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# Can the Legal Eagles Use the Ageless Preemption Doctrine to Keep American Aviators Soaring above the Clouds and into the Twenty-First Century

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# CAN THE LEGAL EAGLES USE THE AGELESS PREEMPTION DOCTRINE TO KEEP AMERICAN AVIATORS SOARING ABOVE THE CLOUDS AND INTO THE TWENTY-FIRST CENTURY?

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## I. INTRODUCTION

AMERICA WITNESSED such an explosion in litigation concerning aviation matters that the courts have heard and decided more aviation cases within the last decade than at any other time during the history of the Nation. Many courts grappled with issues surrounding the express preemption provision within one of the congressional aviation acts. The cursory nature with which opposing sides have presented such cases has led to conflicting results and a confused state of aviation legal policy. The vehemence with which parties have argued, however, serves notice of the underlying rivalry for the, as yet, unresolved control of the aviation subject.

What place does the unfettered aviation subject serve, if any, within the confines of the American federalist system? Want, or fear, of an answer prompts fierce debates about the scope of preemption, for preemption historically represents one of the doctrinal means by which the American judiciary balances and maintains the powers within the system, and therefore creates authority for, and over, each subject part of the Nation.

## II. ORIGINATION AND DEVELOPMENT OF THE DOCTRINE OF PREEMPTION

### A. PRIOR TO THE TWENTIETH CENTURY

The drafters of the Constitution of the United States of America envisioned a system of institutions capable of governing vast amounts of diverse entities, individuals, territories, and concepts. Just as important, the drafters intended to restrain these same institutions from dominating or suppressing the actions, innovations, and growth of those chosen to be governed by this system. From these premises the drafters wrote a constitution which created a new and unique federalist system.

*Black's Law Dictionary* defines the United States federal government as that "system of government administered in a nation formed by the *union* or confederation of several *independent* states."[1]

> In a *federal government*, on the other hand, [in contrast to the ineffectual Confederation] the allied states form a union-not . . . to destroy their separate organization . . . but so that the central power is erected into a true national government, possessing sovereignty . . . while the administration of national affairs is directed, and its effects felt, not by the separate states deliberating as units, but by the people of all, in their collective capacity, as citizens of the nation.[2]

The drafters of the Constitution sought to incorporate all of the separate and independent parts necessary to form a nation into a whole system greater than the sum of its individual parts.[3] This whole system consisted of a Union powerful enough to both effectively govern and simultaneously protect the interests of all of its parts (federal entities, states, individuals, business entities, and other groups) without destroying the individuality of each part. The continuity and effectiveness of such a system depended on mechanisms built into it which were capable of balancing the powers of each entity so that no one governmental institution interfered with the sphere of power of the others.[4]

From its inception, the United States Supreme Court designated itself as the fulcrum of this crucial balancing act.[5] The

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[1] BLACK'S LAW DICTIONARY 611 (6th ed. 1990) (emphasis added).

[2] *Id.*

[3] *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824); M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

[4] *Gibbons*, 22 U.S. (9 Wheat.) at 1; *M'Culloch*, 17 U.S. (4 Wheat.) at 316.

[5] *M'Culloch*, 17 U.S. (4 Wheat.) at 400-01.

Supreme Court decided early on that the federal and state governments represented two of the most necessary and independent spheres of power in the system. Thus, the Supreme Court immediately began to balance those institutions' respective powers in the interests of the Union and its various entities.[6]

To accomplish some of these acts, the Supreme Court developed what became known as the preemption doctrine. With the use of this doctrine to decide the outcome of case issues, the Supreme Court substantiated the power and authority of the whole Union in relation to the states' rights. However, the Court's decisions also assured the federal and state institutions of their respective and separate spheres of power within the entirety of the system and delineated the scope thereof.

What was the purpose and appropriate use of the preemption doctrine? Shortly after its inception, other entities, principally the states, challenged the very existence of the Union as a separate entity with supreme authority within its own sphere. At least in the early half of the nineteenth century, the Supreme Court used its constitutional power to clearly establish the validity of a Union and the supremacy of its federal laws and regulations.[7]

> [T]hese States . . . . [have] said, that they were sovereign . . . . But, when these allied sovereigns converted their league into a government . . . the whole character in which the States appear, underwent a change, the extent of which must be determined by a fair consideration of the instrument by which that change was effected.
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> . . . .
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> We know of no rule for construing the extent of such powers, other than is given by the language of the instrument which confers them, taken in connection with the purposes for which they were conferred.[8]

The Union was made by the people and bound the states: "But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist."[9] The powers of the federal government must be determined from the *nature* of the *purpose* of the entire Constitution. "The nullity of any act,

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[6] *See Gibbons*, 22 U.S. (9 Wheat.) at 1; *M'Culloch*, 17 U.S. (4 Wheat.) at 316.

[7] *Gibbons*, 22 U.S. (9 Wheat.) at 1; *M'Culloch*, 17 U.S. (4 Wheat.) at 316.

[8] *Gibbons*, 22 U.S. (9 Wheat.) at 187, 189.

[9] *M'Culloch*, 17 U.S. (4 Wheat.) at 405.

*inconsistent* with the constitution, is produced by the declaration that the constitution is the supreme law."[10] As Chief Justice Marshall warned, "*[W]e must never forget that it is a constitution we are expounding.*"[11]

In the Union's infancy, the Supreme Court intended to clearly establish that the federal and state governments occupied two separate spheres of power. Should the states' use or effect of its power conflict with, or create an incompatibility with, the nature and purpose of enumerated federal powers at any time, the federal law voided the states' use of its powers. Thus, early Supreme Court decisions established the supremacy of the Union created by the Constitution.[12]

Supreme Court decisions acknowledged the states as institutions with a separate sphere of power. The states were entitled to regulate the entities within their sovereignty except upon subjects covered by the enumerated powers of the federal government. Chief Justice Marshall allowed that the states could regulate some of the same subjects as the federal government. Nevertheless, the states did not share powers concurrently with the federal government. Insofar as the federal government maintained and exercised its valid authority, if, and when, a state regulation came into conflict with those of its federal counterpart, the federal laws and regulations took precedence. So did the Union itself take precedence within the concept of the greater whole acting for the good of all of its parts.[13]

The breadth of the preemptive power presented as many initial controversies as the question of the Union's validity and supremacy. Initially, the Supreme Court clearly intended that federal law preempted a state regulation in any form which threatened the supremacy of the Union or touched the Nation's interests.[14]

The Supreme Court determined the scope of federal preemption, and thereby the breadth of federal power, by the meaning of the words of the laws or issues in controversy.[15] Chief Justice Marshall repeatedly emphasized that the meaning of words must be used "in that sense which common usage justifies."[16] The

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[10] *Gibbons*, 22 U.S. (9 Wheat.) at 210-11 (emphasis added).
[11] *M'Culloch*, 17 U.S. (4 Wheat.) at 407 (emphasis added).
[12] *See Gibbons*, 22 U.S. (9 Wheat.) at 1; *M'Culloch*, 17 U.S. (4 Wheat.) at 316.
[13] *See Gibbons*, 22 U.S. (9 Wheat.) at 1; *M'Culloch*, 17 U.S. (4 Wheat.) at 316.
[14] *See Gibbons*, 22 U.S. (9 Wheat.) at 1; *M'Culloch*, 17 U.S. (4 Wheat.) at 316.
[15] *See Gibbons*, 22 U.S. (9 Wheat.) at 1; *M'Culloch*, 17 U.S. (4 Wheat.) at 316.
[16] *M'Culloch*, 17 U.S. (4 Wheat.) at 414.

words must also be used with the connotation of construing the meaning and purpose of the entire Constitution.[17]

If, in the Court's reading, any subject of state regulation would require national uniformity, it would fall under the supremacy of the federal government. That supremacy removed any regulation repugnant thereto. So long as this country needed to validate its very existence, the Supreme Court consistently used the doctrine of preemption to guarantee the federal government's expansive powers over a wide range of subjects, and particularly over those which exhibited interstate characteristics.[18]

As the existence and stability of the Union became an accepted reality the need to restrain, rather than protect, its growth and power became an object of concern for many parts of the system. The desire for individual autonomy blurred the lines between the powers necessary to maintain uniformity of subjects among the various parts of the federalist system. By the mid-nineteenth century, Supreme Court decisions reflected the Justices' internal dissensions, and thereafter consistent problems with defining the breadth of preemption. This dissension also generated a panoply of words in an attempt to more precisely define and limit the scope of federal power.

> Now the power to regulate commerce, embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question, as imperatively demanding that diversity, which alone can meet the local necessities of navigation.
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> Either absolutely to affirm, or deny that the nature of this power requires exclusive legislation by Congress, is to lose sight of the nature of the subjects of this power, and to assert concerning all of them, what is really applicable but to a part.[19]

*Plumley v. Massachusetts*,[20] decided in the latter half of the nineteenth century, glaringly indicated the Supreme Court's growing struggle to construct rules by which courts could determine the breadth of preemption, and thus, indirectly, define the power of the federal government over all of the entities within the governmental system.

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[17] *Id.* at 415-21.

[18] *See Gibbons*, 22 U.S. (9 Wheat.) at 1; *M'Culloch*, 17 U.S. (4 Wheat.) at 316.

[19] Cooley v. Board of Wardens, 53 U.S. (12 How.) 299, 319 (1851).

[20] 155 U.S. 461 (1894).

The majority decided:

> We are not unmindful of the fact—indeed, this court has often had occasion to observe—that the acknowledged power of the States to protect the morals, the health, and safety of their people by appropriate legislation, sometimes touches, in its exercise, the line separating the respective domains of national and state authority. But in view of the complex system of government which exists in this country, . . . "the rare and difficult scheme of one general government, whose action extends over the whole, but which possesses only certain enumerated powers, and of numerous state governments, which retain and exercise all powers not delegated to the Union," the judiciary of the United States should not strike down a legislative enactment of a State—especially if it has direct connection with the social order, the health, and the morals of its people—unless such legislation plainly and palpably violates some right granted or secured by the national Constitution or encroaches upon the authority delegated to the United States for the attainment of objects of national concern.[21]

Dissenting, Justice Fuller argued:

> The power vested in Congress to regulate commerce among the several states is the power to prescribe the rule by which that commerce is to be governed, and, as that commerce is national in its character and must be governed by a uniform system, so long as Congress does not pass any law to regulate it, or allowing the States to do so, it thereby indicates its will that such commerce shall be free and untrammelled. Manifestly, whenever state legislation comes in conflict with that will, it must give way.
>
> In whatever language such legislation may be framed, its purpose must be determined by its natural and reasonable effect, and the presumption that it was enacted in good faith cannot control the determination of the question whether it is or is not repugnant to the Constitution of the United States. . . .
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> . . . .
>
> I deny that a state may exclude from commerce legitimate subjects of commercial dealings because of the possibility that their appearance may deceive purchasers in regard to their qualities.[22]

As indicated by *Plumley*, by the end of the nineteenth century, Supreme Court decisions had failed to resolve the issues concerning the nature and scope of the federal government's preemptive powers. The Court continually attempted to shape, reshape, and simultaneously preserve, according to the Consti-

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[21] *Plumley*, 155 U.S. at 479-80.

[22] *Id.* at 480-81.

tution, the separate federal and state spheres of power as the Nation and subjects changed with time. Yet, the Court's conduct reflected the original drafters' intent that it should constantly balance federal and state powers to protect the interests of all of the parts of the federalist system.

### B. The First Half of the Twentieth Century

In the first half of the twentieth century the nation experienced a technological and industrial revolution. During this time, Congress passed massive amounts of legislation and based some of it on the federal government's expansive constitutional powers to control interstate commerce. Congress intended its actions to protect the new and fledgling industries and businesses of the twentieth century. Yet, the passage of such legislation dramatically increased the powers of Congress.[23]

The Supreme Court frequently used the preemption doctrine to maintain the balance and parameters between the various parts of the federalist system in this rapidly changing national scenario. The Court addressed many and varied controversies concerning the breadth of that power. However, initially, so long as the Court conceptionalized the facts and issues in a case to touch the subject of interstate commerce, the Court granted the federal government exclusive power.[24] "The power of Congress over interstate commerce 'is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution.' That power can neither be enlarged nor diminished by the exercise or non-exercise of state power."[25] More accurately: "[T]he question is whether the state interest is outweighed by a national interest in the unhampered operation of interstate commerce."[26]

Also:

> Congress of course could have "circumscribed its regulations" so as to occupy a limited field. But so far as it did legislate, the exclusive effect . . . did not relate merely to details of the statute and the penalties it imposed, but extended to the whole subject . . . . The States thereafter could not legislate so as to require

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[23] *See* H. Brogan, The Penguin History of the United States of America (1990).

[24] Southern Pac. Co. v. Arizona, 325 U.S. 761, 781-84 (1945); United States v. Darby, 312 U.S. 100, 114 (1941); Southern Ry. Co. v. Railroad Comm'n, 236 U.S. 439, 446-47 (1915); McDermott v. Wisconsin, 228 U.S. 115, 137 (1913).

[25] *Darby*, 312 U.S. at 114 (citation omitted).

[26] California v. Zook, 336 U.S. 725, 728 (1949).

> greater or less or different equipment; nor could they punish by imposing greater or less or different penalties. . . . "In such a case, the legislation of Congress, in what it does prescribe, manifestly indicates that it does not intend that there shall be any farther [sic] legislation to act upon the subject-matter. . . . [T]he will of Congress upon the *whole subject* is as clearly established by what it had not declared, as by what it has expressed."[27]

The Court even voided safety measures taken by states which regulated the structure, design, equipment, or procedure of any interstate railway operation because Congress expressed the need for economic efficiency and uniform rules throughout that business to guarantee its permanency.[28]

The Court had clearly established in its earliest decisions the Union's exclusive power over the entire subject of interstate commerce.[29] In the early half of the twentieth century, Congress, with the support of the Supreme Court, used that power to protect other entities at the expense of the individual state.[30] Such conduct constituted a subtle, radical new shift in the balance of essential power elements. Concern over this trend caused Justice Stone, in a strongly worded dissent in *Hines v. Davidowitz* to admonish the Court: "At a time when the exercise of the *federal power* is being rapidly expanded through *Congressional action*, it is difficult to overstate the importance of safeguarding against such *diminution* of state power . . . ."[31]

Originally, the Supreme Court used the preemption doctrine to establish the supremacy of the Union based on the Constitution. With the massive twentieth century changes, the Court found it increasingly necessary to determine the scope of the supremacy of only one part of the Union's federal government, the Congress. Additionally, the Court, more often than not, based such interpretations on legislative, rather than constitutional, wording.

No longer was the Court "simply" expounding a constitution. Gone were the days when the Court acted as the voice of the Constitution to arbitrate between competing federal and state

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[27] *Southern Ry. Co.*, 236 U.S. at 446-47 (citation omitted) (emphasis added).

[28] *Southern Pac. Co.*, 325 U.S. at 781-84.

[29] *See Southern Pac. Co.*, 325 U.S. at 761; *Darby*, 312 U.S. at 100; *Southern Ry. Co.*, 236 U.S. at 439; *McDermott*, 228 U.S. at 115; *Gibbons*, 22 U.S. (9 Wheat.) at 1; *M'Culloch*, 17 U.S. (4 Wheat.) at 316.

[30] *Southern Pac. Co.*, 325 U.S. at 761; *Darby*, 312 U.S. at 100; *Southern Ry. Co.*, 236 U.S. at 439; *McDermott*, 228 U.S. at 115.

[31] 312 U.S. 52, 75 (1941) (emphasis added).

powers to preserve the Union. Increasingly, the changes caused by the new and burgeoning twentieth century businesses and technological entities forced the Court to interpret a morass of often poorly worded congressional legislation to balance various powers, including these new businesses, in a conceptually different and changing nation.

Subtly, the Court established the precedent which everyone thereafter conclusively accepted—that the validity of a state statute under the Supremacy Clause depended on the intent of Congress rather than the purpose of the Constitution. Such an interpretation has impaired the Court's use of the preemption doctrine in the twentieth century.

The shift in emphasis to congressional power within the federal sphere forced the Supreme Court to add another panoply of words to reshape, redefine, and further delineate the limits of the preemption doctrine. The Court remained always conscious of the need to assuage the states' concern over the expanding powers of the several branches of the federal government and expressly so stipulated in most cases. Nevertheless, during this era, the Court generally used the preemption doctrine to support Congress's expanding power.

In *Rice v. Santa Fe Elevator Corp.*, Justice Douglas stated that congressional statutes could not preempt laws over subjects covered by the states' historic police powers *unless* Congress made its intentions to so do "clear and manifest."[32] Congress made its intent clear and manifest only when the state statutes irreconcilably conflicted with federal objectives; supplemented a federally pervaded subject; regulated the same federally dominated subject; or imposed the same obligations as federal law on the subject.[33]

Despite the assumption that the state might continue to regulate all of the subjects concerning the safety and welfare of its citizens within state borders regardless of congressional legislation on the matters, in this case, the Court concluded:

> [The issue] is whether the matter on which the State asserts the right to act is in any way regulated by the Federal Act. If it is, the federal scheme prevails though it is a more modest, less pervasive regulatory plan than that of the State. . . . The provisions of Illi-

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[32] 331 U.S. 218, 230, *rev'd*, 331 U.S. 247 (1947).

[33] *Id.* at 230.

> nois law on those subjects must therefore give way by virtue of the Supremacy Clause.[34]

In another case decided the same year, and with similar expostulations and results, Justice Frankfurter divulged the Court's modus operandi during this climate of shifting powers:

> A shrewd critic has thus expressed the considerations that in the past have often lain below the surface of merely doctrinal applications: "Formally the enterprise is one of interpretation of the Act of Congress to discover its scope. Actually it is often the enterprise of reaching a judgment whether the situation is so adequately handled by national prescription that the impediment of further state requirements is to be deemed a bane rather than a blessing."[35]

During this era, the Supreme Court continuously, case by case, reshaped and redefined the boundaries of the preemption doctrine to preserve the Union, the federalist system, and itself within a changing system. However, the other federal and state courts often found themselves unable to apply such an esoteric and shifting doctrine with any degree of certainty to the specific cases before their courts. Some of the lower courts thus used the preemption doctrine with such unexplained inconsistency as to wreak havoc on the very institutions the Court sought to preserve.

### C. The Use of the Preemption Doctrine in Aviation Matters in the Early Twentieth Century

Through the clouds, into the clear blue sky, onto the power scene of the twentieth century's expanding technology, and therefore, inevitably onto the Supreme Court's lap, burst airplanes and the aviation industry. Would it be a blessing or a bane?

The actuality of the concept of aviation burst upon a twentieth century world which had never anticipated such a reality within its power structures. The world witnessed the awesome and boundless capabilities of this industry during both World Wars. No sovereign power intended to obstruct the growth of,

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[34] *Id.* at 236.

[35] Bethlehem Steel Co. v. New York State Labor Relations Bd., 330 U.S. 767, 783 (1947) (Frankfurter, J., writing in a separate opinion in which Justices Murphy and Rutledge joined) (citing Thomas R. Powell, *Current Conflicts Between the Commerce Clause and State Police Power*, 12 Minn. L. Rev. 607, 607 (1928)).

or relinquish control of, such an entity which might even threaten nations' very existences.[36]

From the infancy of the aviation industry, the federal government of the United States left little doubt that the Nation intended, especially through the sphere of broad and comprehensive congressional legislation, to control all of the power of the aviation industry. Yet, the means by which the Nation could control an unknown and unprecedented entity posed dilemmas for governments.

On one hand, the federal government intended to establish its preeminence in regulation over the entire aviation field, to encourage and protect the rapid growth of that industry, and thereby solidify its own power in international matters and within the federalist system. On the other hand, the expansion of federal power and precedents to control an essentially uncontrollable and boundless entity threatened the balance of sovereigns' powers within the federalist system, and perhaps the very existence of the concept of federalism.[37]

Congressional passage of the Civil Aeronautics Act of 1938 (CAA), and the subsequent Supreme Court decisions, clearly established that aircrafts would have unchallenged authority to the clear blue skies.[38] The Court, in *United States v. Causby*, quickly made precedential law to such effect:

> The air is a public highway . . . . To recognize . . . private claims to the airspace would clog these highways, seriously interfere with their control and development in the public interest, and transfer into private ownership that to which only the public has a just claim.
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> . . . .
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> The airspace, apart from the immediate reaches above the land, is part of the public domain. . . . Flights over private land are not a taking, unless they are so low and so frequent as to be a

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[36] Frederick A. Ballard, *Federal Regulation of Aviation*, 60 HARV. L. REV. 1235, 1252 (1947). "It was by 1938 generally agreed that federal legislation to the utmost limits of the Constitution was desirable; that it should be based upon the commerce clause; that it should cover both commercial and private flying; and that it should include both economic and safety regulation." *Id.*

[37] *See* United States v. Causby, 328 U.S. 256, 258-68 (1946); Northwest Airlines, Inc. v. Minnesota, 322 U.S. 292, 294-301 (1944).

[38] *See* Civil Aeronautics Act of 1938, 49 U.S.C.A. §§ 401-681 (West 1940) (repealed 1958) [hereinafter CAA]. The federal government's complete control over civil aviation preempted any other regulations' applicability to such issues. *Id.*

> direct and immediate interference with the enjoyment and use of the land.[39]

Justice Black dissented in *Causby* because he thought that the Constitution entrusted Congress with full control of navigable airspace and not just that space above the regulated minimum safe altitude. Thus, no flight constituted a compensable taking.[40] Justice Black warned the Court against introducing any old concepts of private ownership of land into the field of air regulation, and thus, interfering with Congress's powers to develop the necessary new and vital solutions to the original problems which must arise in the aviation industry.[41]

Indeed, for a Justice on the Supreme Court of the United States of America to articulate the position that a mere business, the aviation industry, constituted such a vital component in the Nation's security system, and to the existence of the federalist system, that its preservation and control by the *federal* government justified eliminating the precedential concepts of land ownership (a foundational concept of the Constitution and most other governments) in pursuit thereof, represented a most surprising development in Constitutional law.

Yet, shortly after *Causby*, the majority of Justices, in *Chicago & Southern Air Lines v. Waterman Steamship Corp.*,[42] stated:

> However useful parallels with older forms of transit may be in adjudicating private rights, we see no reason why the efforts of the Congress to foster and regulate development of a *revolutionary* commerce that operates in three dimensions should be judicially circumscribed with analogies taken over from two-dimensional transit.[43]

Indeed, based on the original CAA and subsequent similar regulations, the Supreme Court established unassailable precedents which gave Congress exclusive jurisdiction over air flight, and over any incident applicable to air flight. Such all encompassing precedents seemed to have completely resolved any issues of control over the new technology. But such a radical shift

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[39] *Causby*, 328 U.S. at 261, 266. *See* Civil Aeronautics Act of 1958, 49 U.S.C.A. §§ 401-682 (West 1940) (repealed 1958) ("There is hereby recognized and declared to exist in behalf of any citizen of the United States a public right of freedom of transit in air commerce through the navigable air space of the United States.").

[40] *Causby*, 328 U.S. at 271.

[41] *Id.* at 274-75.

[42] 333 U.S. 103 (1948).

[43] *Id.* at 108 (emphasis added).

in the balance of powers in a system predicated on balance created problems.

In *Northwest Airlines, Inc. v. Minnesota*, many of the Justices eloquently expressed their concerns about the unknown and possibly uncontrollable evolutionary aspects of such a powerful technology as aviation.[44] The Justices worried about the capability, or lack thereof, of possibly outdated systems to assimilate revolutionary concepts, and about the Court's ability, or lack thereof, to resolve the inevitable conflicts connected to them.[45]

Faced with controversies about the economic or spatial growth of the aviation industry in its infancy, the federal government provided "blanket" protection for the entity, and asserted dominant power over it. When faced with the reality that this industry could threaten its sovereignty, however, the federal government made significant choices to balance the power between sovereigns which affected the aviation industry and the Union forever.

In *Northwest Airlines*, the Supreme Court addressed one of the many controversies surrounding what, how, and when entities could tax a subject which constantly moved through the air.[46] Originally, the Supreme Court definitively granted exclusive control to Congress over the Nation's airspace and all aircraft flying through it. The Court thereby indirectly protected aviator's rights to operate according to congressional statute at the expense of others.[47]

The Court reexamined its expansive position when confronted with an issue of the respective sovereigns' rights to *tax* the aviation industry. In *Northwest Airlines*, the State of Minnesota asserted its right to tax all of the personal property of Northwest Airlines.[48] The airline company objected to being taxed on several legal grounds, including its right to protection under the Commerce Clause.[49]

Since the origination of the Nation, the Supreme Court recognized that a sovereign's power to tax, and thereby acquire revenue, constituted one necessary element of any sovereign's existence.[50] The Supreme Court realized that failure to validate

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[44] 322 U.S. 292 (1944).
[45] *Id.* at 300.
[46] *Id.* at 292.
[47] *Causby*, 328 U.S. at 256.
[48] *Northwest Airlines*, 322 U.S. at 292-94.
[49] *Id.*
[50] *See Gibbons*, 22 U.S. (9 Wheat.) at 1; *M'Culloch*, 17 U.S. (4 Wheat.) at 316.

Congress's power to tax the aviation industry threatened federal sovereignty at the expense of one business entity within the system. Also, failure to readjust the balance of sovereign powers within the system, in relation to this new industry, threatened the sovereignty of all spheres.

Thus, the Court concluded that the State of Minnesota could tax all of the personal property of Northwest Airlines, even that which flew elsewhere, because the airline company's principal place of corporate business resided in Minnesota.[51]

> The continuous protection by a State other than the domiciliary State—that is, protection throughout the tax year—has furnished the constitutional basis for tax apportionment in these interstate commerce situations, and it is on that basis that the tax laws have been framed and administered.
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> . . . .
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> Although a part of the taxing systems of this country, the rule of apportionment is beset with friction, waste and difficulties, but at all events it grew out of, and has established itself in regard to, land commerce. To what extent it should be carried over to the totally new problems presented by the very different modes of transportation and communication that the airplane and the radio have already introduced, let alone the still more subtle and complicated technological facilities that are on the horizon, raises questions that we ought not to anticipate; certainly we ought not to embarrass the future by judicial answers which at best can deal only in a truncated way with problems sufficiently difficult even for legislative statesmanship. . . .
>
> But not to subject property that has no locality other than the State of its owner's domicile to taxation there would free such floating property from taxation everywhere. And . . . neither the Commerce Clause nor the Fourteenth Amendment affords such constitutional immunity.
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> Each new means of interstate transportation and communication has engendered controversy regarding the taxing powers of the States *inter se* and as between the States and the Federal Government. Such controversies and some conflict and confusion are inevitable under a federal system. They have long been the source of difficulty and dissatisfaction for us.[52]

Powers under the Commerce Clause had never entirely taken precedence over constitutional authority for sovereign rights of taxation.[53] The Court refused to establish any such new prece-

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[51] *Northwest Airlines*, 322 U.S. at 299.

[52] *Id.* at 297, 300-01 (citations omitted).

[53] *See Gibbons*, 22 U.S. (9 Wheat.) at 1; *M'Culloch*, 17 U.S. (4 Wheat.) at 316.

dents to protect the aviation industry. These cases caused the drawing of lines. Thereafter, the Court no longer used its preemptive powers to completely shield the aviation industry from the control of other entities in the system.

However, various Justices' statements in *Northwest Airlines* provided a further hint of the anticipated struggles by various entities to reconcile the sovereigns' control over this new and unique aviation technology. According to Justice Jackson's concurring opinion:

> Students of our legal evolution know how this Court interpreted the commerce clause of the Constitution to lift navigable waters of the United States out of local controls and into the domain of federal control. Air as an element in which to navigate is even more inevitably federalized by the commerce clause than is navigable water. Local exactions and barriers to free transit in the air would neutralize its *indifference to space and its conquest of time.*
>
> Congress has recognized the national responsibility for regulating air commerce. Federal control is intensive and exclusive. Planes do not wander about in the 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. It takes off only by instruction from the control tower, it travels on prescribed beams, it may be diverted from its intended landing, and it obeys signals and orders. Its privileges, rights, and protection, so far as transit is concerned, it owes to the Federal Government alone and not to any state government.
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> *Congress has not extended its protection and control to the field of taxation,* although I take it no one denies that constitutionally it may do so. . . . *Our function* is to determine what rule governs in the absence of such legislative enactment.[54]

The Court established that neither the states nor any individuals possessed sovereignty over the airspace. The Court denied the states any rights to tax aircraft in flight. However, the Court refused to completely resolve the controversy over the states' sovereignty to tax aviation matters until Congress legislated on the matter.[55] Justice Black noted, "I do not think we can derive from decisional law a satisfactory adjustment of the conflicting

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[54] *Northwest Airlines*, 322 U.S. at 303-04 (citations omitted) (emphasis added).

[55] *Id.* at 301; *see id.* at 301-02 (Black, J., concurring); *id.* at 302-08 (Jackson, J., concurring).

needs of the nation for free air commerce and the natural desire of localities to have revenue from the business that goes on about them."[56]

While struggling to resolve the novel problems caused by the ascension of aviation technology upon the national scene, the courts failed to grasp the significance of the fact that, by the twentieth century, the courts' conclusions depended on their interpretations of Congressional intent, rather than the Nation's or entities' needs.

At the inception of the Union, the courts interpreted constitutional purposes and used preemptive powers to establish uniform and consistent bodies of law on certain subjects such as ships sailing through the seas.[57] By the mid-twentieth century, and at the time of the advent of aircraft sailing through the air, the courts instead interpreted Congress's intent to provide uniform regulation over certain subjects.[58] The courts seem not to have recognized this subtle shift in the way courts now balanced power and used preemption.

Yet, to attempt to enact uniform and comprehensive law over such a vast field as aviation by interpretation of congressional legislation, rather than constitutional purpose, regardless of the language applied, inevitably led to piecemeal, flawed, and uncertain divisions of power over the entity. This ad hoc approach has been to the detriment of the aviation industry, as demonstrated by some of the related twentieth century decisions.

## III. THE APPLICATION OF AN EVOLVING PREEMPTION DOCTRINE TO LITIGATION SURROUNDING AIR COMMERCE IN THE MID-TWENTIETH CENTURY

### A. The United States Supreme Court Developed a General Rule for the Preemption Doctrine Based on Congressional Intent

In the mid-twentieth century, the United States Supreme Court posited a general rule for the use of preemption:

> The *test* of whether both federal and state regulations may operate, or the state regulation must give way, is whether both regulations can be enforced without impairing the federal

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[56] *Id.* at 307 (Jackson, J., concurring).

[57] *See Gibbons*, 22 U.S. (9 Wheat.) at 1.

[58] *See generally Rice*, 331 U.S. at 218, 230; *Bethlehem Steel Co.*, 330 U.S. at 767; *Causby*, 328 U.S. at 256; *Northwest Airlines*, 322 U.S. at 292.

> superintendence of the field, not whether they are aimed at similar or different objectives. . . .
>
> The maturity of avocados seems to be an inherently unlikely candidate for exclusive federal regulation.[59]

A legislative history replete with words concerning *uniformity* would manifest Congress's intent to preempt state law on a subject. Such legislative history did not exist in this case in contrast to findings in others.[60]

The Court found that it could validly justify and balance the supremacy of federal power over a subject matter by weighing the Nation's need for uniform control in order to protect all of the national interests, and indirectly, all of the other entities thereunder. Balancing *uniformity versus individuality* thus became one of the determining factors in the use of preemption.[61] The only problem remaining was the Court's practice, during this era, of reaching a determination about uniformity based on the Court's interpretation of congressional definition and intent on the subject.

### B. The United States Supreme Court's Use of Preemption Under both Aviation Acts from 1950 to 1978

As oft times explicitly worded, Congress intended to control the field of aviation because of aviation's importance to the military and economic security of the Nation.[62] "Air transportation

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[59] Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963) (emphasis added).

[60] *Id.* at 147-48 (citing Campbell v. Hussey, 368 U.S. 297 (1961) as the basis for the Court's conclusive contrast).

[61] *See Zook*, 336 U.S. at 728; Allegheny Airlines, Inc. v. Village of Cedarhurst, 132 F. Supp. 871, 880 (E.D.N.Y. 1955), *aff'd*, 238 F.2d 812 (2d Cir. 1956).

[62] Indeed, Congress enacted more comprehensive regulations in the Federal Aviation Act of 1958, 49 U.S.C.A. §§ 1307-1542 (West 1973) (repealed 1994) [hereinafter FAA or Federal Aviation Act of 1958], which superseded the CAA, for the express purpose of creating

> [A] Federal Aviation Agency, to provide for the regulation and promotion of civil aviation in such manner as to best foster its development and safety, and to provide for the safe and efficient use of the airspace by both civil and military aircraft, and for other purposes. In exercising the authority granted in, and discharging the duties imposed by, this Act, the Administrator gave full consideration to the requirements of national defense, and of commercial and general aviation, and to the public right of freedom of transit through the navigable airspace.

Federal Aviation Act of 1958, H.R. Rep. No. 2360, 85th Cong., 20th Sess. (1958), *reprinted in* 1958 U.S.C.C.A.N. 3741, 3741.

has come to play an increasingly important role in the economy of the Nation and constitutes a vital element in national defense."[63] Supreme Court decisions reflected congressional perceptions: "A major impetus to federal regulations of air transportation was the failure of the preceding era of freely competitive price and route warfare to bring stability to the Nation's air transport industry."[64]

With each decision connecting uniformity to aviation matters, the Court more clearly established an exclusive federal control over any matter touching upon aircraft in flight, and other entities' control over aircraft matters on the ground.[65]

Thus, the Court allowed the federal government to create a uniform system for defensive and economic security, and secured the Nation's direct control over the lesser aviation subject. The Court also balanced and limited an expansion of federal power by recognizing the diminished need for the uniform control of aircraft on the ground. Thus, various entities, including the federal government, obtained control over aircraft not in flight.

In *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.*, the Court stated:

> We conclude, therefore, that the provisions before us impose valid charges [state and local tax on each passenger ticket specifically to defray airport costs] on the use of airport facilities constructed and maintained with public funds. Furthermore, we do not think that they conflict with any federal policies furthering *uniform* national regulation of air transportation. No federal stat-

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[63] Federal Airport Act-Time for Grants, Etc., S. REP. NO. 654, 87th Cong., 1st Sess. (1961), *reprinted in* 1961 U.S.C.C.A.N. 2707, 2712. Indeed, time has not altered this conception. Upon signing House Bill 904, a bill to ensure a competitive airline industry, President William J. Clinton wrote: "The aviation industry is important not only to our economy, but (as Operation Desert Storm demonstrated just 2 years ago) to our national defense as well." Statement on Signing Enabling Legislation for the National Commission to Ensure a Strong Competitive Airline Industry, I PUB. PAPERS 416 (Apr. 7, 1993).

[64] Hughes Tool Co. v. Trans World Airlines, Inc., 409 U.S. 363, 397 (1973) (Burger, C.J., dissenting).

[65] *See* City of Burbank v. Lockweed Air Terminal, Inc., 411 U.S. 624 (1972); *Evansville*, 405 U.S. at 720-21; *Pan American*, 371 U.S. at 310; *Causby*, 328 U.S. at 256-57; *Northwest Airlines*, 322 U.S. at 292; Allegheny Airlines v. Village of Cedarhurst, 132 F. Supp. 871, 880 (E.D.N.Y. 1955); Odom v. Pacific N. Airlines, Inc., 393 P.2d 112 (Alaska 1964); Trans World Airlines, Inc. v. Hughes, 317 A.2d 114 (Del. Ch. 1974); Frontier Airlines, Inc. v. Nebraska Dep't of Aeronautics, 122 N.W.2d 476 (Neb. 1963); Melnick v. National Air Lines, 150 A.2d 566 (Pa. Super. Ct. 1959).

> ute or specific congressional action or declaration evidences a congressional purpose to deny or pre-empt state and local power to levy charges designed to help defray the costs of airport construction and maintenance. A contrary purpose is evident in the Airport and Airway Development Act of 1970.[66]

In that circumstance, "[a]t least until Congress chooses to enact a nation-wide rule, the power will not be denied to the State[s]."[67]

Justice Douglas dissented on the basis of a citizen's right to travel. According to Justice Douglas, getting onto a plane represented an intrastate act, and stepping off of a plane *constituted an act inseparable from flight.*[68] The tax therefore cannot be an integral part of interstate commerce.[69] Thus, this "power to tax the exercise of a privilege is the *power to control or suppress* its enjoyment."[70]

The Court dealt with *economic* issues concerning *rates and routes* in both *Pan American World Airways, Inc. v. United States,*[71] and *Hughes Tool Co. v. Trans World Airlines, Inc.*[72] In both cases, the Court held that provisions of the Federal Aviation Act of 1958 ("FAA")[73] preempted state antitrust laws as applicable to

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[66] Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc., 405 U.S. 707, 720-21 (1972) (emphasis added).

[67] *Id.* at 722 (*quoting* Freeman v. Hewit, 329 U.S. 249, 253 (1964)). Since *Evansville,* Congress has enacted the Airport Development Acceleration Act of 1973, 49 U.S.C.A. § 1513 (West 1973) (repealed 1994); 49 U.S.C.A. §§ 1711-1727 (West 1973) (repealed 1982, 1994). This Act incorporated the below quoted bill's intent:

> The bill [prohibited] any government agency other than the United States from establishing or levying a passenger head tax or use tax on the carriage of persons in air transportation. This prohibition will ensure that passengers and air carriers will be taxed at a uniform rate—by the United States—and that local "head" taxes will not be permitted to inhibit the flow of interstate commerce and the growth and development of air transportation.
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> . . . .
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> The provision is in response to . . . *Evansville* . . . .

Airport Development Acceleration Act of 1973, S. REP. NO. 93-12, 93d Cong., 1st Sess. (1973), *reprinted in* 1973 U.S.C.C.A.N. 1434, 1435, 1446. (Two other acts passed by Congress also affected airports in various ways: The Airport and Airway Development Acts of 1970 and of 1982).

[68] *Evansville,* 405 U.S. at 722-26.

[69] *Id.*

[70] *Id.* at 726 (quoting Murdock v. Pennsylvania, 319 U.S. 105 (1943)) (emphasis added).

[71] 371 U.S. 296 (1963).

[72] 409 U.S. 363 (1973).

[73] *See* Federal Aviation Act of 1958, *supra* note 62, § 1301.

aircraft. Both decisions clearly reflected the Court's analysis of flight, and the need and intent for uniformity thereover, as the basis for preemption. As the Court stated in *Pan American*:

> Limitation of routes and divisions of territories and the relation of common carriers to air carriers are basic in this regulatory scheme.
>
> . . . .
>
> If the courts were to intrude independently with their construction of the antitrust laws, two regimes might collide. Furthermore, many of the problems presented by this case, which involves air routes to and in foreign countries, may involve military and foreign policy considerations that the Act, as construed by a majority of the Court, . . . subjects to presidential rather than judicial review. It seems to us, therefore, that the Act leaves to the Board . . . all questions of injunctive relief against the division of territories or the allocation of routes. . . .[74]

Perhaps the Court presented one of its most extensive and definitive analyses for the use of the preemption doctrine over aviation matters in *City of Burbank v. Lockheed Air Terminal, Inc.*[75] In *City of Burbank*, the United States Supreme Court considered the states' rights to enact statutes to control noise generated by aircraft *in flight* during descent and take-off. The Court clearly found that the need for uniform aviation flight systems necessitated control of such only by the federal government.[76]

The Court noted that "imposition of curfew ordinances on a nationwide basis would cause a serious loss of efficiency in the use of the navigable airspace."[77]

> [The Noise Control Act of 1972] reaffirms and reinforces the conclusion that FAA, now in conjunction with EPA, has full control over aircraft noise, pre-empting state and local control. . . .
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> . . . .
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> Control of noise is of course deep-seated in the police power of the States. Yet the pervasive control vested in EPA and in FAA under the 1972 Act seems to us to leave no room for local curfews or other local controls. . . . Any regulations adopted by the Administrator to control noise pollution must be consistent with the "highest degree of safety." The interdependence of these factors requires a *uniform* and exclusive system of federal regulation

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[74] *Pan American*, 371 U.S. at 305, 310 (citation omitted).

[75] 411 U.S. 624 (1973).

[76] *Id.* at 625-33.

[77] *Id.* at 628.

> if the *congressional objectives* underlying the Federal Aviation Act are to be fulfilled.[78]

The Court concluded: "There is, to be sure, no express provision of pre-emption in the 1972 Act. That, however, is not decisive. . . . It is the pervasive nature of the scheme of federal regulation of aircraft noise that leads us to conclude that there is pre-emption."[79]

In his dissent, Justice Rehnquist emphasized that such sweeping implied preemption of state and local statutes violated the basic division of legislative powers between the States and Congress.[80] Neither the wording of the legislative history or the Noise Control Act of 1972 indicated any congressional intent to preempt states' legislation of noise control of aircraft. Further, Congress could have easily provided an express preemption provision in the Act. According to Rehnquist, Congress failed to do so, and the Court should not presume to do so.[81]

Although Rehnquist raised seemingly valid points in the preemption analysis, the majority in *City of Burbank* basically ignored that issue, treating federal *control* (strike control) preemption and control of all matters touching aircraft in flight as a foregone conclusion. The majority remained concerned about preempting once fundamental rights of land ownership in order to accommodate new and different concepts created by new technology. Accordingly, an exception was provided for municipal proprietors on an otherwise complete preemption of the noise control issue.[82]

> But, we are concerned here not with an ordinance imposed by the City of Burbank as a proprietor of the airport, but with the exercise of police power. . . . Thus, authority that a municipality may have as a landlord is not necessarily congruent with its police power. We do not consider here what limits, if any, apply to a municipality as a proprietor.[83]

Although inserted as a footnote in the Supreme Court decision, the lower federal and state courts sometimes seized on this "exception" to assert state authority in aviation matters. Some lower courts even rendered a few decisions seemingly at vari-

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[78] *Id.* at 633, 638-39 (citation omitted) (emphasis added).
[79] *Id.* at 633 (citation omitted).
[80] *Id.* at 643.
[81] *Id.* at 644, 653-54.
[82] *Id.* at 635 n.14.
[83] *Id.* at 636 n.14.

ance with the intent of the majority's view in *City of Burbank.* Such reaction indicated that the states share some control over the aviation field.

It should be noted that as a sign of the times, the Court excepted matters of racial discrimination from any analysis. The Court refused to tolerate racial discrimination in air transportation either on the ground or in the air and asserted exclusive federal control over that subject.[84]

### C. Other Courts' Use of Preemption from 1950 to 1978

Interestingly, a perusal of state and lower federal court preemption decisions over aviation matters indicates that such courts generally followed the uniformity analysis expostulated by the Supreme Court and reached similar conclusions. In fact, some of these courts' decisions obviously foreshadowed the above-cited Supreme Court decisions. However, a few states managed to expound states' rights over the aviation subject premised on the flaws inherent in basing power only on congressional intent.

The United States Supreme Court and the lower courts reached similar conclusions about the purely economic issues affecting the aviation industry. If case issues concerned various entities' attempts to control rates, routes, or services of an airline, the lower courts characterized the conduct as interference with aircraft in flight which affected the economic viability of the aviation industry. In such cases, the lower courts found a need for uniform regulation of the aviation industry through federal controls, including the use of preemptive power.[85]

Presumably, these decisions coalesced with those of the Supreme Court preempting antitrust actions dealing with aircraft flight. However, the Delaware state courts sliced off a share of that economic power from within the aviation field when the issues did not directly, or even substantially, concern control of aircraft in flight:

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[84] *See* Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc., 372 U.S. 714, 722-24 (1963).

[85] *See* Odom v. Pacific N. Airlines, Inc., 393 P.2d 112, 115-16 (Alaska 1964); Frontier Airlines, Inc. v. Nebraska Dept. of Aeronautics, 122 N.W.2d 476, 488 (Neb. 1963) ("It appears that Congress has pre-empted the field of interstate air transportation in regard to the routes and points to be served by interstate air carriers . . . ."); Melnick v. National Air Lines, 150 A.2d 566, 569 (Pa. Super. Ct. 1959).

> The policy behind the Federal Aviation Act is primarily to centralize power in the public interest so as to . . . provide an agency endowed with the authority to *supervise airline rates and services.*
>
> There being no conflict, in my opinion, between federal policy as to the operation of aeronautic companies and state law having to do with corporate fiduciary duty, the present suit must . . . be allowed to proceed.[86]

In the matter of taxation, a state court acknowledged the government's fundamental right to tax other entities.[87] However, the state court decision supported congressional legislation partially based on the flight analysis. The court preempted all state or local ordinances requiring head taxes on flight passengers.[88]

Several lower court cases definitively followed precedent and guaranteed the freedom of any entity's air flight over the rights of landowners.[89] The courts previously had declared navigable airspace above the land as part of the public domain rather than private property. In this era, the courts dealt the final blow to all landowners' challenges to aircraft by declaring ascent and descent flight paths part of the public domain and part of flight.[90] "The clear zones, as part of the navigable airspace, are subject to federal regulation, and the orders of the [state] courts infringed upon the federal power."[91]

New York state courts and two federal courts agreed upon one essential conclusion:

> 'Absent congressional action, the familiar *test* . . . is that of *uniformity versus locality.* . . . More accurately, the question is whether the State interest is outweighed by a national interest in the unhampered operation of interstate commerce. . . '.
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> . . . .

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[86] Trans World Airlines, Inc. v. Hughes, 317 A.2d 114, 122 (Del. Ch. 1974) (citation omitted) (emphasis added), *aff'd*, 336 A.2d 572 (Del. 1975).

[87] Allegheny Airlines, Inc. v. City of Philadelphia, 309 A.2d 157, 159 (Pa. 1973).

[88] *Id.* (relying on Pub. L. No. 93-44, § 1113(a), 87 Stat. 90 (1973)).

[89] United States v. City of New Haven, 496 F.2d 452, 454 (2d Cir. 1974); Allegheny Airlines, Inc. v. Village of Cedarhurst, 238 F.2d 812, 815-16 (2d Cir. 1956); United States v. City of New Haven, 367 F. Supp. 1338, 1340-41 (D. Conn. 1973); City of Newark v. Eastern Airlines, Inc., 159 F. Supp. 750, 761-62 (D.N.J. 1958); Allegheny Airlines, Inc. v. Village of Cedarhurst, 132 F. Supp. 871, 882-83 (E.D.N.Y. 1955); All American Airways, Inc. v. Village of Cedarhurst, 106 F. Supp. 521, 523-24 (E.D.N.Y. 1952), *aff'd*, 201 F.2d 273 (2d Cir. 1953); Yoffee v. Pennsylvania Power & Light Co., 123 A.2d 636, 639 (Pa. 1956) ("The right of flight in navigable unused air space is now as constitutionally established as the right to walk through the public square.").

[90] *City of Newark*, 159 F. Supp. at 756.

[91] *City of New Haven*, 496 F.2d at 454.

> It is apparent that *Congress*, by the enactment of the 1938 Aeronautics Act, adopted a comprehensive plan for the regulation of air traffic in the navigable airspace. . . .
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> . . . .
>
> *Federal control and regulation* of the traffic in the navigable airspace includes the airspace through which aircraft necessarily fly for take-offs from and landings at public airports.[92]

Unquestionably, since the 1950s any aircraft flight above minimum safe altitude or in the landing or take-off path constituted conduct in the public domain regulated and guarded by federal power at the expense of the individual landowner. Any federal or state court would preempt any interference with such flight. The courts at least created definitive, comprehensive, and consistent law on that much of the aviation subject.

Court decisions nullifying landowner challenges to in flight aviation caused the local and state governments to step into the individual's shoes. Some government bodies placed noise restrictions on flights. Such direct attacks on flight caused both state and federal courts to make preemptive decisions which foreshadowed, or thereafter supported, *City of Burbank*.[93] Particularly since *City of Burbank*, courts accept a basic premise: "It follows that *City of Burbank* requires that a municipal ordinance resting on police power, which manages or dictates action by aircraft in navigable airspace for the purpose of noise control, is invalid under the preemption doctrine."[94] During this era, the

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[92] *Allegheny Airlines, Inc.*, 132 F. Supp. at 880-81 (quoting *Zook*, 336 U.S. at 728 for the proposition of the uniformity versus locality test) (emphasis added).

[93] *See* American Airlines, Inc. v. Town of Hempstead, 398 F.2d 369 (2d Cir. 1968); United States v. City of Blue Ash, 487 F. Supp. 135 (S.D. Ohio 1978), *aff'd*, 621 F.2d 227 (6th Cir. 1980); British Airways Bd. v. Port Auth., 437 F. Supp. 804 (S.D.N.Y. 1977), *modified*, 564 F.2d 1002 (2d Cir. 1977); American Airlines, Inc. v. Town of Hempstead, 272 F. Supp. 226, 230 (E.D.N.Y. 1967) (forbidding noise restricted flight at JFK International Airport; such a direct conflict with federal law demanded preemption of such state laws), *aff'd*, 398 F.2d 369 (2d Cir. 1968); Village of Bensenville v. City of Chicago, 306 N.E.2d 562 (Ill. App. Ct. 1973).

[94] *City of Blue Ash*, 487 F. Supp. at 137 (citation omitted); *but see* Loma Portal Civic Club v. American Airlines, Inc., 394 P.2d 548 (Cal. 1964) (prohibiting noise ordinance based on the state's interest in furthering public services rather than on an exclusive federal control of air navigation). The court held that "[t]he definition and adjustment of property right and the protection of health and welfare are matters primarily of state law." *Id.* at 554. The savings clause in the CAA, according to the court, supports this conclusion. *Id.* at 555.

Divergent views having been expressed, other courts cited *Loma* as a basis for assertions of state control over flight. *See* Stagg v. Municipal Court of Santa Monica, 82 Cal. Rptr. 578 (Cal. Ct. App. 1969) (holding that federal preemption did not apply to a city ordinance limiting hours for takeoff of jet aircraft).

lower courts addressed the issue of title registration which still remained unresolved by the United States Supreme Court. The vast majority of courts agreed: "By providing a federal system for registration of conveyances and liens affecting the title to aircraft, Congress has preempted that field . . . ."[95] The states never questioned the preemptive power of the federal regulation on such matters, but contested its reach.[96]

On the above-mentioned matters, the lower courts allowed for broad federal control of the aviation subject, even if preserved and strengthened by the use of preemptive force. Thus, on these matters some degree of uniform and consistent law and policy arose. Nowhere, however, are the courts' inherent flaws of subjecting aviation matters to interpretation of congressional intent rather than constitutional purpose as obvious as in the uncertain, controversial, and destructive results stemming from various courts' decisions in personal injury and tort cases.

Tort claims in aviation matters began to accelerate in the mid-twentieth century and continue to plague the system. In the mid-twentieth century, the lower courts seemed to adhere to an in-flight or economic loss versus bodily injury analysis to determine the preemptive scope of federal regulations over state law tort remedies.[97] The courts preempted state and local laws regu-

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Although clearly contradictory to *City of Burbank*, the California courts refused to completely relinquish control over flight, seizing on the illogical gaps in *City of Burbank* caused by the "proprietor exception." *See* National Aviation v. City of Hayward, 418 F. Supp. 417, 421 (N.D. Cal. 1976); Air Transp. Ass'n of America v. Crotti, 389 F. Supp. 58, 63 (N.D. Cal. 1975). Although clearly doctrinaire that the federal government controlled flight in the navigable airspace, hesitancy to overturn badly reasoned law such as *Loma*, albeit part of the balancing act in the federalist system, exemplifies the problems of continued controversies and discrepancies which should be settled for the benefit of the industry and the Nation.

[95] State Sec. Co. v. Aviation Enter. Inc., 355 F.2d 225, 229 (10th Cir. 1966).

[96] *See id.* (finding state recording statutes not applicable to aircraft title instruments); New Jersey v. Greene, 385 A.2d 896 (N.J. Super. Ct. App. Div. 1978) (holding that the registration statute not for same purpose as the FAA recordation statute so not preempted); McCormack v. Air Ctr., Inc., 571 P.2d 835, 838 (Okla. 1977) (holding that filing in accordance with FAA recording regulations preempted all written instruments affecting title to the aircraft); Southern Jersey Airways, Inc. v. National Bank, 261 A.2d 399, 403 (N.J. Super. Ct. App. Div. 1970) (finding federal law to be preemptive only as to recording, allowing state law to apply to security interests).

[97] *Cf. Odom*, 393 P.2d at 115, 118; *Frontier Airlines, Inc.*, 122 N.W.2d at 488 ("It appears that Congress has preempted the field of interstate air transportation in regard to the routes and points to be served by interstate air carriers . . . ."); *but see Melnick*, 150 A.2d at 569; *Frontier Airlines, Inc.*, 122 N.W.2d at 488 (state railway commission had no authority and should have relinquished jurisdiction).

lating airline rates, routes, or services based on an assumed precedent for economic uniformity and stability in the aviation field. These decisions covered even personal property injury. However, if plaintiffs alleged claims for physical injury, even occurring in flight, almost all courts, for differing and illogical reasons, refused to relinquish that specific court's jurisdiction.[98]

The United States Supreme Court failed to articulate a position on jurisdictional supremacy over tort claims in aviation matters. The lower courts, predictably, refused to relinquish control over such a vast subject matter, regardless of logic or consequences, and despite the fact that the subject far surpassed the boundaries of local jurisdiction.

The lower courts willingly recognized the need for national control over most business and contractual aspects of the aviation field and preempted state and local power. Those same courts would not obligingly give up such fundamental power of the states and locales, however, as control over tortious conduct towards those entities' citizens. Only frequent, precedential, comprehensive, and forceful preemption of those laws by the United States could have accomplished such a result.

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[98] *See, e.g.*, Polansky v. Trans World Airlines, Inc., 523 F.2d 332, 337 (3d Cir. 1975) (failing to see a reason to develop federal contract law for regulated air carriers); Rogers v. Ray Gardner Flying Serv., Inc., 435 F.2d 1389, 1393, 1395 (5th Cir. 1970) (While under its commerce clause powers Congress could preempt state law with regard to the liability for injuries resulting from air crashes, the "commerce clause as interpreted by the Courts has left state sovereignty unimpaired, except where Congress has clearly indicated an intent to supersede state law."); Rosdail v. Western Aviation, Inc., 297 F. Supp. 681 (D. Colo. 1969) ("Congress intended to alter common law principles with a definitional section of a regulatory scheme. The Federal Aviation Program . . . makes no provision for its application to tort liability."); Moungey v. Brandt, 250 F. Supp. 445, 452 (W.D. Wis. 1966) (should not generally infer civil remedy available from federal regulatory statute in order to create uniform results in suits for injuries to passengers); Wills v. Trans World Airlines, Inc., 200 F. Supp. 360, 365 (S.D. Cal. 1961) (violation of regulations control overbooking by airline and federal court may grant individual remedy); Porter v. Southeastern Aviation, Inc., 191 F. Supp. 42, 43 (M.D. Tenn. 1961) (state court retained jurisdiction over claim for wrongful death during air crash because the savings clause indicated congressional intent not to preempt state court jurisdiction); McClenny v. United Air Lines, Inc., 178 F. Supp. 372, 377 (W.D. Mo. 1959) (air traffic control personnel governed by regulations cannot acquire a duty or act negligently beyond the scope of regulations concerning air crash); Alaska Airlines, Inc. v. Sweat, 568 P.2d 916 (Alaska 1977) (doctrine of federal preemption of aviation law does not generally extend to tort liability); *Odom*, 393 P.2d at 112 (if a tariff sets limit on amount awarded for loss of personal belongings, the tariff controls the liability issue because Congress intended that one agency be responsible for supervising rates and services).

The federal entities completely abdicated this responsibility in the mid-twentieth century and the states willingly filled the void. The result has been conflicting precedential law on the subject.

By failing to forcefully use its preemptive powers to take control of the entire subject matter and create a uniform aviation law by the mid-twentieth century, the Nation differed from other nations. However, during this time the United States signed the Warsaw Convention ("the Convention") and in most applicable instances followed the Convention's differing precedents. America's failure to adopt precedents similar to those in the international aviation field seriously impaired America's aviation growth and position in the international sphere.

In *Husserl v. Swiss Air Transport Co.*, a passenger sued Swissair for alleged negligent acts which caused the passenger bodily injuries and mental anguish.[99]

The court found:

> [T]he Warsaw Convention is a treaty to which the United States has adhered, it is the supreme law of the land and is, by its terms, applicable to this case. . . .
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> . . . .
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> There can be no question that this uniformity was and is intended to result from a limitation on and a presumption of liability. . . .
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> . . . .
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> To regulate in a uniform manner the liability of the carrier, they must have intended to be comprehensive. To effect the treaty's avowed purpose, the types of injuries enumerated should be construed expansively to encompass as many types of injury as are colorably within the ambit of the enumerated types. Mental and psychosomatic injuries are colorably within that ambit and are, therefore, comprehended by Article 17.[100]

The court concluded:

> (1) [T]hat, if and only if Articles 17, 18, and 19 comprehend the type of injury alleged, then the Warsaw system exclusively conditions and limits the liability to which the carrier may be subject for that injury, regardless of its ultimate cause; (2) that the phrase 'death or wounding . . . or any other bodily injury,' as used in Article 17, does comprehend mental injuries; and (3)

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[99] Husserl v. Swiss Air Transp. Co., 388 F. Supp. 1238, 1241 (S.D.N.Y. 1975). *Husserl* was abrogated by Eastern Airlines, Inc. v. Floyd, 499 U.S. 530 (1991).

[100] *Husserl*, 388 F. Supp. at 1243-44, 1250.

that the otherwise applicable substantive law must provide the appropriate cause of action for the injuries alleged.[101]

Since such clear delineation of preemptive subjects and guaranteed limits of liability have worked within the federation of international nations, a similar system should work within the precepts of American federalism.

## IV. THE COURTS' USE OF THE PREEMPTION DOCTRINE IN AVIATION LITIGATION FROM 1978 TO 1990

### A. THE UNITED STATES SUPREME COURT AVOIDS THE DIFFICULT AVIATION QUESTIONS IN THE SECOND HALF OF THE TWENTIETH CENTURY

Litigation over aviation matters increased from 1978 to 1990. The more voluminous and contentious litigation in this era often seemed to cause the courts to indecisively and inconsistently apply the preemption doctrine to aviation matters. Precedent lost adhesion and results have sometimes been fragmented and incomprehensible. Nevertheless, during this time, the United States Supreme Court considered only six cases which dealt with the preemptive reach of the federal government into the aviation sphere and none of these concerned the most difficult controversies.

Three of the cases dealt with the fundamental, and often discussed, the topic of each sovereign's ability to tax aviation matters. In all of the cases the Supreme Court reiterated its basic flight/ground analysis for deciding aviation tax matters based on Congressional intent. In *Aloha Airlines v. Director of Taxation*, the State of Hawaii passed laws which allowed the state to tax that part of any airline's annual gross income made during the airline's operations in Hawaii.[102] The Court recognized that after its decision in *Evansville*, Congress passed legislation which forbade states to collect any indirect or direct charge on passengers and that this inhibited freedom of flight. The Court characterized Hawaii's annual tax as a gross receipts tax on all passengers flying through Hawaii rather than as an aircraft property tax. Thus, the federal legislation preempted Hawaii's state laws validating the tax.[103]

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[101] *Id.* at 1253.
[102] 464 U.S. 7 (1983).
[103] *Id.* at 11-14.

In direct contrast, during this same era, the Supreme Court decided *Western Airlines, Inc. v. Board of Equalization.*[104] Again, the Court recognized the Congressional legislative foundation for its decision.[105] The Court detailed Congressional acts specifically passed since 1970 to improve the Nation's entire air transportation system, including the airports. Congress designated the airport system crucial to the Nation's commercial, postal, and military security. Congress intended to incorporate airports into the fabric of those federal laws created to tax aviation entities and use the funds acquired therefrom to improve and control the entire aviation sphere.[106]

Based on the controlling analysis that the federal government possessed exclusive power over aircraft in flight, but diverse entities gained power over aviation matters on the ground, the Court noted express exceptions within congressional legislation for state taxation of certain aviation matters.[107] Whereas, in *Aloha Airlines,* the Court held that federal law preempted Hawaii's state laws because they directly taxed passengers.[108] The Court, however, held that the federal law excepted the South Dakota tax on Western Airlines "because the South Dakota Airline Flight *Property* Tax is an 'in lieu tax which is wholly utilized for *airport* and aeronautical purposes,'" and therefore does not violate Section 1513(d) of the Airport and Airway Improvement Act of 1982.[109]

Again based on the flight/ground aviation analysis, in *Wardair Canada, Inc. v. Florida Department of Revenue,* the Supreme Court allowed the state of Florida to impose a tax on aviation fuel used by foreign carriers in international travel.[110] Relying entirely upon federal legislation to justify its decision, the Court found that an essential component in an aircraft consisted of the fuel which personnel loaded onto the aircraft from the ground. Thus, the Court decided that Congress intended for the state to share in the tax apportionment of that aircraft as property.[111]

Whether aviation fuel oil becomes an integral part of an aircraft represented a debatable proposition. Indeed, the Court's

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104 480 U.S. 123 (1987).
105 *Id.* at 124-25.
106 *Id.* at 124-34.
107 *Id.*
108 *Aloha Airlines,* 464 U.S. at 8-10.
109 *Western Airlines,* 480 U.S. at 124 (emphasis added).
110 477 U.S. 1, 1-21 (1986).
111 *Id.*

improvisations in *Wardair* disclosed the Court's verbally unrecognized weakness of always determining the use and scope of federal preemptive powers solely on its interpretations of the intent of Congress. All of the decisions, however, clearly indicate that the Court decided Congress intended that the various sovereigns' abilities to tax aviation matters depended on the taxable topic's characterizations as either subjects in flight over which the federal government possessed exclusive control or subjects on the ground over which various entities might gain a share of control.

In *Philko Aviation, Inc. v. Shacket*, the United States Supreme Court conclusively decided the FAA recordation issue that had been plaguing the lower courts when it held that:[112]

> This case presents the question whether the Federal Aviation Act of 1958, prohibits all transfers of title to aircraft from having validity against innocent third parties unless the transfer has been evidenced by a written instrument, and the instrument has been recorded with the Federal Aviation Administration. We conclude that the Act does have such effect.[113]

In *Philko*, the Court found that a seller sold the same plane to two different people.[114] The first buyer never recorded the sale with the Federal Aviation Administration. Philko, the second buyer, did so. When the two buyers disputed ownership, Philko claimed that his recordation gave him priority ownership rights. The state court, however, decided that the recordation regulation did not preempt state substantive law which in this instance provided the first buyer with priority title to the aircraft.[115]

The United States Supreme Court disagreed:

> [B]ecause of these federal requirements, state laws permitting undocumented or unrecorded transfers are pre-empted, for there is a direct conflict between § 503(c) and such state laws, and the federal law must prevail. These conclusions are dictated by the *legislative history* . . . . Thus, since *Congress intended* to require the recordation of a conveyance evidencing *each transfer* of an interest in aircraft, Congress must have intended to pre-empt any state law under which a transfer without a recordable conveyance would be valid against innocent transferees or lienholders who have recorded.[116]

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[112] 462 U.S. 406, 407 (1983).

[113] *Philko Aviation*, 462 U.S. at 407 (citations omitted).

[114] *Id.* at 407-08.

[115] *Id.*

[116] *Id.* at 410 (emphasis added).

The Court's decision brought some uniformity and fairness to otherwise widely divergent state court decisions. Yet, the Court remained ever mindful of its balancing act and the states' powers within the federal system:

> [A]ccordingly, we hold that state laws allowing undocumented or unrecorded transfers of interests in aircraft to affect innocent third parties are pre-empted by the federal Act. . . . As one commentator has explained: 'The only situation in which priority appears to be determined by operation of the [federal] statute is where the security holder has failed to record his interest. Such failure invalidates the conveyance as to innocent third persons. But recordation itself merely validates; it does not grant priority.[117]

The fifth and most influential case, *Shaw v. Delta Air Lines, Inc.*, only indirectly addressed the aviation subject at the time. The importance of the case related to Congress's recent passage of the Employee Retirement Income Security Act (ERISA) legislation and the comprehensive regulations pertinent thereto.[118]

In *Shaw*, Delta Air Lines provided various medical and disability benefits to employees through benefits plans.[119] The plans did not provide benefits to employees disabled by pregnancy, a violation of the New York Human Rights Law and Disability Benefits Law. The Court determined that ERISA legislation preempted New York's Human Rights Law insofar as such prohibited practices were lawful under federal law. The congressional legislation did not preempt the Disability Benefits Law.[120]

In the context of ERISA, the Court defined the term "relate to" for purposes of evaluating the scope of preemption. Based on legislative history, the Court determined that the federal government passed ERISA statutes to develop uniform employee benefits plans and displace state action over the subject.[121] ERISA preempted state laws, however, only insofar as a state plan related to a plan covered by ERISA. Some state laws were considered to be too remote to relate to ERISA. But laws which

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[117] *Id.* at 412-13 (quoting Michael Scott, *Liens in Aircraft Priorities*, 25 J. AIR L. & COM. 193, 203 (1958)).

[118] 463 U.S. 85 (1983).

[119] *Id.* at 92.

[120] *Id.* at 92, 108-09.

[121] *Id.*

affected matters connected with or referenced to an ERISA plan related thereto.[122]

In the ERISA context, the Court also dealt with the anomaly of interpreting comprehensive federal legislation which contained both express preemption provisions and savings clauses. The Court admonished Congress to "fix" clearly conflicting language within its statutes.[123] The Court, however, determined the intent of Congress in this instance was to retain broad preemptive power over state benefit plans rather than preempt its own powers from its own language:[124]

> While [the savings clause] § 514(d) may operate to exempt provisions of state laws upon which federal laws depend for their enforcement, the combination of Congress' enactment of an all-inclusive pre-emption provision and its enumeration of narrow, specific exceptions to that provision makes us reluctant to expand § 514(d) into a more general savings clause.[125]

Relying on Congress to draft clear and definitive language determinative of the use of the preemption doctrine to define the scope of federal power and delineate the boundaries of federalism may have been one of the biggest flaws of twentieth century judicial interpretation.

One other Supreme Court case of this era related to aviation matters. In *Northwest Airlines, Inc. v. Transport Workers Union of America*, the Court addressed the liability of the airline for discriminating against its female cabin attendants.[126] Such conduct was governed entirely by federal statute. The damage incurred through such conduct derived from the comprehensive legislative scheme. The Court had no authority to provide a new remedy not adapted by Congress.[127] The Court noted: "A narrow exception to the limited lawmaking role of the federal judiciary is found in admiralty. We consistently have interpreted the grant of general admiralty jurisdiction to the federal courts as a proper basis for the development of judge-made rules of maritime law . . . ."[128]

Prior to the inception of the Union, ships plied the seas in a world unconfined by landed restrictions, and virtually free of

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122 *Id.* at 99 n.20, 96-100, 100 n.21.
123 *Id.*
124 *Id.* at 104-05.
125 *Id.* at 104.
126 451 U.S. 77, 97 (1981).
127 *Id.*
128 *Id.* at 95-96.

political control. Upon creation, Nation states recognized the uniqueness of the maritime subject but desired political and economic control over such a powerful and boundless entity. Nations developed a unique federal judicial jurisdiction over maritime matters and a federal set of laws applicable to the unique maritime enterprise.[129]

Thus, the Union practically placed maritime matters beyond the federalist system which the maritime system predated, but theoretically found a niche for the subject matter within federalism. It has been suggested that the similarity of aviation pursuits (planes flying through international air untethered to land boundaries) to maritime pursuits (ships sailing through endless international waters unable even to maneuver on land) demands that the Court create applicable unique federal law as well for the aviation subject even though it evolved more than a hundred years after the Union.

Upon clear thought, and comparison, the Court should have explored the multitudinous analogies between the aviation and maritime subjects. At the very least, the Court and the Nation should have otherwise analogized the positive aspects of the Warsaw Convention to our aviation concepts.

Instead, the Court seemed obsessed with predicating all laws on Congressional intent, or lack thereof, which made the Court squeeze aviation matters into the confining boundaries of the constant contests for power and resultant balancing acts within the modern American federalist system. Such a narrow focus and interpretation of our Constitution damaged the aviation subject, and the impossibility of attempting to confine a virtually limitless concept within traditional precedents weakened the bonds and innovations in the federalist system.

### B. Other Significant United States Supreme Court Decisions About Preemption Made Between 1978 and 1990 Applicable to Aviation Matters

In two other cases decided between 1978 and 1990, the United States Supreme Court dealt with the anomaly of express preemption provisions and a savings clause in federal legislation involving the same legislation.[130]

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[129] *See id.* at 95-99. *See generally Gibbons*, 22 U.S. (1 Wheat.) at 1.

[130] *See* Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987); Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985).

> The two pre-emption sections, while clear enough on their faces, perhaps are not a model of legislative drafting, for while the general pre-emption clause broadly pre-empts state law, the savings clause appears broadly to preserve the States' lawmaking power over much of the same regulation. While Congress occasionally decides to return to the States what it has previously taken away, it does not normally do both at the same time . . . .
> Long aware of this problem, commentators have recommended that Congress amend the pre-emption provisions to clarify its intentions . . . .[131]

In *Pilot Life*, the Court reiterated this concern, stating, "In *Metropolitan Life*, this Court, not[ed] that the pre-emption and savings clauses 'perhaps are not a model of legislative drafting."[132]

In *Metropolitan Life*, the Court found that the savings clause saved other federally legislated benefit plans from the preemptive power of ERISA's language.[133] In *Pilot Life*, the Court found that the express preemption provisions provided strong evidence that Congress did not *intend* to "save" state law remedies not incorporated into ERISA.[134]

Miring its reasoning in the contradictory language of congressional legislation caused inconsistent or at the very least, barely distinguishable decisions by the Court.[135] Even more so, such reasoning caused the Court to make questionable decisions when the Court wished to distance itself from the intent of Congress on a precise subject.[136]

In *Silkwood* the Court considered the conflict between the states' traditional authority to provide tort remedies to its citizens and the federal government's exclusive regulatory authority over the safety aspects of nuclear power.[137]

In an attempt to award damages to the estate of an individual killed, and possibly murdered, by personnel manning a nuclear reactor, the Supreme Court skewed the exclusive and explicit intent of Congress to control nuclear power operations.[138] The Court allowed a private party to recover punitive damages for

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131 *Metropolitan Life*, 471 U.S. at 739-40, 740 n.16.

132 *Pilot Life*, 481 U.S. at 46 (quoting *Metropolitan Life*, 471 U.S. at 739).

133 *Metropolitan Life*, 471 U.S. at 744.

134 *Pilot Life*, 481 U.S. at 54.

135 *See id.*; *Metropolitan Life*, 471 U.S. at 744.

136 Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984).

137 *Id.* at 248.

138 *See* Silkwood v. Kerr-McGee Corp., 667 F.2d 908 (10th Cir. 1982) (factual implications and innuendos relied on by the court); Silkwood v. Kerr-McGee Corp., 485 F. Supp. 566 (W.D. Okla. 1979).

safety violations against an entity which the Court had previously held to be controlled, regulated, and monitored by the federal government.[139] Furthermore, the Court shifted the burden of proof to the defendant corporation "to show that Congress intended to preclude such [punitive damage] awards."[140]

Dissenting Justices pointed out the Court's inconsistencies in interpreting congressional intent. In one decision, the Court preempted all safety regulation of nuclear power from state jurisdiction. In another decision, the Court allowed the states to award punitive damage awards to private individuals for violations of regulations stipulated, defined, and forced upon the nuclear entity by the federal government.[141]

Another dissenting Justice commented:

> I would find preemption of punitive damage awards because they conflict with the fundamental concept of comprehensive federal regulation of nuclear safety. . . . It is not reasonable to infer that Congress intended to allow juries or lay persons, selected essentially at random, to impose unfocused penalties solely for the purpose of punishment and some undefined deterrence. These purposes wisely have been left within the regulatory authority and discretion of the NRC.[142]

The Court appears to reason congressional intent in the context of a specific case based on a specific set of facts. When each dispute must be resolved with an interpretation of more congressional language and intent as to each new set of facts rather than a general comprehensible purpose, the precedents tend to gain more wordings and lose definiteness. Additionally, the lower courts needed to apply the precedential language used by the United States Supreme Court to resolve completely different sets of facts. This led to fragmented and inconsistent decisions on many aviation matters.

### C. Lower Court Decisions Concerning Aviation Matters from 1978 to 1990

Most courts relied on *City of Burbank*, resulting in continuity in the control of aircraft noise during this era.[143] "The only basis

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[139] *Silkwood*, 464 U.S. at 248-58.

[140] *Id.* at 255.

[141] *Id.* at 258-64 (Blackmun, J., joined by Marshall, J., dissenting).

[142] *Id.* at 281-83 (Powell, J., joined by Burger, C.J., and Blackmun, J., dissenting) (citation omitted).

[143] *See, e.g.*, United States v. County of Westchester, 571 F. Supp. 786 (S.D.N.Y. 1983); United States v. New York, 552 F. Supp. 255 (N.D.N.Y. 1982).

other than proprietary power for enactment of the ordinances was the police power, and as exercises of the police power *Burbank* requires that the ordinances be found unconstitutional as violations of the supremacy clause."[144] A few states and locales persisted in challenging the decision throughout the 1980s to regain a piece of the action.[145]

In *Greater Westchester Homeowners Ass'n v. City of Los Angeles*, the California Court of Appeals held that congressional legislation did *not* preempt causes of action which challenged aircraft noise characterized as a nuisance because of the presence of the savings clause in the FAA.[146] The court justified its holding:

> The fundamental fallacy . . . lies in [the] assumption that excessive airport noise results only from the presence of jet aircraft in flight without recognizing that such possibly objectionable presence is also due to the existence of an airport whose location, runways, and noise abatement procedures, among other things, are under the direct and immediate control . . . of the airport proprietor. In other words, airport noise control is essentially a shared responsibility of the federal government and the airport proprietor.
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> Moreover, the allowance of local nuisance actions against excessive airport noise constitutes a much lesser intrusion upon national aviation noise abatement policy than the local night curfew of jet aircraft takeoffs involved in the *Burbank* case.[147]

District courts and the Ninth Circuit Court of Appeals similarly concluded that "the power of a municipal proprietor to regulate the use of its airport is not preempted by federal legislation. . . . The legislative history shows that Congress intended that municipal proprietors enact reasonable regulations to establish acceptable noise levels for airfields and their environs."[148]

Citing the "proprietary exception" and legislative history, some California courts have bypassed the definitive intent of *City of Burbank* to place exclusive control of the residual effects of

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[144] Pirolo v. City of Clearwater, 711 F.2d 1006, 1009 (11th Cir. 1983).

[145] Bieneman v. City of Chicago, 864 F.2d 463 (7th Cir. 1988) (based on *Silkwood*, state law remedies for airport noise and pollution even if noise ordinances preempted); Krueger v. Mitchell, 332 N.W.2d 733 (Wis. 1983); Owen v. City of Atlanta, 277 S.E.2d 338 (Ga. App.), *aff'd*, 282 S.E.2d 906 (Ga. 1981).

[146] 152 Cal. Rptr. 878, 881 (Cal. App.), *vacated*, 603 P.2d 1329 (Cal. 1979).

[147] *Id.* (citations omitted).

[148] Santa Monica Airport Ass'n v. City of Santa Monica, 659 F.2d 100, 104 (9th Cir. 1981); *see also* Santa Monica Airport Ass'n v. City of Santa Monica, 481 F. Supp. 927 (C.D. Cal. 1979).

aircraft flight in the hands of the federal government. In contrast, some California courts have emphatically supported the reasoning in *City of Burbank.*

In *San Diego Unified Port District v. Gianturco,* the Ninth Circuit Court of Appeals found:

> The supremacy clause invalidates any exercise of state power that unduly frustrates or obstructs the objectives of legitimate national policy.
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> . . . .
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> [I]t is clear that *City of Burbank* did not rest solely on pervasive regulation. Indeed, the *national character* of the subject matter was said to be 'the critical issue.' . . .
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> Our analysis of the pertinent state and federal regulations leads us to conclude that the curfew imposed . . . impinges on airspace management . . . . The state has attempted to act in an area preempted by the federal government and its actions are void.[149]

The court further found:

> [Proprietors are exempted] . . . . [b]ut before an entity may possess this power, it must bear the responsibility . . . for excessive aircraft noise. . . .
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> These criteria (ownership, operation, promotion, and the ability to acquire necessary approach easements) comprise a federal definition of proprietors for preemption purposes. . . .
> Without such liability, however, congressional intent, as found in *City of Burbank,* precludes control under the police power, and CalTrans' argument fails.[150]

In *Bethman v. City of Ukiah,* the California Court of Appeals found:

> [P]laintiffs essentially request this court to hold that navigation facilities which were adequate under FAA standards were inadequate and to impose upon [municipal airport owners] the duty to establish additional standards and requirements. Such a holding would be inconsistent with the FAA's exclusive authority to make these determinations.[151]

Are California courts unable to discern any inconsistency in these decisions? The courts allowed, and even required, munici-

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[149] 651 F.2d 1306, 1310, 1312 n.11, 1316 (9th Cir. 1981) (emphasis added).
[150] *Id.* at 1317, 1318 n.33.
[151] 265 Cal. Rptr. 539, 547 (Cal. App. 1989).

pal airport owners to make additional standards for aircraft noise levels (an integral part of aircraft structure and flight) already covered by numerous federal acts. But the same courts excused, and even forbade, the same owners from establishing additional navigational controls (only partially an integral part of aircraft and on the ground) only covered by some FAA regulations.

Earlier courts seemed to make a definitive and encompassing judicial decision about aircraft noise control. A minority view developed in the 1980s which provided viable precedent and increased challenges to federal control over any aviation matter attendant on an airport concept. So long as courts and legislators 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.

Of course, with the United States Supreme Court's continued silence on the subject, the lower courts struggled with the scope, if any, of preemptive power over personal injury claims. The majority of courts decided that "there would . . . be no justification for concluding that . . . Congress intended to occupy the field of liability for personal injuries."[152]

Other courts, however, have recognized the overwhelming problems in applying these traditional remedies in unique and untraditional occurrences and have pleaded for "[t]he immediate passage of a uniform law which will govern the issues of liability and damages in mass tort litigation."[153] Such law "is an absolute necessity if an efficient administration of justice . . . is to be achieved."[154]

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[152] Ravreby v. United Airlines, Inc., 293 N.W.2d 260, 263 (Iowa 1980) (quoting James C. McKay, *Airline Tariff Provisions as a Bar to Actions for Personal Injuries*, 18 GEO. WASH. L. REV. 160, 190 (1950)). *See In re* Air Crash Disaster at Stapleton Int'l Airport, Denver, Colo. on Nov. 15, 1987, 721 F. Supp. 1185 (D. Colo. 1988) (compliance with regulations did not establish as a matter of law that the defendant was not liable for traditional tort law remedies); Elsworth v. Beech Aircraft Corp., 691 P.2d 630 (Cal. 1984) (because of reasoning in *Silkwood*, and existence of savings clause in FAA, the court allowed state law remedies for a private party harmed by violator of FAA regulations unless the defendant carried burden of proof on presumption).

[153] *In re* Disaster at Detroit Metro. Airport on Aug. 16, 1987, 750 F. Supp. 793, 814 (E.D. Mich. 1989).

[154] *Id.*

Lower courts preempted state laws in the area of parachute jumping,[155] pilot regulation,[156] and some areas involving control of helicopter operation.[157]

The increased aviation litigation of the 1980s began to illuminate the weaknesses inherent in the twentieth century courts' adversarial system, which allowed different or multiple spheres of power to control each separate part of the aviation subject balanced by preemptive powers based only on congressional language.

Although by this time precedential law governed some aspects of aviation matters, inconsistent and controversial decisions ran rampant over other matters in the same subject area. A federalist system required shared power, but a strong and balanced federalist system required a positive knowledge of which part controlled what portion of power over each subject matter to unite all of the parts into a larger whole. Still, the biggest challenge to the vitality of aviation law only just began to appear over the horizon in the late 1980s.

By the 1970s, the courts could usually be relied on to resolve the balance of powers over *economic* controversies in aviation matters based on the flight/ground dichotomy of exclusive federal control/shared control and interpretation of Congressional intent as such. The judiciary's historic attempts to gain and then balance the control of each governmental sphere over the fledgling aviation business had coincided with the need for regulatory control, or the perceived need, therefore, to support the

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[155] Blue Sky Entertainment, Inc. v. Town of Gardiner, 711 F. Supp. 678, 694 (N.D.N.Y. 1989) (preempted because of the pervasiveness of federal law in the area of parachute jumping).

[156] Hill v. NTSB, 886 F.2d 1275, 1280 (10th Cir. 1989) (FAA clearly had jurisdiction to deter future unsafe conduct by the pilot); French v. Pan Am Express, Inc., 869 F.2d 1, 6-7 (1st Cir. 1989) (the federal web was apparent in pilot qualification, and all flight plans led to Washington).

[157] Command Helicopters, Inc. v. City of Chicago, 691 F. Supp. 1148, 1150-51 (N.D. Ill. 1988) (Congress impliedly preempted local regulation of helicopter external-loading operations); Gateway Motels, Inc. v. Municipality of Monroeville, 525 A.2d 478, 481 (Pa. Commw. Ct. 1987) (although federal regulations preempt local regulation of airspace and pilot qualifications, Congress could not have intended to shear state and local governments of control over helistops). *See* H.R. REP. No. 95-1211, 15th Cong., 2d Sess. 1, at 73 (1978), *reprinted in* 1978 U.S.C.C.A.N. 3737, 3767 (additional views of Elliot H. Levitas) ("The United States has the finest and safest aviation system in the world, and it has generally performed outstanding service for the American travelling and shipping public. Nevertheless, the industry has been highly regulated since its inception . . . ."). *See also* CAA, *supra* note 38; FAA *supra* note 62.

economic growth and stability of this and many other businesses from the early twentieth century until the 1970s.

However, just as the system seemed to be establishing a consistent judicial conception of economic matters, Congress determined a need to entirely revamp the regulation. Specifically, for whatever reason, Congress found the aviation business in serious financial difficulties by the 1970s. Generalizing that the aviation industry maintained the economic resources, and knew how to best use them given the opportunity, Congress decided to release the industry from its regulatory restraints in order to revitalize the financial condition of the aviation business.[158]

In contemplation of just such a policy, Congress passed the Airline Deregulation Act (ADA) in 1978 to add to, and act in conjunction with, the FAA.[159] Congress included an express preemption provision in this legislation.[160] What explicitly did Congress intend to preempt, and how should this revitalize the

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[158] H.R. REP. NO. 95-1211, at 73.

> [T]he present regulatory system has not always been in the best financial interest of the carriers and the consumers. Congress now has the opportunity to make some changes in the existing restrictive, snail-paced regulatory system in which the industry operations. . . . The time has come to move decision making to the private boardrooms of the industry and away from the lawyers, economists, and bureaucrats at the CAB. . . . [I]t is time to move the airline industry into a more competitive arena where it will have an opportunity to grow in a period of healthy and profitable competition.

*Id.*

[159] Airline Deregulation Act of 1978, 49 U.S.C.A. §§ 1301-1742 (West 1978 & Supp. 1994).

[160] 49 U.S.C.A. § 1305.

> Except as provided in paragraph (2) of this subsection, no State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under subchapter IV of this chapter to provide air transportation.

*Id.* § 1305(a)(1).

In July 1994, Congress repealed, revised, and recodified the Federal Aviation Act as the FAA Act. 49 U.S.C. §§ 40101-49105 (1994). Congress intended § 41713 of the Act to replace § 1305. However, Congress made only minor changes (*see infra*), and obviously intended the original meaning to remain. Thus, cases containing statements pertaining to § 1305 retain validity.

Section 41713(b)(1) states that "[a] State . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart." 49 U.S.C. § 41713(b)(1) (1994).

aviation industry? The solution to these questions represented a challenge to the lower courts in the 1990s as they began to struggle with the intent, scope, and interrelationship of the added provisions to the aviation subject. This also changed and unsettled the judicial landscape in all aviation aspects, once again.

In one of the earliest decisions concerning the interpretation of Section 1305, a federal court revised the impact of the economic regulatory provisions of the FAA.[161] Testimony alleged that state charges on intrastate carriers could cause airlines to raise interstate rates. The court determined that by passing the ADA, Congress intended to preempt any state law affecting airline economics. The court held that states could no longer regulate exempted carriers or the intrastate services of certified carriers.[162]

Another early decision preempted state laws covering air cargos based upon the intent of Congress after passage of the ADA to return the air cargo industry to "competitive market forces."[163] Another, based on Section 1305, preempted decisions which denied an air corporation entry into the air ambulance service.[164] Given the explicit preemptive language in the ADA, a congressional act, these courts found it easy to preempt state laws in the initial cases because the statutes clearly regulated "economic" affairs.

The controversies began when attorneys defended injury claims on the basis of Section 1305 language. Courts initially split over the interpretation of the definition and, therefore, the preemptive scope of services. Some courts used the word to restrict the preemptive scope.[165] Others broadened it.[166]

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[161] Hughes Air Corp. v. Public Utils. Comm'n Cal., 644 F.2d 1334, 1336 (9th Cir. 1981).

[162] *Id.* at 1339-41.

[163] Fireman's Fund Ins. Cos. v. Barnes Elec., Inc., 540 F. Supp. 640, 644 (N.D. Ind. 1982) (court did not dismiss completely on preemption and instead held that more facts were necessary to determine if plaintiff's personal breach of contract claim remained).

[164] Hiawatha Aviation v. Minnesota Dept. of Health, 375 N.W.2d 496 (Minn. Ct. App. 1985), *aff'd*, 389 N.W.2d 507 (Minn. 1986).

[165] Dienfenthal v. Civil Aeronautics Bd., 681 F.2d 1039 (5th Cir. 1982) (services like smoking and beverage supply still regulated by federal law and § 1305 not applicable thereto); Salley v. Trans World Airlines, Inc., 723 F. Supp. 1164 (E.D. La. 1989) (state law claims not in conflict with any provision of the FAA are not preempted).

[166] O'Carroll v. American Airlines Inc., 863 F.2d 11 (5th Cir. 1989) (section 1305 preempted all state law claims; passed after enactment of the savings clause so § 1305 indicated controlling congressional intent); Hingson v. Pacific South-

The lower courts were also divided over the federal government's preemption of state deceptive advertising laws concerning airlines. Some courts saved the state laws,[167] whereas others found them to be preempted.[168]

On at least one aspect of aviation law during this era, and despite a case decision which heavily criticized the Warsaw Convention limitations,[169] courts continued to hold that "[t]here is no question that, when a state cause of action is in conflict with the provisions of the Convention, the conflicting provision of the state action will be preempted by the applicable provisions of the Convention."[170]

## V. WILL THE COURTS' USE OF THE PREEMPTION DOCTRINE IN AVIATION LITIGATION IN THE NINETIES FLY INTO THE TWENTY-FIRST CENTURY?

In the 1990s, the courts still insisted on, and clung to, interpretations of congressional intent as the only means to define the scope of federal preemptive powers in aviation and other matters. Predictably, the courts only confused and fragmented the issues and power struggles. This struggle intensified dramatically as courts decided the scope of the ADA. How the courts will realign the balance of powers to secure the future of aviation and the Nation constitutes the judiciary's never ending dilemma as we hurl ourselves headlong into the twenty-first century.

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west Airlines, 743 F.2d 1408 (9th Cir. 1984) (state regulation of seating policies for handicapped persons preempted by § 1305).

[167] New York v. Trans World Airlines, 728 F. Supp. 162 (S.D.N.Y. 1989) (federal authority to regulate deceptive advertising derived not from § 1305, but from § 411; § 1506 preserved state actions within § 411 purview *or* New York's applicable laws too remote to be related to the preemptive scope of the language of rates, routes, and services).

[168] Illinois Corp. Travel, Inc. v. American Airlines, Inc., 682 F. Supp. 378 (N.D. Ill. 1988), *aff'd*, 889 F.2d 751 (7th Cir. 1989) (changing prices of tickets affected rates and state laws affecting same are all preempted under § 1305).

[169] *In re* Korean Air Lines Disaster of Sept. 1, 1983, 664 F. Supp. 1463 (D.D.C. 1985), *aff'd*, 829 F.2d 1171 (D.C. Cir. 1987), *aff'd sub nom.* Chan v. Korean Air Lines, Ltd., 490 U.S. 122 (1989).

[170] Rhymes v. Arrow Air, Inc., 636 F. Supp. 737, 741 (S.D. Fla. 1986). *Accord* Boehringer-Mannheim Diagnostics, Inc. v. Pan American World Airways, Inc., 737 F.2d 456 (5th Cir. 1984); *In re* Mexico City Aircrash of Oct. 31, 1979, 708 F.2d 400 (9th Cir. 1983).

### A. The Supreme Court Resolves Some Legal Controversies Concerning the ADA but Continues to Avoid the Major Aviation Controversy of the Last Quarter of the Twentieth Century

The first five years of the 1990s spawned as much litigation about the scope of preemptive powers over aviation matters as all of the other years in the Nation's history combined. Nevertheless, during this time, the United States Supreme Court issued only three decisions that were in any way connected to such matters. None dealt directly with personal injury issues even though the other courts vehemently disagreed on the issue. However, the Justices did discuss the scope of the ADA's preemption provision in two of the decisions. Lower courts used the ADA reasoning and applied it to other claims with varying degrees of consistency.

In *Morales v. Trans World Airlines, Inc.*, the majority of the United States Supreme Court found federal intent to preempt certain issues based on the Congressional language in Section 1305 of the ADA.[171] Attorney generals of several states threatened to sue airlines under the various states' general consumer protection statutes to prohibit allegedly deceptive airline fare advertisements. The airlines countered that Section 1305 preempted the state law claims.[172]

Of course the issue for the Court, "at bottom, [was] one of statutory intent," and the Court began with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expressed the legislative purpose.[173] The key to determining congressional intent in enacting Section 1305 lay in the meaning of the words "relat[ing] to," which expressed a broad preemptive power comparable to preemption under ERISA.[174] The Court thought it "appropriate to adopt the same standard here: State enforcement actions having a connection with or reference to airline 'rates, routes, or services' are preempted under . . . § 1305."[175]

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[171] 504 U.S. 374, 378 (1992).

[172] *Id.* at 379-80.

[173] *Id.* at 383.

[174] *Id.* at 383-84 (citing *Shaw*, 463 U.S. at 96; *Pilot Life*, 481 U.S. at 47; and *Metropolitan Life*, 471 U.S. at 739, among others).

[175] *Id.* at 384.

The Court found nothing in the language of Section 1305 to limit its preemptive scope to inconsistent state regulation. "'The pre-emption provision . . . displace[s] all state laws that fall within its sphere, even including state laws that are consistent with ERISA's substantive requirements.'"[176]

Nor did the general savings clause within the FAA limit the broad preemptive scope of Section 1305. The Court had based its decisions in this century on congressional statutory language. Thus, the Court had to explain and reconcile the seemingly conflicting words of the savings clause provisions of the FAA with those of the preemptive provisions of the ADA. What in actuality, yet again, probably only represented another example of poor legislative drafting and oversight, the Court chose to explain rationally rather than confront as a weakness.

The Court found that "it is a commonplace of statutory construction that the specific governs the general, a canon particularly pertinent here, where the 'savings' clause is a relic of the pre-ADA/no pre-emption regime. A general 'remedies' saving clause cannot be allowed to supersede the specific substantive pre-emption provision."[177] Additionally, "[s]uffice it to say that legislative history need not confirm the details of changes in the law effected by statutory language before we will interpret that language according to its *natural* meaning."[178]

Based on the statutory language, the Court likened this case to *Pilot Life*, where the Court "held that a common-law tort and contract action seeking damages for the failure of an employee benefit plan to pay benefits 'relate[d] to' employee benefit plans . . . was preempted by ERISA."[179]

To further support its statutory interpretation, the Court examined the economic implications of the case. An unquestioned purpose of the ADA included preventing state interference in the economic matters of the aviation industry.[180] "In any event, beyond the guidelines' express reference to fares, it is clear as an economic matter that state restrictions on fare advertising have the forbidden significant effect upon fares. Ad-

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[176] *Id.* at 387 (citing Mackey v. Lanier Collection Agency & Serv., Inc., 486 U.S. 825, 829 (1988), and *Metropolitan Life*, 471 U.S. at 739).

[177] *Morales*, 504 U.S. at 384-85 (citations omitted).

[178] *Id.* at 385 n.2 (emphasis added).

[179] *Id.* at 388.

[180] *Id.* at 378.

vertising 'serves . . . an indispensable role on the allocation of resources.'"[181]

The Court established that the states' guidelines impacted airline fares enough to definitionally relate to the airlines' rates, routes and services. The Court therefore held that the ADA preempted the fare advertising provisions of all states' guidelines.[182] The Court appropriately balanced the powers in this decision by granting vast preemptive power to the federal government but reminding all that the effects of some state conduct on rates, routes, and services were too remote or tenuous for federal action to preempt such conduct.[183]

The dissenting Justices in *Morales* did not particularly contest the majority's opinion so much as sidestep it. Based on a review of the extensive history of aviation legislation, including the enactment of the ADA, the dissent agreed that Congress intended to preempt state actions over any economic matters with significant impact on the aviation industry. "Accordingly, we conclude that preemption extends to all of the economic factors that go into the provision of the *quid pro quo* for passenger's fare, including flight frequency and timing, liability limits, reservation and boarding practices, insurance, smoking rules, meal service, entertainment, bonding and corporate financing . . . ."[184]

The dissenting Justices opined, however, that the airline industry failed to prove that the states' guidelines in any way significantly affected airlines' rates. Thus, guidelines enacted to affect the nature of advertising only remotely affected airline fares. Additionally, Congress failed to eliminate parts of the FAA, such as Section 411 which covered deceptive practices and Section 1506, the savings clause, when Congress enacted Section 1305. These actions indicated Congress's intent to continue the airlines' liability to the states if the airlines engaged in deceptive or misleading advertising.[185]

All of the Justices agreed that Congress enacted the ADA to unshackle the aviation industry from most federal economic regulation. Congress added Section 1305 to prevent state entities

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[181] *Id.* at 388.

[182] *Id.* at 391.

[183] *Id.* at 388-91.

[184] *Id.* at 424 (Stevens, J., joined by Rehnquist, C.J., and Blackmun, J., dissenting) (quoting 44 Fed. Reg. 9950-51 (1979) and citing John W. Freeman, *State Regulation of Airlines and the Airline Deregulation Act of 1978*, 44 J. AIR L. & COM. 747, 766-67 (1979)).

[185] *Morales*, 504 U.S. at 419-27.

from filling the void. The Justices were divided over what conduct impacted aviation economics, and to what extent, if any, the ADA's preemptive provision covered subjects generally characterized as other than economic issues.

In *American Airlines, Inc. v. Wolens*, the Justices of the Supreme Court continued to define the scope of Section 1305 as to the obviously economic matters.[186] Yet, again the Court avoided drawing any borderline between state conduct "relating to" an airline's rates, routes, and services, and that too remote to relate to the same.

The Court reiterated that the ADA's preemption provision barred state imposed regulation of air carriers. But, the Court made the distinction that the wording of Section 1305 did not prohibit courts from enforcing airline contract terms set by the parties themselves.[187] This conclusion contradicts the dicta in *Morales*.[188]

In *Wolens*, participants in American Airlines' frequent flyer program challenged the airline's retroactive changes in the terms and conditions of the program.[189] Applying *Morales*, the Court immediately concluded:

> We need not dwell on the question whether plaintiffs' complaints state claims 'relating to [air carrier] rates, routes, or services.' *Morales*, we are satisfied, does not countenance the Illinois Supreme Court's separation of matters 'essential' from matters unessential to airline operations. Plaintiffs' claims relate to 'rates,' *i.e.*, American's charges in the form of mileage credits for free tickets and upgrades, and to 'services,' *i.e.*, access to flights and class-of-service upgrades unlimited by retrospectively applied capacity controls and blackout dates. . . .
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> . . . .
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> As the NAAG guidelines illustrate, the Illinois Consumer Fraud Act serves as a means to guide and police the marketing practices of the airlines . . . . In light of the full text of the preemption clause, and of the ADA's purpose to leave largely to the airlines themselves, and not at all to States, the selection and design of marketing mechanisms appropriate to the furnishing of air transportation services, we conclude that §1305(a)(1) preempts plaintiffs' claims under the Illinois Consumer Fraud Act.[190]

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186 115 S. Ct. 817 (1995).

187 *Id.* at 820.

188 *See Morales*, 504 U.S. 374.

189 *Wolens*, 115 S. Ct. at 823.

190 *Id.* at 823-24 (footnote omitted).

The Court limited this holding with the following caveat:

> We do not read the ADA's preemption clause, however, to shelter airlines from suits alleging no violation of state-imposed obligations, but seeking recovery solely for the airline's alleged breach of its own, self-imposed undertakings . . . .
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> . . . .
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> Market efficiency requires effective means to enforce private agreements . . . . That reality is key to sensible construction of the ADA.[191]

The courts, not the DOT, may solve the adjudication of the private contract disputes.[192]

The Court even managed to reconcile the retention of the savings clause with the logic of its conclusions:

> The ADA's preemption clause, § 1305(a)(1), read together with the FAA's saving clause, stops States from imposing their own substantive standards with respect to rates, routes, or services, but not from affording relief to a party who claims and proves that an airline dishonored a term the airline itself stipulated. This distinction between what the State dictates and what the airline itself undertakes confines courts, in breach of contract actions, to the parties' bargain, with no enlargement or enhancement based on state laws or policies external to the agreement.[193]

In an otherwise focused opinion, the Court added a footnote which addressed issues irrelevant to the case. The Court's presumed need to do so possibly foreshadows what could be a controversial holding about personal injury claims, as well as a blanket conclusion which would contradict some of the findings in *Morales*. "American does not urge that the ADA preempts personal injury claims relating to airline operations . . . . ('It is . . . unlikely that § 1305(a)(1) preempts safety-related personal injury claims relating to airline operations.')."[194]

Justice Stevens' separate opinion revisited arguments dismissed by the majority in both *Morales* and *Wolens*. He argued that the ADA's preemption provision did not cover any private tort or contract claims, and further, that the retention of the savings clause strengthened the presumption against any preemption.[195] Until Congress accepts its responsibility to either

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191 *Id.* at 824.

192 *Id.* at 826-27.

193 *Id.* at 826.

194 *Id.* at 825 n.7.

195 *Id.* at 827-28 (Stevens, J., concurring in part and dissenting in part).

reconcile or repeal these contradictory provisions, courts will undoubtedly continue to use the "savings clause argument" as a simple expediency to defeat preemption defenses.

Justices O'Connor and Thomas addressed Justice Steven's opinion. Succinctly, the Justices reminded the Court that *Morales* relegated the savings clause to the pre-ADA days and it remained only as a relic of the past.[196]

These two Justices diverged from the majority's opinion only with the conclusion that *Morales*'s broad preemptive scope disposed of both "respondents' consumer fraud claims, and of their contract claims."[197] These Justices emphasized: "Thus, where the terms of a private contract relate to airline rates and services, and those terms can only be enforced *through state law*, *Morales* is indistinguishable."[198] These Justices noted that Congress revisited Section 1305 after the Court decided *Morales* and specifically endorsed the broad preemptive interpretation of the Supreme Court. Thus, these Justices found any new approach to preemption unacceptable and emphasized that, if the Court wished to disagree with Congress and itself, the Court must overrule *Morales* rather than redefine its meaning.[199]

To the dissenting Justices, Congress intended the ADA's preemption provision to prevent *any* source from interfering with the economic forces in the aviation industry. Justices Thomas and O'Connor added their own caveat that the ADA sometimes, but not always, preempted personal injury aviation claims.[200] With these perspectives, in *Morales* and *Wolens*, the Justices sharpened arguments which will control the new balance of power over the economics of the aviation industry within the federalist system into the twenty-first century.

Actually, whether arriving at a valid conclusion or not, the Court made an important distinction in *Wolens* between state imposed and privately accepted obligations. Over the years, the federal and state governments competed for power over the aviation subject. Yet, individual persons play a crucial role, for instance as passengers, in the aviation scenario. In enacting Section 1305, Congress probably intended to completely prevent the states from interfering with aviation economic matters

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196 *Id.* at 828-34 (O'Connor, J., with whom Thomas, J., joined as to all but Part I-B, concurring in the judgment in part and dissenting in part).

197 *Id.* at 830.

198 *Id.*

199 *Id.* at 832.

200 *Id.* at 830.

upon the removal from that arena of their major opponent, the federal government.[201]

Indeed, one can surmise that Congress approved the ADA and its preemption provision for the purpose of creating free enterprise business relationships between individuals and aviation enterprises. Such relationships demand the making of private contracts as a fundamental basis for economic exchanges. Thus, logically, Congress intended those entities to avail themselves of the penalties and remedies inherent to a contractual relationship.

*Wolens* appropriately served to remind the usual contestants that other players exist in the federalist system who are affected by preemption. Every factor deserves consideration in establishing an aviation policy. To ignore some of the parties affected by aviation matters would create an unbalanced scheme for the future and endanger the aviation subject itself.

The disturbing note in *Wolens*, however, concerned the Court's apparent reluctance in finally dealing with the personal injury issues. The Court did so in an absolutist manner, in direct contrast to the Court's intentional practice of using compromise to arrive at its economic decisions. The parties forced the lower courts to address these issues within the context of facile, generalized claims and defenses instead of after the presentation of an all-inclusive analysis of the issue with a sensible solution to the problems.

Should the United States Supreme Court be forced to make a decision under the usual circumstances, the aviation industry will undoubtedly continue to suffer as schismatic a future as is presently indicated by the various lower courts' decisions. In fact, the Court very recently vacated a decision, *Johnson v. American Airlines, Inc.*, without even writing an opinion.[202]

The Supreme Court decided another case in the 1990s, *Hawaiian Airlines, Inc. v. Norris*,[203] which only indirectly involved avi-

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[201] *See* Calvin Davison and Lorraine B. Halloway, *The Two Faces of Section 105—Airline Shield or Airport Sword*, 56 J. AIR L. & COM. 93 (1990). "The theory behind [Section 105] was that free entry into the system by new air carriers and expanded service by existing air carriers would provide better service and lower fares for passengers than the detailed regulatory and restrictive entry policies that had governed air transportation for most of its history. To achieve these objectives, it was necessary to prevent state and municipal authorities from filling the regulatory vacuum created by Congress." *Id.* at 93.

[202] 115 S. Ct. 1247 (1995).

[203] 114 S. Ct. 2239 (1994).

ation matters. The preemption issue arose within the employee labor context. The Court refused to preempt the Hawaii Whistleblower Protection Act and labor remedies because of the narrow administrative regulations within the Railway Labor Act (RLA) (not connected in any way with any of the aviation acts).[204]

### B. While the United States Supreme Court Considered the Economic Ramifications of Section 1305, the Lower Courts Made the 1990s the Decade of Section 1305's Effect on Personal Injury Claims

#### *1. Preemption Cases Based on Other than Section 1305*

In the decade of explosive litigation over the ADA's preemption provision, claimants presented courts with only a few other aviation issues. Whether everyone conceded precedent ruled all other matters, or momentarily forgot all else in the obsession over Section 1305, remains unknown. However, the results of those few cases should be mentioned.

The various courts followed well-established precedents in every instance in deciding these other cases. The various groups originally challenged the logic and extent of the preemptive scope over these aviation subjects. Having accepted both the courts' rules and exceptions, neither side sought to raise any new issues in these cases, but rather characterized the facts to fit within an existing rule or exception for the courts' determination.

The courts continued to allow broad preemptive power to the federal government over the control of aircraft noise.

> Both conditions were designed to reduce the effect of aircraft engine noise on residential properties near the airport. Both are invalid. They trespass upon a field that has been impliedly preempted by federal law. . . .
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> . . . .
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> That Court's decision in *City of Burbank* is the 'preeminent authority on the question of federal preemption in the area of aviation.' Furthermore, *City of Burbank* speaks directly to the problem of local efforts to control aircraft engine noise. It is upon that problem that the cited cases focus. . . .[205]

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[204] *Id.* at 2251.

[205] Harrison v. Schwartz, 572 A.2d 528, 528-29, 531 (Md. 1990) (citation omitted) (quoting Blue Sky Entertainment, Inc. v. Town of Gardiner, 711 F. Supp. 678, 691 (N.D.N.Y. 1989)). *See also* Burbank-Glendale-Pasadena Airport Auth. v.

One court upheld the municipal proprietor's rights to control noise within its limits as excepted in *City of Burbank*.[206] Other courts noted that neither *City of Burbank* nor the FAA regulations which provided exclusive federal sovereignty over airspace covered or preempted state or local zoning or land use laws.[207]

The airspace and aircraft flying through it remained under the exclusive control of the federal government.[208] In fact, one court took this doctrine to extreme: "Federal regulation of airspace management, air navigation facilities and air safety is pervasive. . . . Taken alone, the comprehensive federal regulation of air navigation facilities and air safety would permit the Court to conclude that local regulation of the construction of air navigation facilities is preempted."[209]

Before the "preemption explosion," the courts traditionally allowed the same exclusive control over parachuting activities, and most continued to do so.[210] However, one court made the startling statement that the municipal proprietorship exception from *City of Burbank* allowed that entity to control flight and parachutists.[211] No other court has followed this line of reasoning, nor are any likely to challenge the well-established exclusivity of control of airspace by the federal government.

The FAA recordation regulation clearly preempts any other recording law, and state law determines priority status thereafter.[212] States may also continue to tax aircraft property on the ground so long as that tax in no way constitutes a direct head tax.[213] "For the fee to be prohibited, it must bear some rational relation to persons or the carriage of persons traveling in air commerce."[214]

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City of Los Angeles, 979 F.2d 1338 (9th Cir. 1992); Minnesota Pub. Lobby v. Metropolitan Airports Comm'n, 520 N.W.2d 388 (Minn. 1994).

[206] Alaska Airlines, Inc. v. City of Long Beach, 951 F.2d 977 (9th Cir. 1991).

[207] City of Cleveland v. City of Brook Park, 893 F. Supp. 742 (N.D. Ohio 1995); Guillot v. Brooks, 651 So. 2d 345, 348 (La. Ct. App. 1995).

[208] Fiese v. Sitorius, 526 N.W.2d 86 (Neb. 1995); Banner Advertising, Inc. v. City of Boulder, 868 P.2d 1077 (Colo. 1994); *Guillot*, 651 So. 2d at 348.

[209] United States v. City of Berkeley, 735 F. Supp. 937, 940 (E.D. Mo. 1990).

[210] *See* Skydiving Ctr. of Greater Wash., D.C., Inc. v. St. Mary's County Airport Comm'n, 823 F. Supp. 1273 (D. Md. 1993).

[211] Malone Parachute Club, Inc. v. Town of Malone, 610 N.Y.S.2d 686, 688 (N.Y. App. Div. 1994).

[212] General Elec. Capital Corp. v. Advance Petroleum, Inc., 660 So. 2d 1139 (Fla. Dist. Ct. App. 1995).

[213] Alaska Airlines, Inc. v. Department of Food & Agric., 39 Cal. Rptr. 2d 426 (Cal. Ct. App. 1995).

[214] *Id.* at 430.

Just as consistently, courts refused to allow the pervasiveness of FAA regulations to constitute *implied* preemption of negligence claims such as design defects.[215]

Finally, the courts continued to uphold the intent of the Warsaw Convention to broadly preempt any law touching subject matters within its coverage and specifically limiting liability for claims within its purview.[216] The simplicity of decisions concerning issues covered by the terms of the Warsaw Convention begs attention:

> The conference at Warsaw had two goals. First, to establish uniformity as to documentation such as tickets and waybills, and procedures for dealing with claims arising out of international transportation. The second goal . . . of the conference was to limit the potential liability of air carriers in the event of accidents and lost or damaged cargo.
>
> The Convention was not intended to afford complete coverage for casualty losses; it was meant to provide 'necessary protection of a financially weak industry and [to ensure] that catastrophical risks would not be borne by the air carriers alone.'[217]

Another court stated: "[W]e are persuaded that the purposes for which the Convention was created are not consistent with an award of punitive damages."[218]

Two courts addressed issues of first impression but reached appropriately predictable and logical conclusions. In *Koohi v. United States*, the Ninth Circuit Court of Appeals decided that sovereign immunity and the combatant activities exception to the Federal Tort Claims Act (FTCA) preempted the plaintiffs'

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[215] *See* Commander Properties Corp. v. Beech Aircraft Corp., No. 88-2202-O, 1994 WL 544126 (D. Kan. Sept. 23, 1994); Sunbird Air Servs., Inc. v. Beech Aircraft Corp., 789 F. Supp. 360 (D. Kan. 1992).

[216] *See, e.g., In re* Air Disaster at Lockerbie, Scotland on Dec. 21, 1988, 928 F.2d 1267 (2d Cir. 1991); Cheng v. United Airlines, Inc., No. 93-C149, 1995 WL 42157 (N.D. Ill. 1995); Levy v. American Airlines, Inc., No. 90 CIV. 7005 (LJF), 1993 WL 205857, at *5 (S.D.N.Y. 1993), *aff'd*, 22 F.3d 1092 (2d Cir. 1994) (the Warsaw Convention did not preempt state law causes of action not covered by its terms, but did preempt those covered); Jack v. Trans World Airlines, Inc., 820 F. Supp. 1218, 1226 (N.D. Cal. 1993) (Warsaw Convention preempted state law causes of action and not just remedies); Onyeanusi v. Pan American World Airways, Inc., 767 F. Supp. 654 (E.D. Pa. 1990), *aff'd*, 952 F.2d 788 (3d Cir. 1992); Iyegha v. United Airlines, Inc., 659 So. 2d 45 (Ala. 1995); Jones v. American Airlines, Inc., No. 93-0131843, 1995 WL 12512 (Conn. Super. Ct. 1995); Hibbard v. Trans World Airlines, Inc., 592 N.E.2d 889 (Ohio Ct. App. 1990).

[217] *Onyeanusi*, 767 F. Supp. at 656 (quoting Floyd v. Eastern Airlines, Inc., 872 F.2d 1462, 1467 (11th Cir. 1989), *rev'd*, 499 U.S. 530 (1991) (citations omitted)).

[218] *Lockerbie*, 928 F.2d at 1270.

claims for personal and other injuries suffered as a result of the downing of an Iranian civilian airline by a United States military aircraft during a state of military readiness.[219] In *Preston v. Frantz*, the Second Circuit Court of Appeals decided that general federal maritime law preempted the plaintiffs' claims for injuries suffered during a helicopter crash in international waters.[220] The comprehensive uniformity of the federal maritime law also begs examination in the aviation context.

### 2. *Section 1305 Preemption Cases Prior to* Morales

As noted, only a few cases decided in the 1980s resolved legal controversies concerning the interpretation of ADA provisions, and those dealt mostly with economic matters. Only after the Fifth Circuit Court of Appeals commented in *O'Carroll* that Section 1305 preempted all state law claims, including those alleging personal injury, did the courts witness an explosion of aviation litigation which centered almost entirely on the preemptive breadth of Section 1305. Prior to *Morales*, courts, even those in the same state, split over the preemption of personal injury claims and the precedent for each decision.

Based on *O'Carroll*, one court held it inappropriate to address any state law claims pertinent to aviation.[221] Another asserted that a private party possessed no private right of action for any matter covered by Section 1305.[222] Citing *O'Carroll* as controlling law, another Texas court preempted a passenger's claim for injuries allegedly received from the flight attendant's negligence. "Section 1305 clearly applies to Baugh's state law negligence claim. Since Baugh alleges her injury occurred *during a flight* and was caused by a flight attendant in the course of employment, the negligence action arises out of the services afforded passengers by TWA."[223]

In contrast, the Ninth Circuit Court of Appeals decided that overbooking and boarding procedures did not constitute services within the meaning of Section 1305,[224] and refused to preempt claims involving such matters. Services meant specialized

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219 976 F.2d 1328 (9th Cir. 1992).

220 11 F.3d 357 (2d Cir. 1993).

221 Von Anhalt v. Delta Air Lines, Inc., 735 F. Supp. 1030 (S.D. Fla. 1990).

222 O'Connell Management Co., Inc. v. Massachusetts Port Auth., 744 F. Supp. 368 (D. Mass. 1990).

223 Baugh v. Trans World Airlines, Inc., No. 87-2611 (S.D. Tex. Oct. 26, 1989), *aff'd*, 915 F.2d 693 (5th Cir. 1990).

224 West v. Northwest Airlines, Inc., 995 F.2d 148 (9th Cir. 1993).

conduct like mail and cargo operations rather than those related to passenger flights. The court found, however, that Section 1305 preempted any scheme which punished any aviation service regulated by a FAA provision.[225] Thus, the court preempted West's punitive damages claim.[226]

To add to the confusion, a state court disagreed with the latter part of the *West* decision and found that no FAA provisions preempted state law causes of action for compensatory or punitive damages.[227] Then, another Texas court, while somehow reconciling its decision with *O'Carroll*, found that Section 1305 did not preempt claims based on negligent conduct in aircraft maintenance and operation.[228] The United States District Court for Hawaii basically agreed and held that Section 1305 did not preempt claims for injuries due to design defects.[229]

Interestingly, the Ninth Circuit Court of Appeals obviously thought that Section 1305 did not apply to airline passenger services. However, that same court granted stunningly broad scope to the same provision to balance a federal and state economic regulatory matter. In *Federal Express Corp. v. California Public Utilities Commission*, the state court found that a California state agency regulated Federal Express trucks as it did other common carriers on California highways.[230] Federal Express objected on the ground that Section 1305 preempted all such regulations on its trucking enterprise because the trucking operation constituted an integral part of its all-cargo aviation service covered by the FAA and ADA.[231]

The court found that "Federal Express is exactly the kind of an expedited all-cargo service that Congress specified and the kind of integrated transportation system that was federally desired . . . . Congress has freed it from the constrictive grasp of economic regulation by the states."[232] The court preempted all state regulatory controls over the trucks.[233] Insofar as the courts characterized the issues as economic matters, in the early 1990s,

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225 *Id.* at 151-52.

226 *Id.*

227 *In re* Air Crash Disaster at Sioux City, Iowa, 734 F. Supp. 1425, 1428 (N.D. Ill. 1990) (citing *Silkwood*, 464 U.S. at 248).

228 Stewart v. American Airlines, Inc., 776 F. Supp. 1194 (S.D. Tex. 1991).

229 Holliday v. Bell Helicopters Textron, Inc., 747 F. Supp. 1396 (D. Haw. 1990).

230 936 F.2d 1075 (9th Cir. 1991).

231 *Id.* at 1076-78.

232 *Id.* at 1079.

233 *Id.*

based on Section 1305, the courts preempted related state or local legal actions.

During this time another Texas court decided a Section 1305 aviation issue characterized as an economic matter. In *Trans World Airlines, Inc. v. Mattox*,[234] various attorneys general threatened lawsuits against the airlines for alleged violations of the states' Deceptive Trade Practices acts. The court held such laws preempted by Section 1305 and therefore granted the requested injunction.[235]

Most cases in the 1990s involved the impact of Section 1305 on personal injury claims. Yet, the United States Supreme Court chose *Mattox*, an "economic services" case, as one of its first means of attempting to resolve the divisive Section 1305 issues. The Court's case became the seminal *Morales* decision.

### 3. *Section 1305 Cases Decided after* Morales *and Prior to* Wolens

*Morales* seemed a well-reasoned, clearly written opinion which created some well-drawn lines and rules to enclose, limit, and define the preemptive scope of Section 1305 on most issues. The cases decided by the various courts immediately thereafter proved that assumption wrong. Moreover, the lower courts' decisions served to finally illustrate the divisiveness, possessiveness, and fierceness of the underlying controversy about which sphere(s) of power would control tortious conduct in the aviation arena.

Even prior to *Morales*, the states and federal government indicated a willingness to return economic control to the aviation industry. But no state, except Texas (momentarily), intended to relinquish its police powers, nor any individual entity, its tortious rights, to the aviation industry. The aftermath of *Morales* only served as a warning to Congress and the United States Supreme Court that these entities will not succeed in sending a subtle message. Congress or the Court must confront the personal injury controversy head-on. Certainly, there is no shortage of cases from which to choose when the Court decides to address the issue. However, it would be better for the industry if we placed cases other than those presently pending at its disposal.

Since a great number of courts reached opposite conclusions based on exactly the same facts or issues, difficulty persists in

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[234] 897 F.2d 773 (5th Cir. 1990).

[235] *Id.* at 787-88.

characterizing, rationalizing, and predicting the outcome of any pending case. Certainly, these cases failed to shape any fully accepted precedent about the scope of the ADA's preemption provision, and only added confusion to the *Morales* holding and general preemption doctrine.

The various courts claimed to reach decisions based on distinctions between direct or remote services, services as opposed to safety measures, and economic matters as opposed to tortious conduct. Most threw in the "savings clause" argument if denying preemption. It remains easier to list the results than to logically reconcile them. During these years, various courts reached decisions about Section 1305 on the following matters:

a. Airline Security Measures

The following cases were preempted: *Lawal v. British Airways, PLC*[236] and *Williams v. Express Airlines, Inc.*[237]

The following cases were not preempted: *Fenn v. American Airlines, Inc.*;[238] *Bayne v. Adventure Tours USA, Inc.*;[239] *Curley v. American Airlines, Inc.*;[240] *Sedigh v. Delta Airlines, Inc.*;[241] and *Khan v. American Airlines.*[242]

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[236] 812 F. Supp. 713 (S.D. Tex. 1992) (man detained from boarding; conduct related to services, and based on *O'Carroll*, preempted by § 1305).

[237] 825 F. Supp. 831 (W.D. Tenn. 1993) (handicapped person claimed restraint constituted false imprisonment, and on remand after *Morales*, the court declined to follow *Margolis*, deciding that plaintiff's movement during flight constituted airline service and preempted).

[238] 839 F. Supp. 1218 (S.D. Miss. 1993) (passenger sued for false imprisonment and slander after being detained on possibility of theft, but security measures related to safety not service or service too remote to be preempted by § 1305).

[239] 841 F. Supp. 206 (N.D. Tex. 1994) (security measures were services too remote to be preempted by § 1305 where passenger detained while boarding, and sued for false imprisonment).

[240] 846 F. Supp. 280 (S.D.N.Y. 1994) (security measures were services too remote to be preempted by § 1305 in alleged false imprisonment upon deplaning after being falsely accused of smoking marijuana on aircraft during flight).

[241] 850 F. Supp. 197 (E.D.N.Y. 1994) (passenger restrained on aircraft by sky marshalls as risk and sued for false imprisonment, but since airlines are not likely to compete over security measures, such claims do not affect economics).

[242] 639 N.E.2d 210 (Ill. App. Ct. 1994) (court agreed with *Miller*, *Margolis*, and *Doricent*, but declined to follow *Lawal*, and found security measures were services too remote to be preempted by § 1305 where passenger alleged false imprisonment when detained by security agents over stolen ticket).

b. Injury Due to Article Impact from Overhead Bin

The following case was preempted: *Hodges v. Delta Air Lines, Inc.*[243]

The following cases were not preempted: *Heller v. Delta Airlines, Inc.*;[244] *Kiefer v. Continental Airlines.*[245]

c. Boarding Aircraft

The following cases were preempted: *Hirsch v. American Airlines*[246]; *Pearson v. Lake Forest Country Day School*;[247] and *Travel All Over the World v. The Kingdom of Saudi Arabia.*[248]

The following case was not preempted: *Miller v. Northwest Airlines.*[249]

d. Refunding Tickets

The following cases were preempted: *Vail v. Pan Am Corp.*;[250] *Statland v. American Airlines, Inc.*;[251] and *Johnson v. American Airlines, Inc.*[252]

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[243] 4 F.3d 350 (5th Cir. 1993) (required by *Baugh* to preempt state tort claims, and disagreed with result).

[244] No. 92 Civ. 1937 (RPP), 1993 WL 330093 (S.D.N.Y. Aug. 25, 1993) (*Morales* did not require preemption of negligence claim arising from luggage falling from overhead bin onto passenger's head).

[245] 882 S.W.2d 496 (Tex. App.—Houston [1st Dist.] 1994), *aff'd*, 920 S.W.2d 274 (Tex. 1996).

[246] 608 N.Y.S.2d 606 (N.Y. Civ. Ct. 1993) (boarding and seating on flights are passenger services). In *Hirsch*, a passenger's claims arose from alleged injuries received when an attendant dropped a bag from an overhead bin on the passenger. Because no legislative history supported the view that the ADA meant to preempt personal injury claims, and this was not a borderline case, "[p]ersonal injury suits, traditionally within the separate sphere of governmental authority reserved to the states under our federalist system, likewise lie well on the other side of that border." *Id.*

[247] 633 N.E.2d 1315 (Ill. App. Ct. 1994) (boarding and seating policies were services central to the operation of planes).

[248] No. 91-C-3306, 1994 WL 673025 (N.D. Ill. Nov. 28, 1994) (like *Pearson*, related to boarding and seating as service and preempted).

[249] 602 A.2d 785 (N.J. Super. Ct. App. Div. 1992) (security measures for boarding and carry-on luggage are too remote to be preempted service).

[250] 616 A.2d 523 (N.J. Super. Ct. App. Div. 1992) (section 1305 preempted all claims concerning refunds on tickets; *Morales* casts doubt on *Miller* and *West*).

[251] 998 F.2d 539 (7th Cir. 1993), *cert. denied*, 510 U.S. 1012 (1993) (section 1305 preempted any claims about cancelled ticket refunds; complaints should be directed to DOT).

[252] 633 N.E.2d 978 (Ill. App. Ct. 1994), *vacated*, 115 S. Ct. 1247 (1995) (section 1305 preempted refunding policy; more compelling than facts in *Morales*).

e. Crashes and Landing/Take-Off of Aircraft

The following case was preempted: *Lesser v. Mark Travel Corp.*[253]

The following cases were not preempted: *Burke v. Northwest Airlines, Inc.*;[254] *O'Hern v. Delta Airlines, Inc.*;[255] and *Harrell v. Champlain Enterprises, Inc.*[256]

f. Design Defects

The following cases were not preempted: *Cleveland v. Piper Aircraft Corp.*;[257] and *Public Health Trust v. Lake Aircraft, Inc.*[258]

g. Overbooking Flights

The following case was not preempted: *West v. Northwest Airlines, Inc.*[259]

h. Confirmation Mishaps

The following case was preempted: *El-Menshawy v. Egypt Air.*[260]

The following case was not preempted: *Lathigra v. British Airways PLC.*[261]

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253 23 Av. Cas. 18,419 (CCH) (S.D. Tex. 1992) (because landing is essential operation and service to passengers, claim related to landing procedure is preempted where plaintiff was injured during landing accident).

254 819 F. Supp. 1352 (E.D. Mich. 1993) (crash injuries not directly related to services of airline; crash involved airlines' operations, but service too remote for claims to be preempted).

255 838 F. Supp. 1264 (N.D. Ill. 1993) (Passenger injured on rapid descent. Descent represented safety rather than service issue. Congress did not intend § 1305 to preempt safety issues, or if it constituted service, it was too remote.).

256 613 N.Y.S.2d 1002 (N.Y. App. Div. 1994) (Person killed in airline crash. Service not coextensive with safety. Crash related to safety and as indicated by Savings Clause Congress intended courts to adjudicate such claims by traditional state law methods.).

257 985 F.2d 1438 (10th Cir. 1993) (Tort liability for design defects established by 1950s. Section 1305 preempted only rates and routes and not meant to preempt tort actions.).

258 992 F.2d 291 (11th Cir. 1993) (because design defect claims lay outside § 1305's reach for rates, routes, or services, such was not preempted).

259 995 F.2d 148 (9th Cir. 1993) (on remand the court reaffirmed that state tort and contract claims for overbooking flight are too tenuous to be service covered by § 1305).

260 647 A.2d 491 (N.J. Super. Ct. Law Div. 1994) (failure to honor confirmed reservation related to airline service and thus preempted).

261 41 F.3d 535 (9th Cir. 1994) (failure to honor confirmed reservation service too remote to preempt under § 1305).

i. Disembarkation Injury

The following cases were not preempted: *Kay v. USAir, Inc.*[262] and *Jamerson v. Atlantic Southeast Airlines.*[263]

j. Accidents in Terminal or Ground Transport

The following cases were not preempted: *Butcher v. City of Houston*[264]; *Chouest v. American Airlines, Inc.*;[265] *Stagl v. Delta Air Lines, Inc.*;[266] and *Knopp v. American Airlines, Inc.*[267]

k. Discount Flying Plans

The following case was preempted: *Continental Airlines, Inc. v. American Airlines, Inc.*[268]

The following cases went both ways: *Wolens v. American Airlines. Inc.*;[269] and *Wolens v. American Airlines, Inc.*[270]

l. ERISA Plans and Physical Requirements

The following cases were preempted: *Belgard v. United Airlines*;[271] and *Aloha Airlines, Inc. v. Ahue.*[272]

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262 No. 93-4856, 1994 WL 406548 (E.D. Pa. July 28, 1994) (Congress could not have intended § 1305 to preempt all service-related negligence).

263 860 F. Supp. 821 (M.D. Ala. 1994) (section 1305 did not preempt state law negligence claims against airlines).

264 813 F. Supp. 515 (S.D. Tex. 1993) (services in § 1305 did not encompass care of building or terminal space).

265 839 F. Supp. 412 (E.D. La. 1993) (accident in ground transportation too remote to be preempted under § 1305; distinguished from *Federal Express* as individual tort case instead of state economic regulation).

266 849 F. Supp. 179 (E.D.N.Y. 1994) (where plaintiff injured by third party, it is illogical to assume duty to care for building or terminal space, so airline had no duty to the plaintiff).

267 No. 01-A-01-9406-CV00301, 1994 WL 687004 (Tenn. Ct. App. Dec. 9, 1994) (section 1305 does not preempt standards of care for transportation of passengers in air terminal).

268 824 F. Supp. 689 (S.D. Tex. 1993) (value pricing plans constituted object of § 1305 and limits thereon preempted).

269 589 N.E.2d 533 (Ill. 1992) (damage claim concerned airline's frequent flyer program and Congress did not intend § 1305 as blanket preemption provision so injunctive relief was preempted, but breach of contract and consumer fraud claims survived).

270 626 N.E.2d 205 (Ill. 1993) (on remand after *Morales* reached same decision because claims too remote to rates, routes, or services to be preempted; Supreme Court decision discussed *supra*).

271 857 P.2d 467 (Colo. Ct. App. 1992) (few factors are more important to services than quality of airline employees, therefore airline's employee requirement regulations preempted Colorado's Handicapped Discrimination Law).

m. Assault and Battery, and Criminal or Rude Treatment

The following case was preempted: *Cannava v. USAir, Inc.*.[273]

The following cases were not preempted: *Doricent v. American Airlines, Inc.*;[274] *Sardinas v. American Airlines, Inc.*;[275] *Pittman v. Grayson*;[276] and *Anderson v. Evergreen International Airlines, Inc.*[277]

n. Wrongful Death Claims

The following case was preempted: *Howard v. Northwest Airlines, Inc.*[278]

o. Antitrust Claims

The following case was preempted: *Corporate Travel Consultants, Inc. v. United Airlines, Inc.*[279]

p. Safety Instead of Service

The following case was not preempted: *Dudley v. Business Express, Inc.*[280]

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272 12 F.3d 1498 (9th Cir. 1993) (FAA-constituted "medical benefit" in ERISA plan preempting other regulations).

273 No. 91-30003-F, 1993 WL 565341 (D. Mass. Jan. 7, 1993) (claimed USAir treated passenger discourteously while ticketing and nonflight and flight services were too remote to be services under § 1305).

274 No. 91-12084Y, 1993 WL 437670 (D. Mass. Oct. 19, 1993) (one discrimination even in seating too remote to be legitimate component of service and preempt such claim, but case severely criticized congressional drafting of the ADA that caused case-by-case adjudication of aviation issues).

275 No. 93-0347267-S, 1994 WL 516811 (Conn. Super. Ct. Sept. 13, 1994) (although attendant shoved passenger, such conduct too remote to be service under § 1305).

276 869 F. Supp. 1065 (S.D.N.Y. 1994) (ADA not intended to be safe harbor from civil prosecution for civil analogues of criminal offenses).

277 886 P.2d 1068 (Or. Ct. App. 1994) (services did not encompass safety issue, point of wrongful discharge claim for which FAA provided no remedy and therefore did not intend to preempt).

278 793 F. Supp. 129 (S.D. Tex. 1992) (wrongful death action preempted because related to service to ill passenger; absence of private remedy not a factor on the appropriate decision).

279 799 F. Supp. 58 (N.D. Ill. 1992) (Antitrust Act related to rates and was preempted in this case where defendant failed to prove case acceptable for removal action).

280 882 F. Supp. 199 (D.N.H. 1994) (passenger suffered head injuries, but measures for safety were not services within the meaning of § 1305).

q. All Personal Injury Claims

The following case was preempted: *Smith v. American West Airlines, Inc.*[281]

The following case was not preempted: *Margolis v. United Airlines, Inc.*[282]

During this era, one court got frustrated with the confusion and obsession over the ADA's preemption provision.[283] The court thus fashioned its own *test* for deciding preemption under Section 1305. The case involved a familiar controversy wherein the plaintiffs characterized an airline employee's rude conduct as personally injurious to themselves, while the airline characterized the conduct as appropriate service. The court found that *Morales* dictated that Section 1305 could preempt some personal injury claims. Other claims, however, were not preempted by the court due to congressional retention of the "savings clause."[284]

The court thought that confining an inquiry to the relationship between conduct and airline services inadequately limited its viable options to resolve such controversies. The court opined that the overall conduct of flight activity should bear on a case's outcome. With this in mind, a specific test applied to each case would decide the preemption issue as a matter of law.[285]

The test consisted of three steps:

1) Make a threshold determination about whether an activity constituted a service; and

2) If the activity constituted a service then decide whether the activity remotely affected airline service; and

3a) If the activity was not remote, then determine if "the underlying tortious conduct" constituted activity "reasonably necessary to the provision of the service[s];"[286] and

3b) If not, the state law tort claim retained validity.

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[281] 4 F.3d 356 (5th Cir. 1993), *rev'd*, 44 F.3d 344 (5th Cir. 1995) (until court overturned precedential law, state law tort claims for personal injury were preempted by § 1305).

[282] 811 F. Supp. 318 (E.D. Mich. 1993) (finding no legislative history intended ADA to preclude common law negligence actions, provided no remedy for such complete preemption, and negligence claims were not related to airline services).

[283] Rombom v. United Air Lines, Inc., 867 F. Supp. 214 (S.D.N.Y. 1994).

[284] *Id.* at 216-21.

[285] *Id.* at 221-22.

[286] *Id.* at 222.

The court decided reasonableness as a matter of law.[287]

This court created a totally new and detailed test to resolve the preemption issues in this case. To date, no other court has adopted this test. More importantly, the court's creation of a new test indicated its own frustration with the use of the original preemption doctrine's rules to resolve power struggles and dissensions in the aviation sphere. The court expressed the sentiments of many courts in its sense of significant losses of judicial control over all aviation matters during the explosion of personal injury litigation.

Having attempted, and failed, to provide some direction and stability to these tort issues with the *Morales* decision, the United States Supreme Court should have confronted, balanced, and resolved the tort law issues in a subsequent decision. Instead, the Court most recently, in *Wolens*, addressed more economic pricing programs. The Court in *Wolens* may or may not have clarified the preemption doctrine's application to economic issues. As will be seen below, it certainly only sustained and increased the lower courts' confusion on tort law issues which consequently continues to plague the entire aviation industry. In the interest of stability to stabilize the industry, courts need to seek a formula to guarantee some continuity and predictability in legal application of doctrines to various and changing factual scenarios.

### 4. *Section 1305 Cases Decided After* Wolens

The United States Supreme Court used well-written arguments in *Wolens* to sharpen a position on economic matters in the aviation sphere. Perhaps the Court hoped to steer the lower courts toward a more universal and balanced "middle" position on all aviation matters as well.[288] If so, the Court failed in this aim. After *Wolens*, the courts continued the dissension over Section 1305 in much the same fashion as before the decision. Again, it remains easier to list results for comparisons than to reconcile the irreconcilable:

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[287] *Id.* at 222.

[288] *See Wolens*, 115 S. Ct. 817.

a. Injury Due to Article Impact from Overhead Bin

The following case was preempted: *Costa v. American Airlines, Inc.*[289]

The following case was not preempted: *Hodges v. Delta Airlines, Inc.*[290]

b. Boarding Aircraft

The following case was preempted: *Shupe v. American Airlines, Inc.*[291]

The following cases were not preempted: *Rowley v. American Airlines, Inc.*;[292] *Chukwu v. Board of Directors Varig Airline*;[293] and *Chukwu v. Board of Directors British Airways*[294]

c. Ticketing and Security Measures

The following case was not preempted: *Smith v. America West Airlines, Inc.*[295]

d. Disembarkation Injury

The following case was not preempted: *Moore v. Northwest Airlines, Inc.*[296]

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[289] 892 F. Supp. 237 (C.D. Cal. 1995) (based on previous California decisions, § 1305 injuries suffered from article falling from overhead bin preempted under § 1305).

[290] 44 F.3d 334 (5th Cir. 1995) (The court found that services include ticketing, boarding, food handling, baggage handling, and flying aircraft. *Id.* In this case, a passenger's claims were not preempted where bottles fell from overhead compartment and injured the passenger, since the claim involved operation of aircraft and not services. *Id.* This decision reversed the lower court. *See supra* note 281 and *infra* note 295).

[291] 893 S.W.2d 305 (Tex. App.—Fort Worth 1995), *aff'd*, 920 S.W.2d 274 (Tex. 1996) (claims for poor boarding services made under state's fraud law preempted under § 1305; services not excepted by *Wolens*).

[292] 875 F. Supp. 708 (D. Or. 1995) (boarding disabled person had no significant impact on airline services, and too tenuous for services to be preempted under § 1305).

[293] 880 F. Supp. 891 (D. Mass. 1995) (breach of contract claim for boarding mishap).

[294] 889 F. Supp. 12 (D. Mass. 1995) (remand to ascertain facts necessary to determine if contract claims enlarged by state laws per *Wolens* and preempted).

[295] 44 F.3d 344 (5th Cir. 1995) (where passenger allegedly injured because the airline ticketed a hijacker and allowed him to board, the claim was not preempted because the service involved safety and operation of the aircraft and therefore too remote for § 1305 service).

[296] 897 F. Supp. 313 (E.D. Tex. 1995) (based on *Hodges*, deplaning accidents not preempted under § 1305).

e. Discount and Advertised Programs

The following case was preempted: *Wagman v. Federal Express Corp.*[297]

f. Rude Treatment

The following case was preempted: *Harris v. American Airlines, Inc.*[298]

g. All Personal Injury Claims

The following case was not preempted: *Katonah v. USAir, Inc.*[299]

The complete inability to generalize or predict the outcome of the above-cited cases, or similar future ones, indicates the present fragile and uncertain state of legal affairs on aviation matters. The current state of the law demands serious thought about the purpose of aviation in America, and in our ever reshaped federalist system. The courts must therefore develop a better framework in which to decide the larger aviation issues and establish a much clearer overall policy.

## VI. HOW COULD THE PREEMPTION DOCTRINE HELP PROPEL THE AVIATION INDUSTRY AND THE FEDERALIST SYSTEM INTO THE TWENTY-FIRST CENTURY?

The United States of America represents a federalist system created from the union of independent states intending to create a greater and stronger whole nation capable of protecting all of the individual entities' parts. The United States Supreme Court functions as one component in the deliberate balancing act maintaining this system by determining spheres of power therein from the nature and purpose of the Constitution.[300] "[W]e must never forget that it is *a constitution* we are expounding."[301] But we have forgotten! The legal community has

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[297] 844 F. Supp. 247 (D. Md. 1994), *aff'd*, 47 F.3d 1166 (4th Cir. 1995) (ADA language clearly preempted state regulation of advertising airline programs where Federal Express's overnight delivery related to fares).

[298] 55 F.3d 1472 (9th Cir. 1995) (serving beverages constituted a service under § 1305 and preempted claims made in reference even if characterized as racial in attempt to conceptionalize a *Wolens* exception).

[299] 876 F. Supp. 984 (N.D. Ill. 1995) (Federal law did not preempt state law tort claims. If such were intended, Congress would have done so explicitly.).

[300] *M'Culloch*, 17 U.S. (4 Wheat.) at 316; *Gibbons*, 22 U.S. (9 Wheat.) at 1.

[301] *M'Culloch*, 17 U.S. (4 Wheat.) at 407.

become obsessed with shaping the entire future of the aviation subject within the confines of an interpretation of only congressional intent, limited even more with restrictions by one express preemption provision. Since the 1990s, the legal community has forgotten to consider the place and purpose of that individual aviation subject matter in the Nation's future and shunned the other legal precedents of decades of prior aviation policy.

As noted in several previous sections, the parallels between aviation and maritime activities should have prompted thought to construction of a federal aviation law. Alternatively, the international scope of such a means of travel and commerce should have forced some thought toward the development of policies and laws similar to those which shaped the Warsaw Convention. Although the authors personally favor either of those two concepts as the most appropriate legal frameworks for future aviation policy, it remains unlikely that such revisions of thought will occur at this late date in American aviation history.

Within America's federalist framework, the United States Supreme Court originally posited the preemption doctrine as one means to maintain the supremacy of the Union. Although dependent on congressional intent for validation by the time the Court applied the preemption doctrine to aviation issues, all of the Nation's courts thereafter accepted the doctrine's applicability to establish the *exclusivity* of federal control over any aspect of *flight*, including landing and take-off procedures. As part of the necessity to balance powers and concepts (uniformity versus individuality) to maintain the federalist system, all of the courts accepted various powers' control over aviation matters connected to ground affairs.

Congress drafted and approved the ADA with the knowledge of these precedents. Congress supplemented the preexisting FAA congressional legislation with the ADA, based on Congress's policies for the aviation subject and judicial precedent controlling the balance of powers over it. Congress intended for the ADA legislation to clarify and enlarge American aviation policy, not diminish and shrink it to one segregated, obsessive argument. Congress wrote the ADA to loosen its exclusively federal economic regulatory control over aviation matters and to protect its formerly exclusive preserves from another entity's powers. As *Morales* held, Congress even meant to broaden its

protection to the economic aspects of the business which are related to matters on the ground as well as in the skies.[302]

One major function of the legal sphere is to determine the purpose of each individual part's position within the federalist system to support the growth of the entity and increase the strength of the system. If preemption represents another doctrinal means to accomplish the task, then we should hardly determine the entire future of the aviation subject upon the limited, no matter how broadly worded, language of one such express provision.

We should interpret Section 1305 in the context of preemption precedents over the entire aviation subject. Logically, Section 1305 serves to substantiate the trend to preempt all laws or measures regulating aircraft *in flight* and during takeoff and landing, including the troublesome and expensive complaints about employee service on board aircraft, and during boarding and disembarkation. Continuing to balance powers, courts would not preempt any complaints about incidents bound to the ground.

Several more cases with issues similar to those highlighted in *Morales* and *Wolens* may need to be decided to determine the "bright line" which will illuminate those grounded economic matters which Congress intended to preempt by the addition of Section 1305 to aviation policy. Such reasoning, and consequent policy, follows and simply adds definiteness to traditional precedents in aviation matters.

After research, the "flight" concept seems a more appropriate solution to the raging controversies of the 1990s, and the more important problems of propelling the American aviation industry into the twenty-first century. This viable solution, however, must be solidified with legal precedents and credible evidence to ensure judicial awareness of the reality of aviation technology and affairs, as well as its rights to as much protection as any other entity in the system.

Too often facile and short-sighted legal procedures and tactics, particularly with increased litigation in the 1990s, contribute as much as any other factor to poorly reasoned, confusing, and conflicting legal decisions. A Supreme Court decision

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[302] *See Morales*, 504 U.S. at 374; *but see* Paul S. Dempsey, *The Disintegration of the U.S. Airline Industry*, 20 TRANSP. L.J. 9 (1991) (disputing the entire premise of congressional legislation relating to deregulation upon which courts based all of the judicial decisions after 1978 which effect the airline industry).

about the applicability of Section 1305 to all personal injury claims cannot be far in the future. How visionary it will be depends a great deal on the thought with which litigators present issues within the next several years. To assume that insurance or business practices will preserve the aviation industry, regardless of legal protection and direction, overlooks the evidence of bankrupt business disasters from the litigation of the 1980s.

Hopefully, the legal community would like to see a strong and visionary aviation industry wing its way into the twenty-first century. To ensure such, we must present a case with issues that will provide the courts a means to forge useful and understandable precedents creating a balance of powers which will include and assimilate the aviation subject.