aviation policy. It will also include a preflight checklist to identify the reasons federal law should not preempt an aviation claim. The Note will conclude by

4. The facts of Payne Stewart's last flight are condensed from the following sources: Alan Levin, *Final Flight: Minute by Minute, Payne Stewart's Jet Flew Beyond Help*, USA TODAY, October 26, 1999, at 1A; Matthew L. Wald, *Pro Golfer and 5 Others Die in a Baffling Jet Accident*, THE NEW YORK TIMES, Oct. 26, 1999, at 1A; Edward Walsh & William Claiborne, *Ghostly Flight of Death: Golf Champion, Others Dead in Jet Crash*, THE PLAIN DEALER, Oct. 26, 1999, at 1-A.

5. *See* Morrison, *supra* note 1, at 1A.

6. Staff Reports, *Law May Prohibit Stewart Family From Filing Lawsuit*, THE ORLANDO SENTINEL, November 8, 1999, at C3.

7. This article deals with preemption as it applies to domestic air accident litigation. Preemption, however, plays a predominant role in litigation involving accidents beyond the boundaries of the United States. For example, the Supreme Court recently held that the Warsaw Convention preempts all claims involving incidents aboard flights to landing in a signatory country. *See* Tseng v. El Al Airlines, 525 U.S. 155 (1999). Additionally, air accidents occurring more than a marine league from shore are governed by the Death on the High Seas Act. *See* Charles J. McMullin, *Obstacles and Guidance in Trying Aviation Wrongful Death Cases*, 1997 J. MO. B. 109, 111. Accidents beyond the boundaries of the United States are beyond the scope of this Note.

8. Federal preemption is the central debate of a century of aviation law. Courts do not have an answer to the question, but the discussion has been lively. Judges seem to defend their positions with all the bravado of test pilots. One Judge, recently certifying the issue, boldly proclaimed: "Reasonable minds might differ with my view, although they would be wrong." United Airlines, Inc. v. Mesa Airlines, Inc., 1999 U.S. Dist. LEXIS 16256, *4 (N.D. Ill. 1999).

explaining why the Supreme Court should grant certiorari on the issue of preemption at the next possible opportunity. The 1990s witnessed key battles on the issue of preemption. The next opportunity could be soon.

II. An Aerial View of Preemption

In 1903, the Wright Brothers assembled loose bike parts and invented the aerospace industry. The invention of aerospace law was not far behind. With the simple flip of a coin, Wilbur and Orville decided who would be the first to take a powered flight into history. After nearly a century, however, barristers are still arguing over who should occupy the left seat[9] of aviation law.[10] Some jurisdictions believe that Congress should hold the controls.[11] Others maintain that the controls are in the hands of the states.[12] A consensus is not likely. Preemption was not borne of aviation law, however, and any discussion of the issue begins long before the Wrights dreamt of powered flight, and before the dawn of the aviation century.

A. Basic Tenets of Federal Preemption

Much as pilots must distribute the weight of an aircraft for the plane to fly with stability,[13] legislators must balance national power between the federal and state governments to keep the nation on a steady course. This delicate balance between federal and state power is called federalism.[14] The Founding Fathers established the doctrine of federalism in the Constitution and the Bill of Rights.[15] Preemption developed as a tool—a device which legislators use to shift the balance of power in favor of the national government.

Under the Constitution, Congress has plenary authority to remove certain activities from state control.[16] This authority derives from several textual provisions, including the Supremacy Clause,[17] the Necessary and Proper Clause,[18] and the powers enumerated under Article I.[19] When

9. Traditionally, the pilot-in-command occupies the left seat. Rod Machado, ROD MACHADO'S PRIVATE PILOT HANDBOOK G8 (1998).

10. *See* discussion *infra* at Part III.

11. *See* discussion *infra* at Part III.B.1.

12. *See* discussion *infra* at Part III.B.2.

13. MACHADO, *supra* note 9, at P1.

14. Christopher N. May & Allen Ides, CONSTITUTIONAL LAW: NATIONAL POWER AND FEDERALISM 212 (1998).

15. Gerald Gunther & Kathleen M. Sullivan, CONSTITUTIONAL LAW 87 (13th ed. 1997).

16. *Id.* at 337.

17. U.S. CONST. art. VI, cl. 2.

18. U.S. CONST. art. I, § 8, cl. 18.

19. U.S. CONST. art. I, § 8.

Congress determines that a certain activity (nuclear safety, for example[20]) would function better under a uniform system of federal laws, Congress may remove the activity from state regulation.[21] In these cases, Congressional legislation preempts state law.[22]

There are several types of federal preemption.[23] When Congress addresses the issue in a statutory provision, express preemption exists.[24] Courts may also infer that Congress intended to preempt state law. This is called implied preemption, and it has two types.[25] When Congress enacts such broad legislation that states have little conceivable room to regulate an activity, Courts may infer that Congress intends to remove the entire activity from state control.[26] This is known as field preemption.[27] In situations where state law actually conflicts with the terms[28] or goals[29] of a federal statute, federal law supersedes state law by the virtue of the Supremacy Clause. This is known as conflict preemption.[30]

Whether it is express or implied, preemption is a murky topic.[31] The presence of an express provision does not necessarily make the issue any clearer. Courts still face the task of defining the scope of a preemption provision.[32] Absent preemptive language, Courts must decide whether state law conflicts with federal law, or whether Congress intended to establish an exclusive web of federal regulatory control. In either case,

20. Pacific Gas & Elec. Co. v. State Energy Res. Conservation and Dev. Comm'n, 461 U.S. 190, 199 (1983).

21. Cooley v. Bd. of Wardens, 53 U.S. (12 How.) 299, 319 (1851), *cited in* City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 625 (1973). Congress must act pursuant to an enumerated power within Article I of the Constitution when it removes an activity from state regulation, *dee* GUNTHER & SULLIVAN, *supra* note 15, at 337.

22. Gunther & Sullivan, *supra* note 15, at 337.

23. *See* Michigan Canners and Freezers Ass'n v. Agric. Mktg. & Bargaining Bd., 467 U.S. 461, 469 (1984).

24. Shaw v. Delta Air Lines, 463 U.S. 85, 95 (1983).

25. The Public Health Trust of Dade County, Fla. v. Lake Aircraft, Inc., 992 F.2d 291, 294 (11th Cir. 1993); French v. Pan Am Express, Inc., 869 F.2d 1, 2 (1st Cir. 1989).

26. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

27. Abdullah v. American Airlines, Inc., 181 F.3d 363, 366 (3d Cir. 1999).

28. Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963).

29. Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

30. May & Ides, *supra* note 14, at 221.

31. Gills v. Ford Motor Co., 829 F. Supp. 894, 895 (W.D. Ky. 1993).

32. For example, the Airline Deregulation Act of 1978 expressly preempts state law regarding the "prices, routes, and services" of airlines. 49 U.S.C. § 41713b (1999). However, state courts differ over what constitutes a "service" within the meaning of the ADA. In the context of air crash litigation, some state courts have held that landing is an essential service, thus prohibiting courts from applying state law to claims arising from accidents that occurred during landing. *E.g.* Lesser v. Mark Travel Corp., 23 Av. Cas. ¶18,419 (CCH) (S.D. Tex. 1992). Other courts have held that landing is not a "service" within the meaning of the ADA, allowing state law to govern the claim. *E.g.* Burke v. Northwest Airlines, Inc., 819 F. Supp. 1352 (E.D. Mich. 1993); *see also* Harrell v. Champlain Enter., Inc., 613 N.Y.S.2d 1002 (N.Y. App. Div. 1994).

courts may not remove an activity from state control unless it is the clear and manifest purpose of Congress to do so.[33] Congressional intent is, therefore, preemption doctrine's *sine qua non*.[34]

Federalism does provide a certain amount of state sovereignty. States' rights are reserved by the Tenth Amendment.[35] State power can operate either independently, or concurrent with federal power. For example, when Congress has the authority to regulate an activity but chooses not to, states obtain the power to regulate the activity by default.[36] On these occasions, state and federal authority are concurrent, but federal power lies dormant.[37] States may then regulate freely.[38] On other occasions, an activity may traditionally belong within the exclusive realm of state, rather than federal, control.[39] Activities such as public safety, morals, and general welfare traditionally lie within these "police powers" of the states.[40]

Preemption doctrine is currently redefining itself. The principle received its last major tenet with the Supreme Court's ruling in *Cipollone v. Liggett Group, Inc*,[41] which ratified the doctrine *expressio unius est exclusio alterius*.[42] Literally translated, the maxim means "to express one is to exclude the other."[43] In practice, it means the enactment of a provision defining the preemptive reach of a statute leaves matters outside the statute open to state control.[44]

Taken at face value, the Supreme Court's ruling in *Cipollone* preserves the balance of state and federal power established in both the Constitution and the Bill of Rights. Under the Supremacy Clause and the Necessary and Proper Clause, Congress has broad power to draft legislation preempting state law.[45] Areas outside federal control are subject to

33. Rice v. Santa Fe Elevator Corp., 331 U.S. at 230.

34. Congressional intent has been called the "ultimate touchstone" of preemption analysis. Malone v. White Motor Corp., 435 U.S. 497, 504 (1978).

35. U.S. CONST. amend. X.

36. May & Ides, *supra* note 14, at 287.

37. *Id.*

38. *Id.* Even when Congressional power is dormant, however, states power is not unlimited. State law must be rationally related to a legitimate state purpose, and must not unduly burden or discriminate against other states. *Id.* at 288.

39. *Id.* at 177.

40. *Id.* at 289.

41. Cippllone v. Liggett Group, Inc. 505 U.S. 504 (1992).

42. *Cipollone* addressed whether the Public Health Cigarette Smoking Act of 1969, 15 U.S.C. § 1331-1340, preempted common-law death claims against cigarette manufacturers. *See* Cipollone 505 U.S. at 509. The Supreme Court's ruling, however, has been applied beyond the cigarette industry. Whether *Cipollone* applies to aviation is the subject of dispute. *See* discussion *infra* Part III.

43. Abdullah v. American Airlines, Inc., 181 F.3d at 372.

44. *Cipollone*, 505 U.S. at 517 (1992).

45. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 413-27 (1819).

state authority under the Tenth Amendment.[46] *Cipollone* applies this principle to express preemption. When Congress drafts a preemption provision, areas outside the provision, by default, are open to regulation by the states.[47]

The *Cipollone* standard presents a difficult standard for lower courts to implement,[48] and courts subject preemptive provisions to varying levels of scrutiny. Some courts, for example, have held that *Cipollone* prohibits courts from engaging in any implied preemption analysis whenever a statute contains an express preemption clause. An implied preemption analysis may proceed only when a statute lacks any preemptive language.[49] Other courts have held that the mere presence of an express preemption provision does not necessarily prohibit a finding of implied preemption. An express preemption provision must provide a "reliable indicium of congressional intent" with respect to state authority.[50] When a preemption provision is "facially ambiguous as to Congress's intent," these jurisdictions hold that courts may resort to an implied preemption analysis despite the preemptive language.[51] A preemption provision limits, but does not preclude, a finding of implied preemption.[52]

Courts also disagree over how to apply a state regulation which lies outside the scope of an express preemption clause (and thus should not be preempted), but actually conflicts with federal statutes (and thus should be preempted.).[53] Traditional theory holds that state laws that are not expressly prohibited, but actually conflict with federal law, are void under the Supremacy Clause.[54] Some courts instead hold that, despite the conflict, any state law outside the scope of the express provisions remains in force.[55] The doctrine is full of dispute and inconsistency.

Preemption doctrine is particularly difficult to apply to the law of flight.[56] Federal law encompasses every facet of aeronautics. Federal Aviation statutes are detailed, often quite specific, and number in the

46. May & Ides, *supra* note 14, at 169.

47. *Cipollone*, 505 U.S. at 516-17.

48. Gills v. Ford Motor Co., 829 F. Supp. 894, 895 (W.D. Ky. 1993).

49. American Agric. Movement v. Bd. of Trade, 977 F.2d 1147, 1154 (7th Cir. 1992).

50. *Cipollone*, 505 U.S. at 517.

51. *See Gills*, 829 F. Supp. at 898 (discussing jurisdictions which have found implied preemption despite preemptive language contained in a statute).

52. This ruling seems to preserve the spirit of *Cipollone*, which held that Congress's enactment of a provision defining the preemptive reach of a statute implies that matters beyond that reach are open to state control. *Cipollone*, 505 U.S. at 517.

53. *See Gills*, 829 F. Supp. at 898; *See also* Public Health Trust of Dade County, Fla. v. Lake Aircraft, Inc., 992 F.2d at 295.

54. Cleveland v. Piper Aircraft Corp., 985 F.2d 1438, 1447 (10th Cir. 1993).

55. *Id.*

56. *See* discussion *infra* Part III.

thousands. They give the appearance of implied preemption.[57] However, Congress has also enacted express preemption provisions removing certain narrow aspects of aeronautics from state control.[58] State common-law rules furthermore apply like gospel in air crash cases.[59] Aviation law, in short, does not fit neatly into the mold of preemption doctrine. It is a disorienting legal fog, traversed by litigators piloting their cases with few instruments to guide them.

B. Aviation Law: Tilting the Scales

Unlike other fields of law, aviation rests on slanted scales of justice.[60] In air crash cases, state law favors the plaintiff.[61] Federal preemption, in most cases, would tip the scales to the other side, in favor of pilots, airlines, and manufacturers.[62] In order to understand the phenomenon, it is first necessary to understand the interplay of federal and state aeronautical law.

1. The Federal Regulatory Framework.

In the early days of flight, aviation was largely unregulated. Congress first established its presence with an austere code of twenty-five regulations, including such aeronautical wisdom as "Don't take the machine into the air unless you are satisfied it will fly."[63] Congressional control grew as the century progressed. Federal aviation statutes now include thousands of regulations pertaining to pilots, airports, airlines, manufacturers, and aircraft noise.[64] Congress has established such broad authority, that Justice Jackson, in a famous concurrence, described its scope as follows:

> Federal control is extensive and exclusive. Planes do not wander about the

57. *See* discussion *infra* Part II.B.

58. *Id.*

59. Patrick J. Shea, Note, *Solving America's General Aviation Crisis: The Advantages of Federal Preemption Over Tort Reform*, 80 CORNELL L. REV. 747, 757-58 (1995).

60. R. Daniel Truitt, *Hints of an Uneven Playing Field in Aviation Torts: Is There Proof?*, 61 J. AIR L. & COM. 577, 579 (1996).

61. Both strict liability and *res ipsa loquitur*, doctrines of state liability law, favor the plaintiff. For a discussion of *res ipsa loquitur, see* Theresa Ludwig Kruk, Annotation, *Res Ipsa Loquitur in Aviation Accidents*, 25 A.L.R. 4th 1237 (1999). For a discussion of strict liability, *see* Shea, *supra* note 59, at 756-58.

62. Ashley W. Warren, *Compliance with Governmental Regulatory Standards: Is It Enough to Immunize a Defendant from Tort Liability?*, 49 BAYLOR L. REV. 763, 771-72 (1997).

63. Thomas N. Tarnay, Comment, *Aircraft Designs Subjected to FAA Special Certification Review—Mitsubishi MU-2 and Beechcraft Bonanza: The Role of the SCR in Aircraft Design Certification and Implications for Federal Preemption*, 62 J. AIR L. & COM. 591, 597 (1996).

64. Acts of Congress affecting aviation are codified at Title 49, Transportation, Subtitle VII - Aviation Programs. Regulations enacted by the Federal Aviation Administration are codified at Title 14 of the Code of Federal Regulations.

> sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands. The moment a ship taxis onto a runway it is caught up in an elaborate and detailed system of controls.[65]

In short, no aircraft or pilot can ever outfly the reach of Washington.

Congress regulates flight through a comprehensive statute known as The Federal Aviation Act of 1958.[66] The Act sets forth the goals of federal aeronautics policy.[67] It also creates the Federal Aviation Administration,[68] and gives the Administration broad authority to adopt regulations when the Administration perceives a need.[69]

The Federal Aviation Act, as originally drafted, contained no express terms discussing preemption.[70] It did, however, contain two clauses which seemed to balance federal and state authority. The first is the Sovereignty Clause, found at § 40103, which declares, "the Government of the United States shall have exclusive jurisdiction over the airspace of the United States."[71] The second clause is a savings clause. It proclaims that the Act does not supersede any remedies existing at statutory or common law.[72] How these clauses interact has been the subject of strong controversy among the federal courts.

Early decisions interpreted the sovereignty clause as conveying to Congress the exclusive right to regulate the skies, while states reserved the right to regulate the land. Once an aircraft touched down, it entered state jurisdiction.[73] Few courts uphold this interpretation today.[74] In-

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65. Northwest Airlines v. Minnesota, 322 U.S. 292, 303 (1944).

66. 49 U.S.C. §§ 40101-49105 (2000). The Federal Aviation Act of 1958 was originally codified at 49 U.S.C. App. § 1301. It was repealed in 1994 by Pub. L. No. 103-272, and recodified without substantive change at 49 U.S.C. §§ 40101 - 49105 (2000). The recodification was limited to section numbers and organization of the statutory provisions. Since the provisions themselves were not substantively changed, many authorities—including the Supreme Court—continue to refer to aviation statutes by their old short titles. This Comment continues the custom. *E.g.,* Wolens v. American Airlines, Inc., 513 U.S. 219, 238 (1995); Abdullah v. American Airlines, Inc., 181 F.3d 363 (3d Cir. 1999); *see also* Trinidad v. American Airlines, Inc., 932 F. Supp. 521, 524 (1996).

67. 49 U.S.C. § 40101 (2000).

68. Tarnay, *supra* note 63, at 599.

69. 49 U.S.C. § 44701 (1999).

70. *See Shea, supra note 59,* at 762.

71. 49 U.S.C. § 40103 (1999).

72. 49 U.S.C. § 40120(c) (1999).

73. Ann Thornton Field & Frances K. Davis, *Can the Legal Eagles Use the Ageless Preemption Doctrine to Keep American Aviators Soaring Above the Clouds and Into the Twenty-First Century?*, 62 J. AIR L. & COM. 315, 334 (1996).

74. The Sixth Circuit is one of the few adherents. Gustafson v. City of Lake Angelus, 76 F.3d 778, 786 (6th Cir. 1996) "The FAA has, thus, made clear that although FAA regulations preempt local law in regard to aircraft safety, the navigable airspace, and noise control, the FAA does not believe Congress expressly or impliedly meant to preempt regulation of local land or water use in regard to the location of airports or plane landing sites."

stead, courts have developed a split of authority. The majority of Circuits holds that, due to the savings clause, aviation has not been preempted.[75] Other circuits hold that the savings clause preserves state damages or injunctive relief, as remedies, but only for a breach of federal regulations. This is tantamount to a finding of complete preemption, and it is controlling precedent in at least two jurisdictions.[76]

The Federal Aviation Act later received two significant modifications, each critical to the issue of preemption. Both amendments add express preemption provisions. The first is known as the Airline Deregulation Act of 1978 (ADA).[77] In an attempt to strengthen the airline industry by opening it to direct market competition, Congress removed airline "prices, routes, or services" from state regulatory control.[78] The second is known as the General Aviation Revitalization Act of 1994 (GARA),[79] and it represents an attempt by Congress to bolster America's light aircraft industry by protecting it from products liability lawsuits.[80] GARA, a federal statute of repose, cuts off the tail of liability of manufacturers for aircraft or component parts that have been in service more than eighteen years.[81] Both statutes only preempt narrow areas of state air law, leaving courts to argue about areas of aviation not preempted by ADA and GARA.

Regulations enacted by the Federal Aviation Administration constitute a second major source of federal statutory control. Known among pilots as Federal Aviation Regulations, or FARs, they are codified at Title 14 of the Code of Federal Regulations.[82] These detailed regulations prescribe standards for every aspect of the aerospace industry to follow.[83] Everything from the time a pilot must wait after consuming alcohol before acting as pilot-in-command,[84] to the recommended ground loading on ski-equipped bushplanes,[85] can be found in the FARs. Compliance is mandatory, and a breach can bring both administrative and civil penal-

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75. *See* discussion *infra* Part III.B.1.

76. *See* discussion *infra* Part III.B.2.

77. 49 U.S.C. § 41713b (1999) (Formerly 49 U.S.C. § 1305). Like the Federal Aviation Act of 1958, the Airline Deregulation Act of 1978 was recodified without substantive change in 1994 pursuant to Pub. L. No. 103-272.

78. Morales v. Trans World Airlines, Inc., 504 U.S. 374, 378-79 (1992).

79. General Aviation Revitalization Act of 1994, 103 Pub. L. No. 298 (1994).

80. Timothy S. McAllister, *Symposium on the General Aviation Revitalization Act: A "Tail" of Liability Reform: General Aviation Revitalization Act of 1994 & the General Aviation Industry in the United States*, 23 TRANSP. L.J. 301 (1995).

81. *Id.* at 310-11.

82. Machado, *supra* note 9, at F1.

83. Shea, *supra* note 59, at 754.

84. 14 C.F.R. § 91.17 (2000) (also known as the "eight-hour, bottle-to-throttle" rule).

85. 14 C.F.R. § 23.505 (2000), *cited in* Tarnay, *supra* note 63, at 603.

ties.[86] The regulations are so extensive, in fact, that proponents of preemption believe they indicate Congress's intent to establish a uniform system of federal control.[87]

FARs have various functions. For example, they have been used to define certain terms, such as "crew member," for aviation insurance purposes.[88] Their most important function, however, is in defining the standards of care for participants in the aviation industry. Many states have incorporated the FARs into state law.[89] The weight given to FARs however, varies from jurisdiction to jurisdiction. Some jurisdictions apply the FARs as a general standard of conduct. Violation of an FAR may constitute "some evidence of negligence"[90] under state law. Conversely, if the circumstances require additional precautions, pilots must take them. FARs supply minimum standards, and compliance may not excuse a pilot, airline, manufacturer, or other entity from liability.[91] Other jurisdictions hold that a breach of FARs conveys a presumption of negligence, which may be refuted by a showing of reasonable care.[92] The application of FARs is far from uniform.

Many jurisdictions hold that a violation of FARs, as regulatory or safety statutes, conclusively establishes negligence per se.[93] Courts disagree, however as to whether all FARs provide sufficiently clear standards of conduct to warrant this imposition of strict liability. Some jurisdictions divide the FARs into the general and the specific. Provisions such as the duty to avoid operating an aircraft in a careless or reckless manner are general standards of conduct. General standards are too vague to warrant the imposition of negligence per se.[94] Other provisions, such as the duty to avoid known icing conditions,[95] create a specific duty. Breach of a spe-

86. World Airways, Inc. v. International Bhd. of Teamsters, 578 F.2d 800 (9th Cir. 1978).

87. Abdullah v. American Airlines, Inc., 181 F.3d 363, 364 (3d Cir. 1999) "Our finding on preemption is based on our determination that the FAA and relevant federal regulations establish complete and thorough safety standards for interstate and international air transportation and that these standards are not subject to supplementation by, or variation among, jurisdictions."

88. Keyser v. Connecticut Gen. Life Ins. Co., 617 F. Supp. 1406 (N.D. Ill. 1985).

89. Pauline E. Calande, Note, *State Incorporation of Federal Law: A Response to the Demise of Implied Federal Rights of Action*, 94 YALE L.J. 1144, 114 (1985). *See also*, Bowen v. United States, 570 F.2d 1311, 1319 (1978) (held FARs incorporated into Indiana statute); Beck v. Thompson, 818 F.2d 1204, 1209 (1987) (FARs incorporated into Mississippi statute); Bibler v. Young, 492 F.2d 1351, 1359 (1974) (FARs incorporated into Ohio statute).

90. *In re* Air Crash Disaster, 635 F.2d 67, 76 (2d Cir. 1980).

91. Beck v. Thompson, 818 F.2d 1204, 1209 (1987).

92. Steering Committee v. United States, 6 F.3d 572, 577 (9th Cir. 1993).

93. *See In re* N-500L Cases, 691 F.2d 15 (1st Cir. 1982); Bibler v. United States, 492 F.2d 1351 (6th Cir. 1974); Bowen v. United States, 570 F.2d 1311 (7th Cir. 1978); Northwest Capital Management & Trust Co. v. United States, 828 F.2d 1330 (8th Cir. 1987).

94. Ridge v. Cessna Aircraft Co., 117 F.3d 126, 131 (4th Cir. 1997).

95. Bowen, 570 F.2d at 1320.

cific duty is negligence per se, resulting in strict liability.[96] Not all jurisdictions, however, have separated the FARs into the general and the specific. In these jurisdictions, any breach of any regulation—no matter how general, vague, and open to interpretation— would support a finding of negligence per se.[97]

Aside from the Federal Aviation Act and accompanying FARs, a body of federal common law is developing around aviation cases. The most potentially significant is the federal law of contribution and indemnity among multiple tortfeasors. In the few jurisdictions upholding contributory negligence as a complete defense, any pilot error would bar a pilot's claim against a manufacturer—even if the aircraft contained a legitimate design defect which directly contributed to the crash.[98] The Federal law of contribution and indemnity would overcome this harsh outcome by determining the degree of fault on a percentage bases, and allocating damages in proportion to fault.[99]

All the above federal rules—the Federal Aviation Act, the FARs, and federal common law—would supplant state laws if a jurisdiction finds federal preemption. Compliance with statutes and regulations would become a complete defense.[100] This defense would overcome a strong judicial bias against the aviation industry inherent in state tort doctrines.[101] Victims, however, would have a lot to lose.

2. State Tort Doctrine

State tort law arose in the context of barnstormers and biplanes. During the early era of flight, aviators were gallant and death-defying, and from a legal standpoint, flying was an ultrahazardous activity.[102] As most ultrahazardous activities, flying brought strict liability on its participants.[103] The first Uniform Aeronautics Act held pilots absolutely liable for any damage caused by the flight of the aircraft, whether a pilot was negligent or not.[104] This was the start of the anti-flying bias aviation would face as state law continued to evolve.

Strict liability continues to be a constant presence in aerospace law, and it threatens both pilots and the industry. Under state law, a pilot may

96. Beck, 818 F.2d at 1204.
97. *See In re N-500L*, 691 F.2d at 28.
98. Bowen, 570 F.2d at 1319-20.
99. Kohr v. Allegheny Airlines, Inc., 504 F.2d 400, 405 (7th Cir. 1974).
100. Warren, *supra* note 62, at 771-72 (1997).
101. Truitt, *supra* note 60, at 579.
102. William J. Appel, Annotation, *Strict Liability, in Absence of Statute, for Injury or Damage Occurring on the Ground Caused by Ascent, Descent, or Flight of Aircraft*, 73 A.L.R. 4th 416 (2000).
103. *Id.*
104. *Id.*

be found negligent per se for violating a safety statute, or FAR.[105] The Restatement (Second) of Torts § 520A also holds pilots strictly liable for ground damage caused by the flight of the aircraft.[106] This would, in theory, impose strict liability for a crash.[107] Courts, however, rarely apply the doctrine in the arena of air crash litigation.[108]

Manufacturers face a greater risk from state tort doctrine. When an aircraft crashes, the manufacturer has traditionally been subjected to "automatic inclusion" as a defendant,[109] and faced strict liability for the aircraft or component. In order to establish liability, an injured victim need only prove three factors: 1) she was using the product as the manufacturer intended; 2) the product contained a manufacturing or design defect of which the victim was not aware; and 3) this defect caused the victim's injury.[110] The culpability of the manufacturer is immaterial.[111] Strict products liability, both for defective design and defective manufacture, was adopted by the Restatement (Second) of Torts § 402A.[112] It has been adopted by an "overwhelming majority"[113] of jurisdictions, achieving nearly "the dignity of a holy writ."[114]

Even if pilots, airlines, and manufacturers are not held strictly liable, however, they are often presumed negligent under the tort doctrine of *res ipsa loquitur*. Literally translated as "the thing speaks for itself," *res ipsa* is becoming increasingly successful as a means of proving aviation accident cases.[115] In practice, a court presumes that the incident would not ordinarily occur in the absence of negligence.[116] The presumption can be overcome by a showing of due care on the part of the defendant.[117] It is the civil equivalent of "guilty until proven innocent."[118] A defendant is

105. *See supra* note 93.

106. RESTATEMENT (SECOND) OF TORTS § 520A (1999).

107. Crist v. Civil Air Patrol, 278 N.Y.S.2d 430 (1967).

108. *See* Appel, *supra* note 102, at 416.

109. McAllister, *supra* note 80, at 307.

110. Shea, *supra* note 59, at 757.

111. *Id.*

112. RESTATEMENT (SECOND) OF TORTS § 402A (1965) (stating that strict liability applies to aircraft).

113. Shea, *supra* note 59, at 757.

114. *Id.* at 758-59. Strict liability is not the only products liability test applied in aircraft cases. For an application of the consumer expectations test, *see* Berkebile v. Brantly Helicopter Corp., 281 A.2d 707 (Pa. Super. Ct. 1971). For an application of the risk-utility test, *see* Wilson v. Piper Aircraft Corp., 577 P.2d 1322 (Or. 1978).

115. Kruk, *supra* note 61, at 1237 (1999).

116. *Id.*

117. *Id.*

118. Professional pilot and columnist Len Morgan wrote, "You've learned that the American way is to presume an individual innocent until proved guilty. The professional pilot soon learns not to lean heavily on that." Len Morgan, *Going Pro: When You're Starting Your Piloting Career, Expect Surprises*, FLYING, August, 1984, at 18.

liable until proven non-liable.[119] *Res ipsa* is common in air crash litigation, and has been applied to midair collisions, emergency landings, collisions with mountains or surface structures, and ground damage caused by objects falling from aircraft.[120]

These specialized state tort-law doctrines are not the only factors placing aviation defendants at a disadvantage in the courtroom. Defendants face a phenomenon labeled "the technical problem."[121] Aviation litigators, in a relatively short time, must process complex legal and aerodynamic theories and present these theories convincingly to a judge and jury of nonexperts. The jury must interpret complicated theories and concepts, encompassing aerodynamics, engineering, and air-traffic and pilot jargon, and apply complex legal doctrines to reach a decision.[122] Under such circumstances, it is easy to fall back on gut-level instinct in choosing between the deep pocket and the wounded victim. Thus, juries tend to find in favor of the injured claimant at rates much greater than expected,[123] and verdicts are often huge, reaching into the hundreds of millions of dollars.[124]

From a defendant's perspective, preemption would simply level the playing field, but if federal law supplants the state doctrines of strict liability, *res ipsa loquitur*, and ordinary negligence, then legitimate claimants lose the fiercest weapons in their arsenal. Compliance with all applicable federal regulations would be conclusive that the defendant acted with due care, even if a jury could be convinced otherwise. The choice of law can thus be critical in air disaster litigation,[125] and neither side is likely to give in.

III. The Aviation Preemption Debate

A. Both Sides of a Complex Issue

Preemption does not often arise in the context of air crash litigation. This is surprising, since preemption is perhaps the hottest dispute in other areas of aviation tort law. It shows up in cases involving in-flight injury from turbulence[126] and overhead baggage,[127] wrongful exclusion,[128] and

119. Kruk, *supra* note 61, at 1237.

120. *Id.*

121. Truitt, *supra* note 60, at 580.

122. *Id.* at 579-80.

123. *Id.* at 579.

124. Howard T. Edelman, *Mass Torts: Punitive Damages Crash in the Second Circuit: In re Air Disaster at Lockerbie, Scotland on December 21, 1988*, 58 BROOK. L. REV. 497, 500 (1992).

125. *See* United Airlines, Inc. v. Mesa Airlines, Inc., No. 87-C9535, 1999 U.S. Dist. LEXIS 16256, AT *4 (N.D. Ill. 1999).

126. *E.g.,* Margolis v. United Airlines, Inc., 811 F. Supp. 318 (D. Mich. 1993).

127. *E.g.,* Gee v. Southwest Airlines, 1997 U.S. App. LEXIS 12266 (9th Cir. 1997).

128. *E.g.,*Von Anhalt v. Delta Air Lines, Inc., 735 F. Supp. 1030 (S.D. Fla. 1990).

airport noise.[129] Preemption is primarily a defendant's doctrine, and defendants involved in air crash litigation have more at stake than parties in any other type of aviation claim. Logically, they should press any issue powerful enough to tip the scales of justice legally in their favor. For some reason, they rarely do. However, as the recent debate illustrates, both proponents and opponents of preemption have sound legal arguments, and the current split of authority supports either side.

Proponents of preemption claim a textual foundation for their side of the debate. They cite the Sovereignty Clause of the Federal Aviation Act as evidence of Congress's intent to create a uniform system of federal control.[130] They also claim that the hundreds of Federal Aviation Regulations leave no room for state supplementation.[131] The fact that Congress enacted a few very narrow preemption provisions, proponents argue, does not accurately reflect Congress's intent. The comprehensive nature of federal regulation implies Congressional intent to preempt the field.[132]

Proponents cite the goals of the Federal Aviation Act as further evidence that Congress could not have intended to leave aviation in the hands of the states. The Act has a dual purpose. It promotes air safety, while promoting the health of a vital American industry.[133] Congress must balance these two concerns when enacting any aviation legislation.[134] State legislatures and courts face no such restriction. A jury, for example, may consider many factors in deliberation. The health of the aviation industry is usually not one of them.[135] Therefore, state law contravenes one goal of the Federal Aviation Act.[136]

Proponents also analogize aviation to federal statutes in other fields of transportation. For example, under the National Traffic and Motor Vehicle Safety Act of 1966 (MVSA),[137] Congress has adopted Federal Motor Safety Standards governing the design and manufacture of automobiles. Some courts have declared that these standards preempt any effort by state courts to impose liability under state products liability law.[138] Like the MVSA, the Federal Ports and Waterways Safety Act of

129. *E.g.*, Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973).

130. World Airways, Inc. v. International Bhd. of Teamsters, 578 F.2d 800 (9th Cir. 1978).

131. Abdullah v. American Airlines, Inc., 181 F.3d 363, 365 (3d Cir. 1999).

132. Geoffrey M. Hand, Comments, *Should Juries Decide Aircraft Design:* Cleveland v. Piper Aircraft Corp. *and Federal Preemption of State Tort Law*, 29 U.S.F.L. REV. 741, 786-87 (1995).

133. 49 U.S.C. § 40101(a)(1) (1999); 49 U.S.C. § 40101 (d)(3) (1999).

134. Hand, *supra* note 132, at 785-86.

135. Jill A. Van Wormer, Comment, *Federal Preemption of Aircraft Design Certification Standards After Cleveland v. Piper Aircraft Corp.: Can General Aviation Manufacturers Recover?* 19 IOWA J. CORP. L. 665, 678-79 (1994).

136. Hand, *supra* note 132, at 782-84.

137. 15 U.S.C. § 1381-1431 (1988).

138. *See, e.g.*, Gills v. Ford Motor Co., 829 F. Supp. 894 (W.D. Ky. 1993).

1972 bears a striking similarity to the Federal Aviation Act.[139] It establishes comprehensive minimum standards for the design, construction, alteration, maintenance, and operation of vessels carrying bulk cargoes.[140] The Supreme Court has ruled that, despite the statutory language labeling these regulations "minimum standards" for safety, any state action imposing more stringent requirements would be void under the Supremacy Clause.[141] Despite the fact that aviation regulations are, under the Act, also minimum standards, they should, likewise, supersede any state attempts to regulate aviation.[142]

Proponents claim additional support from public policy. According to proponents, aviation, as an interstate activity, would function much better under centralized control.[143] Pilots can easily cross the nation on a single tank of gas. They should not expect to be held to differing standards of conduct or certification requirements in each state.[144] Nor should a manufacturer put a new design through thousands of changes under the federal certification process, only for a jury in a single jurisdiction to find the aircraft defective.[145] Proponents claim that state tort doctrine is a relic of the era when federal control was minimal. It has no place in the modern reality of flight.[146]

Opponents cite arguments that are just as numerous, and no less convincing. Opponents claim that the Federal Aviation Act contains a savings clause, explicitly preserving state statutory and common-law control over aviation.[147] The Act also declares that the Federal Aviation Regulations are "minimum standards."[148] Taken together with the two very narrow preemption provisions adopted under the Airline Deregulation Act and the General Aviation Revitalization Act, federal statutes clearly express the desire of Congress to leave areas outside the express preemption provisions within the hands of the states.[149] In fact, opponents argue that the express preemption provisions would not even have been necessary if the entire field of aviation were already under federal control.

Opponents claim the recently-enacted *Cipollone* standard is conclusive on the issue of federal preemption. Under *Cipollone*, once Congress

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139. Hand, *supra* note 132, at 781.
140. Ray v. Atlantic Richfield Co., 435 U.S. 151, 161-65 (1977).
141. *Id.* at 157-59.
142. Hand, *supra* note 132, at 781-83.
143. French v. Pan Am Express, Inc., 869 F.2d 1, 6 (1st Cir. 1989).
144. *Id.*
145. Hand, *supra* note 132, at 784-85.
146. *Id.*
147. 49 U.S.C. § 40120(c) (1999).
148. 49 U.S.C. § 44701(a)(2) (1999).
149. Cleveland v. Piper Aircraft Corp., 985 F.2d 1438, 1443-44 (10th Cir. 1993).

has spoken on preemption by adopting express preemption provisions, and those provisions reasonably indicate Congress's intent regarding the field, areas outside the provisions are open to state control.[150] Congress has adopted express preemption provisions regarding aeronautics.[151] In doing so, Congress struck down more comprehensive preemptive proposals.[152] Courts should, therefore, accept these provisions as conclusive.[153] Areas outside the express language should be fair game for the states.[154] If Congress desired to preempt the entire field, it could have done so under the Commerce Clause.[155]

Opponents claim public policy also necessitates a finding against preemption. Tort law, the basic law at issue in aviation cases, has historically been left to the states. State police powers include public safety and general welfare.[156] Safety of the skies and general welfare of the flying public is no different.[157] In addition, much of the aviation industry is self-policing. Manufacturers are responsible, in many instances, for self-certifying the safety of their aircraft under the Federal Aviation Administration's Delegation of Authority provisions.[158] If compliance with these airworthiness regulations were the sole means used to judge a manufacturer's conduct, the potential for fraud would be high.[159] Safety thus depends on state tort law.

In this manner, the debate continues. The majority of jurisdictions have faced the issue either at the trial level or on appeal. Most of these cases concerned torts outside the air crash context. However, the Federal Aviation Act provides no reason to distinguish between different areas of flight. Any ruling that applies to one area, no matter how peripheral, should apply to all other areas of flight with equal force. Different facts do not merit a different application of federal law.[160]

B. The Preemption Debate: A Dogfight Among the Circuits

Preemption has split the Federal Circuit Courts into two polar majorities.[161] One side of the debate holds that Federal Aviation statutes are

150. Cipollone v. Liggett Group, Inc., 505 U.S. 504, 517 (1992).
151. *See* discussion *infra* Part II.B.1.
152. *See* discussion *infra* Part IV.A.
153. *Cleveland*, 985 F.2d at 1447.
154. *Id.*
155. Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249 (1972).
156. Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977).
157. Abdullah v. American Airlines, Inc., 181 F.3d 363, 375 (3d Cir. 1999).
158. Tarnay, *supra* note 63, at 604.
159. Hand, *supra* note 132, at 788.
160. Hand, *supra* note 132, at 786-87.
161. To date, only the Sixth Circuit has failed to adopt one of the two majority viewpoints. *See* Gustafson v. City of Lake Angelus, 76 F.3d 778 (6th Cir. 1996).

minimum standards, open to supplementation by the states.[162] The other side holds that federal aviation regulations totally preempt state aviation law, allowing recovery only for a breach of federal aviation regulations.[163] Injunction, compensatory, even punitive damages are available—but only if the defendant, in effect broke some form of aviation statutory law.[164] The issue has a clear division, and key cases characterize both sides.[165]

1. Circuits Against Preemption

Cleveland v. Piper Aircraft, Inc.,[166] is an unusual case. Its facts are controversial.[167] Its holding has spawned several law review articles.[168] It overruled Supreme Court precedent.[169] It applied *Cipollone* for the first time in an air accident setting.[170] It saw the United States file its first historic brief as *amicus curiae*.[171] And it became the definitive case against preemption.

Cleveland concerned a products liability claim. The aircraft involved was an updated version of a time-honored design: the Piper Super Cub.[172] Cleveland, the pilot, altered the aircraft in violation of federal regulations.[173] He took out the front seat, and then attempted to fly the plane from the back seat where visibility was greatly reduced.[174] The owner of the airport knew Cleveland's intentions, knew the aircraft was not legal, and parked a van in the runway to prevent Cleveland's takeoff.[175] Cleveland attempted takeoff, towing a glider, and unable to see the van. He collided, suffering serious injury. The glider pilot, and the owner

162. *See* Hodges v. Delta Airlines, Inc., 44 F.3d 334 (5th Cir. 1995); Gee v. Southwest Airlines, 1997 U.S. App. LEXIS 12266 (9th Cir. 1997); Cleveland v. Piper Aircraft Corp., 985 F.2d 1438 (10th Cir. 1993); Public Health Trust v. Lake Aircraft, Inc., 992 F.2d 291 (11th Cir. 1993).

163. *See* French v. Pan Am Express, Inc., 869 F.2d 1 (1st Cir. 1989); Abdullah v. American Airlines, Inc., 181 F.3d 262 (3d Cir. 1999) (determining the Second Circuit's position as well); Bieneman v. City of Chicago, 864 F.2d 463 (7th Cir. 1988).

164. *See infra* note 165.

165. Both the Third and Tenth Circuits certified the issue, and reached opposite conclusions. *See* United Airlines, Inc. v. Mesa Airlines, Inc., 1999 U.S. Dist. LEXIS 16256, *4 (N.D. Ill. 1999).

166. Cleveland v. Piper Aircraft Corp., 985 F.2d 1438 (10th Cir. 1993).

167. Tarnay, *supra* note 63, at 630-31.

168. *See, e.g.,* Hand, *supra* note 132. *See also* Lance M. Harvey, Note, Cleveland v. Piper Aircraft Corp.: *The Tenth Circuit Holds that the Federal Aviation Act of 1958 Does Not Preempt State Common Law Claims for Negligent Design*, 46 BAYLOR L. REV. 485 (1994).

169. *Cleveland*, 985 F.2d at 1444.

170. *Id.* at 1443-44.

171. Hand, *supra* note 132, at 773-74.

172. Tarnay, *supra* note 63, at 630-31.

173. Mark A. Valetti, Comments, *Preemption of State Law Tort Claims in the Context of Aircraft Manufacturers*, 60 J. AIR L. & COM. 699, 714-15 (1995). *See also* Hand, *supra* note 132, at 768.

174. Valetti, *supra* note 173, at 714-15.

175. *Id.*

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of the van, were unhurt.[176]

Cleveland brought suit under state law against Piper, claiming that the aircraft was defectively designed in that it lacked proper forward visibility.[177] A jury agreed, awarding the pilot $2.5 million,[178] despite the fact that the Super Cub had passed all F.A.A. design certification tests, and had proven itself over years of service.[179] Piper appealed, claiming that these design regulations preempted state products liability law.[180] The Tenth Circuit Court of Appeals disagreed.

The Tenth Circuit's opinion represents a major turning point in the history of aviation preemption doctrine. For the first time, a Circuit Court of Appeals applied the holding of *Cipollone* to the field of aeronautics.[181] The Court ruled that, under the Federal Aviation Act, as supplemented by the preemption provision of the Airline Deregulation Act, Congress removed a narrow part of aviation law from state control. Any area outside the preemptive language of the statute was open to regulation by the states.[182]

Cleveland was significant for another reason: the United States, through the Department of Justice, filed an historical first brief as *amicus curiae* on behalf of the private aircraft manufacturer.[183] The United States urged the Court to find that Congress, by virtue of the Sovereignty Clause, had preempted the entire field of aviation safety.[184] The Tenth Circuit held otherwise. According to the Circuit Court, the Sovereignty Clause was intended to establish sovereignty over U.S. airspace to the exclusion of other nations; not the exclusion of the states.[185]

The Tenth Circuit also declined to follow Supreme Court precedent regarding aviation preemption.[186] In *City of Burbank v. Lockheed Air Terminals, Inc.*,[187] the Supreme Court found preemption in the field of airport noise. Although seemingly unrelated to aircraft design, both are governed by the Federal Aviation Act of 1958, as amended, and the Federal Aviation Regulations. At the time *City of Burbank* was decided, however, the Federal Aviation Act had not yet been amended to include

176. Hand, *supra* note 132, at 767-68.

177. Cleveland v. Piper Aircraft Corp., 985 F.2d 1438, 1441 (10th Cir. 1993).

178. *Id.* at 1440.

179. John S. Yodice, *Product Liability—A Case Study*, AOPA PILOT, 1993.

180. *Id.*

181. *Cleveland*, 985 F.2d at 1443-44.

182. *Id.* The decision was rendered before Congress passed the General Aviation Revitalization Act of 1994, 103 Pub. L. No. 298 (1994). GARA adds another narrow preemption provision, lending support to the Tenth Circuit's holding.

183. Hand, *supra* note 132, at 773-74.

184. Cleveland, 985 F.2d at 1444.

185. *Id.*

186. *Id.* at 1444.

187. 411 U.S. 624 (1973).

express preemptive language.[188] The Tenth Circuit held that *City of Burbank* was no longer valid, in light of the new express preemption statutes and the *Cipollone* standard. The Court found that *City of Burbank* was a legal relic, inapplicable in the current aviation environment.[189] The Supreme Court denied certiorari.[190]

The Tenth Circuit was careful to emphasize that the Federal Aviation Act applied uniformly, and all areas of flight outside the preemptive language of the Airline Deregulation Act are open to more stringent standards imposed by state statutory and common law. This applied to product design and air safety, as well as airport noise.

Cleveland represents a triumph for the plaintiffs' aviation bar. Not only did it open air accident litigation to state law. It also gave plaintiffs' attorneys in that jurisdiction the right to try aviation noise cases, which had previously been prohibited by the Supreme Court's holding in *City of Burbank*.[191] State courts within the Tenth Circuit could once again decide noise claims, and state legislatures could dictate noise standards.

Many other jurisdictions have decided against preemption, both in the area of air crash disasters, and other less-spectacular aviation torts. Ironically, in *Cleveland*, the Tenth Circuit found that the "principles of [aviation preemption doctrine] are well settled."[192] The opinion went on to become widely criticized, and not universally followed. In fact, in 1999, the Third Circuit reached an opposite conclusion in a slightly different setting. To this day, the issue remains unresolved.[193]

2. Circuits For Preemption

In 1969, a student pilot flying a Piper Cherokee on a solo cross-country flight, collided with an Allegheny Airlines DC-9 in the skies over Indianapolis.[194] Both aircraft were destroyed and all occupants were killed. Wrongful death actions were commenced on both sides, to which the United States was joined as a defendant pursuant to the Federal Tort Claims Act.[195] The lawsuits alleged improper air traffic control instructions. At the trial level, the District Court applied Indiana law. However, the Seventh Circuit found that the federal Government held a "predominant, almost exclusive interest" in regulating the nation's airways,[196] and

188. *Id.*
189. *Id.*
190. Piper Aircraft Corp. v. Cleveland, 510 U.S. 908, 908 (1993).
191. *City of Burbank*, 411 U.S. at 640.
192. *Cleveland*, 985 F.2d at 1441.
193. *See* Abdullah v. American Airlines, Inc., 181 F.3d 363 (3d Cir. 1999).
194. Kohr v. Allegheny Airlines, Inc., 504 F.2d 400 (7th Cir. 1974).
195. *Id.*
196. *Id.* at 403.

therefore the Federal Aviation Act preempted state aviation law.[197] It remanded the case for further proceedings according to federal, rather than state, law.

A finding of preemption is a rarity in the air accident setting. This notorious lack of caselaw is unusual, since implied preemption has been applied in other areas of aviation tort law.[198] All areas of aviation—accidents notwithstanding—are governed by the same federal statutes. A finding of preemption in one area should apply to all areas of flight.[199]

The Third Circuit followed this reasoning in 1999, when it rendered the key decision supporting preemption, *Abdullah v. American Airlines, Inc.*[200] Although the case did not specifically deal with air accidents, the Third Circuit used the case to deal a sweeping blow to state regulatory control over aeronautics. The Third Circuit held that federal aviation regulations provide the exclusive standard of care in all air safety cases.[201] However, under the Savings Clause, states were free to impose their own remedies for a breach.[202] This would include injunctive relief, as well as compensatory and punitive damages.[203] The Third Circuit, by its ruling, exited the twentieth century leaving a turbulent wake in aviation law.

Abdullah concerned a passenger who was injured when an airliner encountered turbulence.[204] The Third Court remanded the case after determining that the District Court should not have applied the state law of negligence to the claim.[205] The Third Circuit reasoned that federal aviation regulations establish complete and thorough safety standards for aeronautics, thus preempting the entire field.[206] However, state damage remedies still exist for a violation of federal statutes.[207]

The Court found support in the Savings Clause of the Federal Aviation Act. According to the Act, the states reserved any "remedies" then available by statute or common law. The court drew the distinction between remedies and standards of care.[208] A remedy, according to the court, defined the type of relief available for any breach of a federally

197. *Id.* at 404.

198. Field & Davis, *supra* note 73, 366-80.

199. *See id.* at 354 ("So long as courts and legislatures make rules about each individual aviation matter on the facts of each single and specific case, fragmentation, inconsistency, and uncertainty will permeate the aviation industry."). *See also* Abdullah v. American Airlines, Inc., 181 F.3d 363, 369-70 (3d Cir. 1999).

200. Abdullah v. American Airlines, Inc., 181 F.3d 363, 369-70 (3d Cir. 1999).

201. *Id.* at 364-65.

202. *Id.*

203. *Id.* at 376.

204. *Id.* at 364-65.

205. *Id.* at 376.

206. *Id.* at 364-65.

207. *Id.*

208. *Id.* at 374.

imposed standard of care.[209] Remedy did not mean the standard of care itself.[210] Therefore, Congress had not intended to preserve state tort doctrines when it enacted the Federal Aviation Act.[211]

Despite the fact that an award of damages functions as a state regulation, the court did not find the practice inconsistent with federal preemption.[212] An award of damages can act as a signal to a party to stop any activity that resulted in the award. If damages are awarded for a breach of a federal guideline, the sanction would encourage the party to adhere to federal regulations. Therefore, state damages awards provide a way for the states to strengthen the federal regulatory system.[213]

The Circuit looked to the Supreme Court's holding in *City of Burbank* as further support that the federal government had preempted the entire field of aviation law.[214] *City of Burbank* held that the area of aircraft noise had been preempted by the Federal Aviation Act.[215] Since the Act preempted airport noise, it must preempt all other areas within its broad scope as well. The Act governs all areas of flight with equal authority. The Third Circuit expressly declined to follow the reasoning of *Cleveland*.[216]

Finally, the Third Circuit found support for its argument in the structure of the FARs themselves. According to the Court, the federal regulations provide the standard of care airlines and pilots must observe when operating an aircraft.[217] Title 14, Part 91 of the Federal Aviation Regulations states: "No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."[218] The Court found that this regulation provides the standard of care for the aviation industry.[219] Pilots, aircraft owners, and airlines operating an aircraft carelessly or recklessly would be in breach.[220] This standard of care renders state laws of negligence unnecessary. Any breach of this federal standard

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209. *Id.* at 375-76.

210. In reaching its conclusion, the Third Circuit relied on *Silkwood v. Kerr-McGee*, 464 U.S. 238 (1984). In *Silkwood*, the Supreme Court held that the federal government may preempt state regulation over an industry. However, states may determine the relief awarded for a breach of federal regulations. Traditional remedies of injunction, as well as compensatory and punitive damages, could be awarded according to state law. Abdullah v. American Airlines, Inc., 181 F.3d 363, 375-76 (3d Cir. 1999).

211. *Abdullah*, 181 F.3d at 364-65.

212. *Id.* at 374-76.

213. *Id.*

214. *Id.* at 363.

215. City of Burbank v. Lockheed Air Terminal Inc., 411 U.S. 623, 626 (1973).

216. Abdullah v. American Airlines, Inc., 181 F.3d 363, 374 (3d Cir. 1999).

217. *Id.* at 364-65.

218. *Id.*

219. *Id.*

220. *Id.* at 370-71.

would result in an award of damages under to state law.[221]

The Third Circuit's approach was not entirely new. In fact, portions of its ruling had been applied previously in various other jurisdictions.[222] The Court's holding, however, went against the majority of the Circuits, and like a sonic boom in preemptive jurisdictions, its repercussions could potentially send a shockwave through every aspect of flight affected by the Federal Aviation Act.

IV. Why Federal Aviation Standards Do Not Preempt State Law

Eject—that is what the Second Circuit did in 1996 when asked to consider the out-of-control issue of air safety preemption.[223] The Court declined to rule. It saw the issue, climbed out on the wing, and jumped. Most Circuits, however, have struggled with the issue like test pilots wrestling hurtling aircraft out of a spin. Each Circuit solved the problem in its own way, and the doctrine did not evolve with uniformity. However, many factors show that the Circuits finding against preemption were correct. If aviation safety had a pilot's operating handbook, the checklist against preemption would read as follows:

A. Preemption Is Not The Intent of the Modern Congress

Congress historically sends mixed signals regarding aviation preemption. House and Senate reports support either side, depending on which Session debated the issue. Viewed in its entirety, however, legislative history indicates a clear trend toward states' rights.

Congressional debates underlying the original Federal Aviation Act of 1958 stressed the importance of a single, uniform system of regulation.[224] Both the House and the Senate reports called for strong federal control. The original House Report declared that the Federal Aviation Agency, precursor to the Federal Aviation Administration, would have "full responsibility and authority for the promulgation and enforcement of safety regulations."[225] In a letter to the House Committee on Interstate and Foreign Commerce, the Chairman of the Airways Modernization Board stated: "It is essential that one agency, and one agency alone, be responsible for issuing safety regulations if we are to have timely and

221. *Id* at 364-65.

222. *See* discussion *infra* Part IV.F. (applying FARs as state standards of care).

223. In 1996, the Southern District of New York certified the question of federal preemption of aviation safety law for interlocutory appeal to the Second Circuit. The Second Circuit declined to address the issue. Abdullah v. American Airlines, Inc., 181 F.3d 363, 366 (3d Cir. 1999).

224. French v. Pan Am Express, Inc., 869 F.2d 1, 5 (1st Cir. 1989).

225. *Id.*

effective guidelines for safety in aviation."[226] Neither state legislators nor state courts could adopt more stringent standards.

Early Senate Reports, likewise, seem to give the Federal Aviation Act preemptive effect. They state, in part:

> Aviation is unique among transportation industries in its relation to the federal government – it is the only one whose operations are conducted almost wholly within federal jurisdiction, and are subject to little or no regulation by States or local authorities. Thus, the federal government bears virtually complete responsibility for the promotion and supervision of this industry in the public interest.[227]

A comparison of these early statements, however, with the most recent House preemption debates—carried on in 1994, when Congress adopted the General Aviation Revitalization Act— is conclusive of the issue. Congress today clearly intends to leave aviation open to the states.

General aviation was a booming business in the 1970s. Piper, Beechcraft, and Cessna filled the market with small planes and high hopes for the future, but the market entered a near-fatal spiral that lasted well into the 1990s.[228] Cessna stopped making single-engine aircraft,[229] and, for the most part, so did Beechcraft.[230] Piper, manufacturer of the venerable Cub, filed for bankruptcy.[231] New light aircraft were becoming as rare an airborne sight as California condors,[232] and products liability lawsuits were blamed as the cause of the decline.[233]

Congress faced the problem of saving general aviation from products liability claims. The search for a solution turned to preemption.[234] If federal design regulations were given preemptive effect, products liability claims brought under state law would be barred. Congress could simply enact legislation expressly removing aircraft design from state authority. Congress considered doing just that. Senator Nancy Kassebaum of Kansas, the home state of the Cessna Aircraft Corporation, introduced the

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226. *Id.*

227. S. Rep. No. 1811, at 5 (1958).

228. Jennifer L. Anton, Comment, *A Critical Evaluation of the General Aviation Revitalization Act of 1994*, 63 J. AIR L. & COM. 759, 765-66 (1998).

229. John H. Boswell & George Andrew Coats, *Saving the General Aviation Industry: Putting Tort Reform to the Test*, 60 J. AIR L. & COM. 533, 536 (1994).

230. *Id.*

231. *Id.*

232. When President Clinton signed GARA into law, he remarked: "an innovative and productive industry has been pushed to the brink of extinction." *Quoted in* Shea, *supra* note 59, at 765.

233. Other causes have been cited as contributing to the decline of general aviation. *See* Panel Discussion, *The General Aviation Revitalization Act*, 63 J. AIR L. & COM. 169 (1997). However, due to intense lobbying, the debate focused on products liability. Shea, *supra* note 59, at 764.

234. Shea, *supra* note 59, at 788.

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General Aviation Accident Liability Standards Act (Senate Bill 67), which would, in her words, "replace the current patchwork of unpredictable and inconsistent state general liability laws with uniform, fair, and reasonable federal standards of liability."[235]

Congress, however, rejected Senate Bill 67 in favor of the General Aviation Revitalization Act of 1994, a limited statute of repose cutting off liability completely for aircraft or component parts in service more than eighteen years.[236] The House Hearings contain statements that Congress was voting out "a very limited preemption of state law."[237] According to the Hearings, GARA "preserves all civil actions against all other elements of the General Aviation industry . . . . Victims would be free to bring suits against pilots, mechanics, base operators, etc., where there is negligence."[238] In contrast to Congressional policy at the time the Federal Aviation Act was drafted, these statements indicate the present intent of Congress to preserve a victim's right to bring suit under state law in air crash cases.[239]

Congress has taken upon itself the dual responsibility of promoting air safety while protecting the interests of the aviation industry. Congress is free, under the Supremacy Clause, the Commerce Clause, and the Necessary and Proper Clause, to remove aeronautics entirely from state law.[240] Congress twice debated the issue and chose not to. Although early Congressional intent may have indicated a desire to establish uniform control of the skies, the trend has since changed.[241] Subsequent amendments to the original Federal Aviation Act of 1958 remove narrow portions of the aviation industry from state control. Both in legislative history and through the structure of these statutes, Congress evinced a clear desire to leave the rest of aviation law firmly within the reach of the states.[242]

B. The Supreme Court Does Not Support Preemption

Inconsistency is, unfortunately, the only consistent feature of preemption doctrine. No source of authority is always in favor of, or against,

235. 139 Cong. Rec. S470 (daily ed. Jan. 21, 1993).

236. Anton, *supra* note 228, at 768-70.

237. H.R. Rep. No. 103-525, at 6-7 (1994).

238. *Id.* at 7.

239. *See* McAllister, *supra* note 80, at 312 ("GARA affirmatively preserves a role for state law. State law governs the adjudication of aviation products liability cases . . . ."). *Compare with* Harvey, *supra* note 168, at 497 (writing pre-GARA, the author maintains: "Congress would have to . . . add a preemption provision of its own in order to change the preemptive reach of the substantive provisions of the 1958 Act.").

240. City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 653 (1973).

241. McAllister, *supra* note 80, at 315.

242. *Id.*

the preemption of air safety. The Supreme Court is no different. Supreme Court opinions swing with each new piece of aerospace legislation. However, as key rulings during the 1990s indicate, the trend within the modern court is solidly against implied preemption.

In *Executive Jet Aviation, Inc. v. City of Cleveland*,[243] decided in 1972, the Supreme Court found that Congress is free to preempt aviation accident law if it chooses, by virtue of the Commerce Clause. Justice Stewart, writing for the majority, stated that air commerce is interstate in nature and thus open to Congressional control. If federal uniformity is Congress's goal, the Court reasoned, Congress can implement it through legislation. So far, Congress has not accepted this invitation.[244]

The Supreme Court found in favor of preemption, however, in *City of Burbank*,[245] the Court's most controversial ruling to date on the issue. The year was 1973. Congress had just enacted the Noise Control Act.[246] This Act gave the Federal Aviation Administration joint authority with the Environmental Protection Agency to establish noise control standards for airports.[247] The Court held that the Federal Aviation Act, in conjunction with the Noise Control Act, implicitly preempted the field of airport noise. Neither municipalities nor state courts could regulate the issue in any manner.[248]

The Court failed to articulate the affect of its ruling in *City of Burbank* on other areas of flight, such as safety and design. Lower courts, therefore, reached conflicting rulings when presented with the issue. Some courts reasoned that, if the Federal Aviation Act implicitly preempted noise claims, it must implicitly preempt the more regulated areas of flight, such as safety and design.[249] The Third Circuit, as aforesaid, relied on *City of Burbank* in finding that Federal law supplants state standards of care for air safety.[250] The Tenth Circuit, in *Cleveland*, found otherwise.[251]

The facts of *City of Burbank* do provide grounds for distinction between noise and other areas of flight. *City of Burbank* holds that the Federal Aviation Act must work in conjunction with the Noise Control act to preempt airport noise regulation.[252] The Noise Control Act has no rele-

243. *Executive Jet Aviation, Inc.*, 409 U.S. 249 (1972).
244. *Id.*
245. *City of Burbank*, 411 U.S. 624 (1973).
246. 42 U.S.C. § 4901 (1999).
247. *City of Burbank*, 411 U.S. at 628-29.
248. There was one exception. Any city acting as the proprietor of an airport could adopt its own noise abatement procedures. *Id.* at 636.
249. Abdullah v. American Airlines, Inc., 181 F.3d 363, 368 (3d Cir. 1999).
250. *Id.*
251. Cleveland v. Piper Aircraft Corp., 985 F.2d 1438, 1444 (10th Cir. 1993).
252. *City of Burbank*, 411 U.S. at 638.

vance to issues of crashworthiness and safety.[253] Therefore, no preemption exists. The Federal Aviation Act by itself does not preempt state law. The Tenth Circuit, however, did not use this rationale in reaching its decision. The Tenth Circuit noted that the Supreme Court decided *City of Burbank* before the Federal Aviation Act contained any express preemption provisions.[254] Subsequent Supreme Court rulings, issued after the Act had been amended, tend to follow the *Cipollone* standard. Viewed in proper historical perspective then, *City of Burbank* is no longer binding precedent.[255]

Cipollone v. Liggett Group, Inc.[256] provides the Supreme Court's current bright-line test for determining federal preemption. The *Cippolone* standard is as follows:

> when Congress has considered the issue of preemption and has included in the enacted legislation a provision expressly addressing that issue, and when that provision provides a reliable indicium of congressional intent with respect to state authority, there is no need to infer congressional intent to preempt state laws from the substantive provisions of the legislation. Such reasoning is a variant of the familiar principle of *expressio unius est exclusio alterius*: Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted.[257]

Under the *Cipollone* standard, express preemption provisions foreclose any discussion of implied preemption when these express provisions provide a reliable indication of Congressional intent.[258] The governing aviation statute has been amended by two preemption provisions—the Airline Deregulation Act[259] and the General Aviation Revitalization Act.[260] Legislative history and Congressional policy, as discussed above, support a finding that these provisions reliably indicate Congressional intent regarding state tort law. According to *Cippolone*, Courts should therefore refrain from any discussion of implied preemption.[261] All areas of flight outside the express preemption provisions are open to additional regulation by state courts and legislatures.

The Supreme Court ruled twice on aviation preemption after the en-

253. *See* 42 U.S.C. § 4901 (1999) (defining policy and scope of Act).
254. *Cleveland*, 985 F.2d at 1444.
255. *Id.*
256. Cipollone v. Liggett Group, Inc.,505 U.S. 504 (1992).
257. *Id.* at 517.
258. *Id.*
259. Ann K. Wooster, Annotation, *Construction and Application of § 105 of Airline Deregulation Act (49 U.S.C.A. § 41713), Pertaining to Preemption of Authority Over Prices, Routes, and Services*, 149 A.L.R. FED. 299 (2000). 49 U.S.C. § 1305(a)(1), the preemption provision of the ADA, was recodified without substantive change at 49 U.S.C. § 41713 (1999).
260. McAllister, *supra* note 80, at 302.
261. *Id.*

actment of the Airline Deregulation Act. Both cases indicate a shifting attitude away from *City of Burbank*.

In *Morales v. Trans-World Airlines*,[262] decided during the same term as *Cipollone*, the Court held that the express language of the Airline Deregulation Act conveys upon the courts broad authority to determine what constitutes airline "prices, routes, and services." These areas are exempt from regulation by the states.[263] However, the Court held that areas of flight too remote or peripheral to have a direct effect on airline prices, routes, or services are open to state control.[264] Therefore, the Federal Aviation Act did not entirely preempt state law.

The 1995 case of *Wolens v. United Air Lines, Inc.*,[265] signaled an even stronger surge in favor of the states. Although the holding of *Wolens* was quite narrow, the Court found that breach-of-contract claims were open to resolution under state contract law, even if these actions concerned ticket pricing.[266] Preemption of prices and services does not give airlines the right to break contractual obligations. Airlines, according to the Court, are free to negotiate their own contractual terms, and must expect to be bound by them.[267] In a footnote that became more famous than the opinion itself, however, the Court refused to limit its holding to contract claims. The Court specifically found that the Federal Aviation Act, as amended by the Airline Deregulation Act, would not preempt safety-related personal injury claims relating to airline operations.[268] The Court quoted a brief from the United States as *amicus curiae*, urging that a negligence claim arising out of a plane crash would not be preempted by federal law.[269] Both the Supreme Court and the United States as *amicus curiae* found against preemption.[270] This provides compelling, nearly conclusive evidence that the modern trend is against federal control.

Interestingly, the Third Circuit, in *Abdullah v. American Airlines*, did not even attempt to explain or distinguish *Cipollone* in its finding of preemption. This lack of attention was clearly judicial error. The Supreme Court has ruled that inferior federal courts must follow the rulings of any higher court that has the power to revise or reverse the lower court's

262. Morales v. Trans World Airlines, Inc., 504 U.S. 374, 424 (1992).

263. *Id.*

264. *Id* at 390.

265. American Airlines, Inc. v. Wolens, 513 U.S. 219 (1995).

266. *Id.* at 228-29.

267. *Id.*

268. *Id.* at 231.

269. This brief ran counter to the brief the United States filed in *Cleveland v. Piper*, which urged implied preemption of aircraft design, an aspect of aviation safety. *See Cleveland*, 985 F.2d at 1444.

270. *Wolens*, 513 U.S. at 231.

holding.[271] The Supreme Court has chastised a Circuit Court of Appeals for failing to follow a Supreme Court opinion.[272] The Third Circuit found that *expressio unius*, the core rationale of the *Cipollone* standard,[273] should be "taken with a grain of salt"[274] in the context of aviation law. The Third Circuit should instead take *expressio unius* as binding precedent, as recent Supreme Court authority indicates a continuing shift toward state control over aviation claims.[275]

C. The Trend Is Against Preemption

The First Circuit, in a widely-quoted preemption decision of 1989, proclaimed that "all flight plans lead to Washington."[276] The court found that the regulation of interstate flight and flyers must, of necessity, be "monolithic."[277] The Court feared a "crazyquilt"[278] of state law. Now, however, it appears that the First Circuit is primed to rule against federal preemption.[279] This would reflect the current trend in aviation jurisprudence: federal preemption has been steadily losing ground in the district courts.[280]

In *French v. Pan Am Express, Inc.*,[281] the First Circuit spoke out originally in favor of preemption. The Court found that the Federal Aviation Administration had been entrusted with plenary authority over aerospace safety concerns. The pervasiveness of federal regulation had preempted the field.[282] The Court then ruled that no area is more important to air safety than the qualifications of pilots. Therefore, pilot certification was off limits to state courts.[283]

The First Circuit cited *International Brotherhood of Teamsters*,[284] a

271. Hutto v. Davis, 454 U.S. 370, 374-75 (1982).

272. *Hutto*, 454 U.S. at 374-75 (1982) (stressing that "unless [the Courts] wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts, no matter how misguided the judges of those courts may think it to be.").

273. Cipollone v. Liggett Group, Inc., 505 U.S. 504, 517 (1992).

274. Abdullah v. American Airlines, Inc., 181 F.3d 262 (3d Cir. 1999).

275. *Cipollone*, 505 U.S. at 517.

276. French v. Pan Am Express, Inc., 869 F.2d 1 (1st Cir. 1989).

277. *Id.* at 6.

278. *Id.*

279. *See* Somes v. United Airlines, Inc., 33 F. Supp. 2d 78 (1999).

280. To date, of the five federal Circuits finding preemption of aviation safety regulation, only the Third Circuit seems consistently dedicated to federal preemption. Within the Second Circuit, for example, trial courts have found against preemption of aviation tort claims. *See, e.g.*, Trinidad v. American Airlines, Inc., 932 F. Supp. 521 (S.D.N.Y. 1996). The same is true of the Sixth Circuit. *See, e.g.*, Margolis v. United Airlines, Inc., 811 F. Supp. 318 (D. Mich. 1993).

281. *French*, 869 F.2d at 1.

282. *Id.*, at 6.

283. *Id.* at 5.

284. World Airways, Inc. v. International Bhd. of Teamsters, 578 F.2d 800 (9th Cir. 1978).

Ninth Circuit opinion, as compelling authority.[285] Later, however, the Ninth Circuit reversed itself and found preemption to be limited by to the express provisions of the Airline Deregulation Act.[286] A case pending in the First Circuit, *Somes v. United Airlines, Inc.*,[287] suggests that the First Circuit may not be far behind.

Somes involves a wrongful death claim involving a passenger who suffered a heart attack en route. His life may have been saved had the airliner been equipped with a defibrillator—equipment which is currently carried aboard a number of airlines, but which is not required by the FARs.[288] United moved to dismiss, claiming that federal aviation regulations preempt the field of aircraft safety.[289] The District Court disagreed. In reaching its decision, the District Court held that the regulations in question were "minimum requirements,"[290] and that, "notwithstanding Congress's indication that air safety was of paramount importance . . . neither the Federal Aviation Act nor the regulations promulgated thereunder suggest that it was Congress's 'clear and manifest purpose' to preempt the type of claim Somes asserts."[291] The First Circuit is now poised to rule against preemption.[292]

Similarly, a District Court within the Seventh Circuit recently certified the question whether aviation tort claims have been disposed of through preemption.[293] The court referred to the issue as a "vexed question."[294] From all appearances, Circuit precedent—which supports preemption—will soon be overturned.

In *Bieneman v. City of Chicago*,[295] currently controlling precedent within the Seventh Circuit, the Court held that states could award damages, but only if the defendant breached a federal regulation. The standard of care for the aviation industry was thus entirely determined by

285. *French*, 869 F.2d at 5-6.

286. Gee v. Southwest Airlines, 1997 U.S. App. LEXIS 12266, at *3 (9th Cir. Oct. 10, 1997) (deciding simultaneously four separate cases, each involving preemption under the ADA). The Court found that tort claims involving injury during landing and takeoff were allowed to proceed according to state law.

287. Somes v. United Airlines, Inc., 33 F. Supp. 2d 78 (D. Mass. 1999).

288. *Id.* at 80.

289. *Id.*

290. *Id.* at 87.

291. *Id.*

292. Rodriguez v. American Airlines, Inc., 886 F. Supp. 967 (D.P.R. 1995). In *Rodriguez*, it is interesting to note that a District Court within the First Circuit specifically held that state law governs air crash cases. Neither the ADA or the Federal Aviation Act preempts these types of claims. Perhaps the First Circuit will rely on *Rodriguez* as authority.

293. United Airlines, Inc. v. Mesa Airlines, Inc., 1999 U.S. Dist. LEXIS 16256 (N.D. Ill. Oct. 4, 1999).

294. *Id.* at *4.

295. Bieneman v. City of Chicago, 864 F.2d 463 (7th Cir. 1988).

federal aviation statutes, and no state could award damages against those who abided by them.[296] A state could neither extract money for failing to engage in conduct that the Federal Aviation Administration had considered mandating, but ultimately rejected.[297] The Court held that the Savings Clause of the Federal Aviation Act allows state courts to award damages, but only for a violation of federal rules.[298] Although the Seventh Circuit rendered its opinion in the context of airport noise, the Court held "state courts award damages every day in air crash cases, notwithstanding that federal law preempts the regulation of safety in air travel."[299]

Despite the Seventh Circuit's precedent, trial courts within the Circuit display a different trend. For example, in *O'Hern v. Delta Airlines, Inc.*,[300] the Northern District of Illinois cited both *Cleveland v. Piper* and *Cipollone* as proof that federal laws do not preclude state-law tort claims.[301] Likewise, in *Retzler v. Pratt & Whitney Co.*,[302] the Illinois Court of Appeals for the First District found that state personal injury claims are not preempted by federal statute. If the trend is any indication, the Seventh Circuit will be the first jurisdiction in the new century to join the movement against preemption.

Of all the Circuits, however, the Fifth Circuit endured the most painful metamorphosis from a preemptive to a non-preemptive regime. The Court issued one of the most controversial rulings in favor of preemption, *O'Carroll v. United Air Lines, Inc.*,[303] in which the Court held that Congress had intended to preempt all state common law tort claims related to the airline safety. Pursuant to the precedent set by *O'Carroll*, the Fifth Circuit later found a personal injury claim for injury from falling overhead baggage to be preempted in *Baugh v. American Airlines*.[304]

Five years later, the Fifth Circuit reversed itself in *Hodges v. United Air Lines, Inc.*, and expressly overruled both *O'Carroll* and *Baugh*.[305] The Court found that the Airline Deregulation Act, as an economic deregulation statute, could not have been intended it to bar all claims brought under state tort law. Therefore, state negligence law was not preempted.[306]

296. *Id.* at 472.
297. *Id.*
298. *Id.*
299. *Id.* at 471.
300. O'Henn v. Delta Airlines, Inc., 838 F. Supp. 1264 (N.D. Ill. 1993).
301. *Id.* at 1266-67.
302. Retzler v. Pratt and Whitney Co., 1999 Ill. App. LEXIS 938 (Ill. App. Ct. Dec. 23,1999).
303. O'Carroll v. United Air Lines, Inc., 863 F.2d 11 (5th Cir. 1989).
304. Baugh v. American Airlines, 919 F.2d 693 (5th Cir. 1990).
305. Hodges v. United Air Lines, Inc.,44 F.3d 334 (5th Cir. 1995).
306. *Id.* at 335.

Although aviation cases involve diverse facts, the underlying law is the same. Whether the court is deciding crashes, falling baggage, airport noise, pilot certification, or contract claims, in most jurisdictions states may supplement federal aviation law. The federal government has chosen to preempt two small areas of flight, but where the Act is silent, the states may regulate freely.

D. Analogies to Other Transportation Fields Do Not Apply to Flight

Proponents of federal preemption attempt to analogize aviation law to similar laws governing other forms of transportation.[307] Most notably, courts have implied a certain degree of preemption in both maritime law[308] and automobile design.[309] Although the laws governing each are deceptively similar to aviation, the statutory provisions governing ships and automobiles leave clear grounds of distinction from the aerospace industry.

The National Traffic and Motor Vehicle Safety Act of 1966 possesses a statutory structure resembling the Federal Aviation Act of 1958.[310] This Act gives the federal government authority to adopt Federal Motor Vehicle Safety Standards.[311] The Act also contains a provision stating the preemptive scope of the regulations. It reads as follows:

> "No state or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard . . . which is not identical to the Federal standard."[312]

This Act, like the Federal Aviation Act, contains a savings clause, which provides: "compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law."[313] The courts have held that the Savings Clause preserving common-law liability does not prevent a finding of implied preemption.[314] Courts have limited this finding, however, to state regulations whose terms directly conflict with federal regulations.[315] Thus, although implied preemption has been found in the area of auto-

307. *See, e.g.,* Hand, *supra* note 132 (analogizing federal aviation and maritime statutes). *See also* Shea, *supra* note 59 (analogizing federal aviation and highway safety statutes).
308. Ray v. Atlantic Richfield Co., 435 U.S. 151, 161-65 (1977).
309. Gills v. Ford Motor Co., 829 F. Supp. 894 (W.D. Ky. 1993).
310. 15 U.S.C. §§ 1381-1431 (1988).
311. Cleveland v. Piper Aircraft Corp., 985 F.2d 1438, 1447 (10th Cir. 1993).
312. *Gills*, 829 F. Supp. at 896.
313. *Id.* at 896.
314. *See id.* at 898.
315. *Id.*

mobile design, it is conflict preemption.[316] The aviation dispute involves implied preemption of the entire field.[317] Even in the Motor Vehicle Safety Act context, Courts have held that federal regulations are minimum standards. State common law may require safety measures in addition to those mandated by federal regulations, as long as those regulations do not conflict with the terms of federal law.[318] Drawing an analogy to aviation, FARs are, in the words of Congress, also "minimum standards."[319] States may impose safety standards in addition to the FARs. The states would only be precluded from drafting conflicting regulations.

The field of maritime law also involves a federal regulatory scheme very similar to aviation.[320] The Federal Ports and Waterways Safety Act of 1972 (PWSA) established "comprehensive minimum standards of design, construction, alteration, repair, maintenance, and operation for vessels carrying certain cargoes in bulk."[321] In *Ray v. Atlantic Richfield*, the Supreme Court was not persuaded that statutory language designating these comprehensive regulations as "minimum standards" would allow states to impose additional requirements.[322] The Court held that Congress had intended to establish "uniform national standards."[323] Therefore, the Court invalidated all state attempts to regulate areas covered by the PWSA.

Aviation law is distinguishable. It is true that the Federal Aviation Act, much like the PWSA, designates the federal regulations as "minimum standards,"[324] while creating a comprehensive regulatory scheme. However, the Court's rationale in *Ray* is inapplicable to aviation law. *Ray* does not attempt to address situations in which express preemption provisions exist. The Ports and Waterways Safety Act contains no preemptive language.[325] It leaves the issue to judicial determination. The Federal Aviation Act, in contrast, contains preemption provisions.[326] Therefore, *Cipollone*, not *Ray*, is the applicable precedent. The preemption provisions in the Federal Aviation Act are dispositive. Areas outside the pre-

316. *Id.*

317. *See* discussion *supra* Part II.B.2.

318. *Id.* at 898-99.

319. 49 U.S.C. § 44701 (1999).

320. *See* Hand, *supra* note 132.

321. Ray v. Atlantic Richfield Co., 435 U.S. 151, 161 (1977).

322. *Id.* at 168.

323. *Id.* at 163-65.

324. 49 U.S.C. § 44701 (1999).

325. Richard E. Levy & Robert L. Glicksman, *Judicial Activism and Restraint in the Supreme Court's Environmental Law Decisions,* 42 VAND. L. REV. 343, 398-99 (1989).

326. *See* discussion *supra* Part II.B.2.

emptive language are open to state authority.[327]

Although highway safety and maritime law are facially similar to aerospace law, aviation also presents firm grounds for distinction. No analogy is compelling enough to warrant a finding of complete preemption.

E. Preemption is Unworkable and Against Public Policy

Aviation law is a pursuit of extremes. Any time trouble develops in the air, a dramatic story follows. In a successful case, it is a story of luck, heroism, and triumph at the height of adversity. At its worst, it is a tragedy involving the loss of hundreds of lives. Dramatic facts often lead to huge verdicts in the courtroom,[328] which in turn have repercussions on the industry. Insurance rates and prices take off, while fewer planes leave the ground.[329] Enough high verdicts, and the industry could suffer irreparable damage.[330] Despite concerns raised by aerospace advocates, however, the greater weight of reason indicates that public policy is best served by continuing to apply state doctrine, rather than federal law, to aviation claims.[331]

With such stringent and carefully-crafted federal regulations in place, industry supporters challenge the claim that a jury of non-experts should have the right to impose additional requirements.[332] Federal regulation ensures that flight is safe. Pilots are re-certified and re-examined as often as every six months. Aircraft are inspected, overhauled, and rebuilt by FAA-licensed mechanics as often as every one-hundred hours of flight time. Manufacturers comply with extensive regulations before any individual aircraft ever receives a coveted airworthiness certificate. Before an airplane enters the stream of commerce, it has undergone a rigorous safety certification process.[333] The jury, according to industry supporters, does not have the requisite knowledge to find that the federal certification process —designed by experts—was, in fact, negligent.[334]

Proponents' arguments presume that state tort doctrine exists merely to establish a standard of care. However, state tort law also has other purposes. Among them is placing the burden of loss upon those most deserving to bear it.[335] That, for example, is the theory behind strict lia-

327. *Cleveland*, 985 F.2d at 1447.
328. Edelman, *supra* note 124, at 500.
329. McAllister, *supra* note 80, at 306-08.
330. *Id.*
331. *Id.*
332. Van Wormer, *supra* note 135, at 678-79.
333. Hand, *supra* note 132, at 754-57.
334. John S. Yodice, *Product Liability—A Case Study*; AOPA PILOT, 1993.
335. Escola v. Coca-Cola Bottling Co. of Fresno, 150 P.2d 436, 440-41 (1944).

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bility for design and manufacturing defects. When a product malfunctions, both the victim and the manufacturer may have exercised all due care. Between equally blameless parties, equity favors placing the loss upon the party who placed the product into the stream of commerce.[336] This is true for many reasons. The party placing a product into the stream of commerce is in the better position to inspect the product before it enters the market.[337] The party placing the product into the stream of commerce may also be better situated to bear the loss, since it would likely carry liability insurance.[338] These reasons and others justify placing strict products liability on the manufacturer, even though the manufacturer may have exercised all possible care in the manufacturing process. State products liability, therefore, does not overlap with the function of the Federal Aviation Regulations. The FARs provide a minimum standard of care.[339] State products liability law places responsibility when both parties have acted without culpability.

Res ipsa loquitur, much like products liability law, serves to protect the victims. It shifts the burden of proof in cases where critical evidence may be accessible only to the defendant by requiring the defendant to produce evidence in order to overcome a presumption of fault.[340] Nowhere is evidence more solidly under the defendant's control than in aviation. Under the FAA's Delegation of Authority provision, manufacturers self-certify their own compliance with design standards.[341] If a plane crashes, the National Transportation Safety Board also requests the help of the manufacturer in determining what went wrong.[342] In order to secure a manufacturer's full cooperation, conclusions drawn by the NTSB's investigation are inadmissible in a court of law.[343] Victims and their representatives are specifically excluded from the investigation.[344] All of these official procedures remove critical evidence from the victim's reach, making it difficult to build a case.[345] *Res ipsa loquitur* prevents this lack of proof from defeating a meritorious claim.[346]

336. *Id.*
337. *Id.*
338. *Id.*
339. 49 U.S.C. § 44701(a)(1) (1999).
340. William L. Prosser, THE LAW OF TORTS, 213-14 (4th ed. 1981).
341. Tarnay, *supra* note 63, at 604.
342. Truitt, *supra* note 60, at 602.
343. 49 U.S.C. § 1154 (1999).
344. Truitt, *supra* note 60, at 602.
345. *Id.* at 602.
346. Aviation plaintiffs' attorney Arthur Alan Wolk makes the following observation: "After the accident happens, and the pilot is ashes and the airplane is a pile of junk, and the only people who are invited to attend and participate in the investigation are the manufacturers of the product, how do you expect anybody (except the manufacturer) to know what happened?" Arthur Alan Wolk, *Product Liability: A Plaintiff's Lawyer Responds*, AOPA PILOT, 1993.

Pilots, like victims, will suffer under a preemptive regime. First, pilots themselves are also victims when a design defect brings an aircraft down. Second, pilots suffer an added hardship under FAA enforcement procedure. The FAA, like other administrative law agencies, is not bound to follow American notions of procedural due process.[347] It may, by trickery or whim, suspend or revoke a license to fly.[348] To a commercial pilot, this can be devastating. Thus, the system creates an incentive for pilots to plea bargain for a brief suspension rather than face FAA proceedings.[349] This attempt to save a license, however, could open the pilot to civil liability. In a preemptive jurisdiction, breach of an FAR or other federal statute is dispositive of civil liability.[350] A pilot who admits to a breach in an administrative action—even if only to save his license—may be collaterally estopped from denying this breach in a subsequent civil action.[351] Consequently, his liability would be established before he enters the courtroom, even if a jury might otherwise find that he acted reasonably.

Applying federal Regulations in place of state law can also saddle pilots with liability in other ways. For example, FAR 91.7 makes pilots solely responsible for determining whether the aircraft is in a condition for safe flight.[352] Any crash due to a system failure would indicate that the aircraft was not in a safe condition. The pilot might therefore face

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347. THE KINDER GENTLER FAA - THE MYTH, OR HOW TO PROTECT YOUR PILOT'S LICENSE (Alchemy Video Productions, 1993). *See also* RAMP CHECK (Alchemy Video Productions, 1994).

348. *Id.*

349. Jerry A. Eichenberger, GENERAL AVIATION LAW 95-126, 119 (1997).

350. *See* Abdullah v. American Airlines, Inc., 181 F.3d 363 (3d Cir. 1999).

351. Bowen v. United States, 570 F.2d 1311, 1314 (7th Cir. 1978). Collateral estoppel, unlike *res judicata*, does not require that the parties in both suits be the same. Collateral estoppel is a form of issue preclusion, preventing parties from relitigating an issue that has been adjudicated in a prior action. Unlike *res judicata*, collateral estoppel can be mutual (the parties in both lawsuits are identical), or nonmutual (between parties who were not present in the prior action). Joseph W. Glannon, CIVIL PROCEDURE: EXAMPLES AND EXPLANATIONS 477-93 (3d ed. 1997). Nonmutual collateral estoppel may be invoked offensively by a plaintiff, to preclude a defendant from asserting a defense. *Id.* at 481. It may also be invoked defensively, precluding a plaintiff from raising an issue. *Id.* at 480. The key question is whether the party against whom collateral estoppel is invoked fully litigated, or had the opportunity to fully litigate, an issue in the prior action. Whether administrative law proceedings constitute full adjudication of a pilot's liability is a subject of controversy. *See, e.g.,* David A. Brown, Note, *Collateral Estoppel Effects of Administrative Agency Determinations: Where Should Federal Courts Draw the Line?*, 73 CORNELL L. REV. 817 (1988). In *Bowen*, a pilot who had lost a FAA enforcement proceeding attempted to bring a civil suit against the United States for negligent air traffic control procedures. The United States asserted the pilot's contributory negligence as a complete defense. Since violation of a FAR was negligence per se, and the pilot was found to have violated a FAR in the enforcement proceeding, the pilot was collaterally estopped from denying his negligence in his civil action. Interestingly, mutuality was found to exist in this case, since the United States was the prosecuting party in the enforcement action. In a growing number of jurisdictions, however, mutuality is not necessary. GLANNON at 478.

352. 14 C.F.R. § 91.7 (1999).

liability for breaching FAR 91.7—even if a jury might find that the defect was not apparent during the pilot's preflight inspection. Likewise, FAR 91.3 states that "The pilot-in-command is directly responsible for, and is the final authority as to, the operation of that aircraft."[353] Under this FAR, some jurisdictions have imposed an absolute duty on the pilot, like a the captain of a ship, for the safety of an aircraft and its crew.[354] Other courts have found this FAR too general for the imposition of liability.[355] Nonetheless, if preemption applied, the vague standards contained in aviation statutes would be the only tools available to Courts for determining the reasonableness of a pilot's conduct.

Ironically, federal regulations can also suffer from insufficiency, despite their scope. A finding of preemption rests on the belief that federal regulations are comprehensive, yet, sometimes, the very failure to regulate might in itself be a significant contributing factor in an accident. In these situations, state law is necessary for determining the reasonableness of a defendant's conduct.

The design of the Beech Baron demonstrates the type of situation where a reasonable jury might find federal regulations grossly inadequate. Most aircraft have dual sets of controls. The Baron, however, is equipped with a "throw-over" yoke; a single control wheel for both pilot seats.[356] Only by releasing a hinge pin and pivoting the control arm can the pilot in the opposite seat gain access to the controls.[357] If that one yoke should malfunction, the pilots would have a serious problem. Additionally, in an emergency, it would be impossible for a copilot to assume the controls with any degree of swiftness. In light of the industry standard of equipping aircraft with dual controls, a reasonable jury might find that the "throw-over" yoke is a negligent design— despite the fact that it was approved under FAA regulations.

Backup radios are another example where a jury might find federal regulations are themselves insufficient. Handheld flight radios are readily available, but not yet required equipment under the FARs. If an aircraft's radio fails, a pilot without a backup radio would have to fly without radio communication.[358] This places his life, and the lives of others, at risk. In

353. 14 C.F.R. § 91.3 (2000).

354. One jurisdiction has held: "[T]he pilot-in-command, like a ship's captain, has the ultimate responsibility for the safety of his plane and passengers and must comply with the extensive body of regulations published by the FAA." Cappello v. Duncan Aircraft Sales of Florida, Inc., 79 F.3d 1465, 1469 (6th Cir. 1996). Another jurisdiction has also held the pilot charged with direct responsibility, reasoning that, since the pilot's life is at stake, the duty to assure safety is also his. *See* Brooks v. United States, 695 F.2d 984, 990 (5th Cir. 1983).

355. *See* Ridge, 117 F.3d at 130-31.

356. Melvin M. Belli, MODERN TRIALS 220 (2d ed. 1982).

357. *Id.*

358. Eichenberger, *supra* note 349, at 113.

the same way Judge Learned Hand found the entire boating industry negligent for not carrying radios,[359] a reasonable jury might decide that all pilots should be required to carry handheld radios. In the words of Judge Hand, "[c]ourts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission."[360]

Despite the complexity of preemption doctrine, the problem is no different from any other legal issue. The solution that is the most just, the most practical, and the best balance among all the interests involved is the right answer. A carefully crafted solution should therefore alloy legal theory with common sense. And a consideration of the mechanics of flight and law can lead to only one conclusion: aviation should not be elevated beyond state control.[361]

F. The Federal Aviation Act Preserves the Balance of Federalism

The Federal Aviation Act of 1958 functions much like the Constitution and preserves the carefully-crafted balance of federal and state power. The Act contains provisions delegating authority to the federal government.[362] The Act also has provisions reserving power to the states.[363] In form and function, the Act is federalism set aloft.

The Supremacy Clause of the Constitution conveys power. It renders federal laws "the Supreme Law of the Land, any state laws to the contrary notwithstanding."[364] Much as the Supremacy Clause conveys power, the Tenth Amendment reserves power. Any power not exercised by the federal government lies dormant.[365] When Congressional power lies dormant, state power fills the void.[366] This is the basis of federalism, and the fundamental theory of the preemption debate.

The Federal Aviation Act of 1958 may be viewed from a federalist perspective. The Act contains a broad Sovereignty Clause, which, much like the Supremacy Clause, gives the federal government sweeping, but not yet utilized, power to regulate aviation. It is up to the federal government, however, to exercise this power. When federal power over aviation lies dormant, the Savings Clause reserves state authority over the field.

Federal regulations create an illusion of preemption. The federal

359. The T.J. Hooper, 60 F.2d 737 (2d Cir. 1932).
360. *Id.*
361. *Cleveland*, 985 F.2d at 1444, 1447.
362. 49 U.S.C. § 40103 (1999).
363. 49 U.S.C. § 40120(c) (1999).
364. U.S. CONST. art. VI, cl. 2.
365. May & Ides, *supra* note 14, at 169.
366. *Id.*

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government has enacted thousands of regulations regulating nearly every conceivable feature of air safety. When Congress perceives a need, it enacts more. Congress has, however, expressly declared these regulations – despite their quantity and scope – to be minimum standards.[367] By choice, Congress has circumscribed its own power. States, under the Savings Clause, are free to adopt more stringent standards, either through legislative or common law measures.[368]

There are, in contrast, two occasions when Congress has chosen to exercise its plenary authority over aviation. On both occasions, Congress drafted clear statutory language preempting state power. These occasions produced two separate Acts of Congress: the Airline Deregulation Act of 1978[369] and the General Aviation Revitalization Act of 1994.[370] State law can not contravene the language of these statutes.[371] On the other hand, the Savings Clause reserves the rights of the states to regulate areas outside the scope of these Acts.

The Federal Aviation Act of 1958 reflects federalism onto the microcosmos of aviation law. The basic functioning is the same. The difference is scale. The Federal Aviation Act of 1958 regulates an industry. The Constitution controls a nation.

V. What It All Means

America has chosen *stare decisis* over civil law. The reason is simple: *stare decisis* is more precise. Codified law serves its function well: it provides a baseline of regulation assuring a minimum degree of safety, but it cannot—no matter how comprehensive—foresee every potential hazard. There are some situations where the biggest failure might be a failure to regulate. Common law then provides the tool for carving fact-specific standards of care. Put simply then, common law is common sense. When something goes wrong, a jury should place the burden upon the party deserving the blame. Preemption would still this valuable mechanism of justice.

Payne Stewart's last flight graphically illustrates preemption's harsh ability to remove potentially valid claims from state courts. Because of GARA, an express preemption statute, Stewart's family may be barred from bringing suit against the Learjet parent corporation—even if the air-

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367. 49 U.S.C. § 44701 (1999).

368. *Cleveland*, 985 F.2d at 1447.

369. 49 U.S.C. § 41713 (2000).

370. General Aviation Revitalization Act of 1994, 103 Pub. L. No. 298 (1994).

371. Shaw v. Delta Air Lines, 463 U.S. 85, 95 (1983) (areas of law expressly preempted are forbidden from state regulation).

craft contained a design defect waiting like a time bomb to go off.[372] Imagine if more than one hundred families—for instance, the families of the victims of USAir Flight 427[373]—were barred from bringing suit merely because they could not piece together enough chips of a crashed airplane to prove by summary judgment standards that a manufacturer breached a Federal design regulation. Imagine the same scenario in plane wreck after plane wreck, when family after family goes uncompensated. Or imagine a pilot, pleading to a breach of violations in order to save his license from patently unfair administrative law proceedings, later estopped from denying civil liability for an injury he may not have caused.[374] These scenes could become common in a preemptive regime.

State law may be harsh. State doctrine may contain inequities. However, it is the province of the Courts to change courtroom procedure. Aviation is no longer an ultrahazardous activity. In fact, due to the scope of federal regulation, aviation is one of the safest modes of transportation. If negligence per se and *res ipsa loquitur*—state doctrines forged in the barnstorming age—are no longer fair, it is up to state courts to decline to apply them. It is unwise to replace them completely with federal law.

Elevating the skill of the aviation bar provides a potential solution to the perceived inequities of the Courtroom. The "technical problem"[375] of allowing juries to find against aviation's corporations might result more from faulty lawyering than from any fault of state law.[376] It is the job of the aviation trial lawyer to make the jury understand both the breadth and limits of federal regulation and apply it properly to the conduct of the Defendant. For this reason, the field of aviation law, much like the field of patent law, demands a certain degree of expertise. Piloting a plane is not something many people do.[377] Chances are, a typical panel will not contain jury members with flight experience. It is the duty of an aviation attorney to make the jury understand the duties and responsibilities involved. In order to do so, aviation lawyers must be intimately familiar with aeronautics. In short, aviation lawyers should be pilots.[378]

372. Staff Reports, *Law May Prohibit Stewart Family From Filing Lawsuit*, THE ORLANDO SENTINEL, November 8, 1999, at C3.

373. *See* Morrison, *supra* note 1, at 1A.

374. *See* discussion *supra* note 354.

375. *See* Truitt, *supra* note 60, at 579.

376. *Id.* at 587.

377. Private Pilots comprise only about 0.003 percent of the United States population. *See* Appel, *supra* note 103, at 416.

378. Daniel Cathcart, a proponent of the "expert" advocate in aviation cases, proposes the following qualifications for an aviation litigator: 1) he should be a seasoned trial lawyer; 2) he should be an experienced pilot whose certificates and ratings have at least qualified him for flight under instrument flight rules and procedures. Piloting experience will provide the lawyer with

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Expert trial attorneys alone will not end the debate, however. Plaintiffs have a powerful lobby in the American Trial Lawyer's Association.[379] Defendants have the General Aviation Manufacturing Association, the airline industry, and other interest groups.[380] A host of areas, such as aircraft safety, pilot design, and airport noise, depend on the outcome of the debate.

The Supreme Court must grant certiorari if the issue is to resolve. Until the Supreme Court rules, preemption itself will remain a patchwork of state authority. The preemption issue will not fly away on its own, and only Supreme Court action can bring the Circuit Courts back into formation.

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the necessary vocabulary, jargon, and buzz words involved in aviation. He will be familiar with current procedures and techniques and will have a practical knowledge of the Federal Aviation Regulations and their application. *Quoted in* Truitt, *supra* note 60, at 587.

379. Shea, *supra* note 59, at 781-83.

380. Robert F. Hedrick, *A Close and Critical Analysis of the New General Aviation Revitalization Act*, 62 J. AIR L. & COM. 385, 386-87 (1996).

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