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A PRACTICAL RECONCILIATION OF STATE AND FEDERAL CONTROL

BY THOMAS K. TAYLOR¹

In recent issues, and again in this issue of the Journal of Air Law and Commerce are two articles and a report discussing governmental control of aviation. The first of these presented the case for exclusive federal control, and the second endeavored to establish a broad field for continued state regulatory activity. It is immediately significant that the factual subject matter and the nomenclature employed in each case were designed to support the position of the respective writers.

Mrs. Mabel Walker Willebrandt, whose article "Federal Control of Air Commerce"² was first in point of time, concerned herself largely with scheduled carrier operations. The facts and figures, as well as the arguments presented, dealt almost exclusively with large scale, interstate air commerce in the big business sense of the term. Having painted her picture with these colors she very rightly called for Congress to usurp the entire field of control *for this type of aviation*.

Mr. Charles L. Morris, Commissioner of Aeronautics for Connecticut, then answered Mrs. Willebrandt, stating his views under the heading "State Control of Aeronautics."³ Though seemingly at odds with Mrs. Willebrandt, Mr. Morris was concerned with intra-state flying, non-scheduled aircraft operations, and matters generally which might be properly within state jurisdiction. The "sectional" approach to the problem was entirely different from the "national" approach of the earlier article. Thus Mr. Morris presented another picture of aviation, and argued for state control of his type of aviation. Except for a certain amount of borderline friction, these writers had no quarrel, nor were their positions necessarily conflicting.

The third of these documents is the minority report of the Aeronautical Law Committee of the American Bar Association which was submitted by Mr. George B. Logan.⁴ Though this report was

1. A. B. Amherst College, 1937; Ll. B. Washington University, 1940; Flying Cadet, Air Corps Training Attachment, Hicks Field, Fort Worth, Texas.

2. 11 Journal of Air Law and Commerce 204.

3. 11 Journal of Air Law and Commerce 320.

4. See page 268 of this issue.

intentionally restricted in scope,⁵ the reader found a comprehensive analysis of the problems of regulation, as well as a clarification of terminology. Avoiding legal restrictions, Mr. Logan presented a complete picture of aviation, assigned the federal government "practically the entire field of aviation," and proceeded analytically and practically to demonstrate a need for state supervision of the remainder of the field.

Instead of arguing for either federal or state control, it appears vastly more important to coordinate the two. It is felt that there is not, nor can there be, any conflict in air law arising out of the duality of control which is inherent under our form of government. The inevitable development of aviation, in *all* of its aspects, will not tolerate an unnecessary obstacle of this nature. The purpose of this writing is to inquire how this coordination may be brought about most effectively.

Inasmuch as the states have the constitutional power to regulate certain phases of aviation, and have undertaken to legislate in this regard, they have assumed large responsibilities. In order to serve the interests of air commerce in its entirety, the states must design their programmes to meet these requirements:

1. They must confine their legislation within established jurisdictional limitations or run afoul of the federal power.
2. They must actively and affirmatively promote the federal program during these first years of the 1938 Civil Aeronautics Act.
3. They must cooperate in their activities so that the desired uniformity may be maintained.

In order to accomplish the first of these purposes, it is necessary that the constitutional limitations on jurisdiction over air commerce be understood. Such an understanding on the part of experts of aeronautical science, the legislating bodies of the state and federal governments, and the delegated, rule-making administrative bodies of the governments, would avoid legal proceedings involving the validity of regulations.

The courts of this country have long given their scholarly attention to the question of federal versus state control over matters arising under the commerce clause of the Constitution. Certain precedents are unquestionably applicable in the aeronautical phase of the controversy. The theories, precedents and logic supporting federal

5. *Ibid*: "My dissension with the Committee Report is directed specifically to the Committee's recommendation which is 'avoid urging any more state legislation on the part of this association'."

jurisdiction have been too often iterated to warrant repetition. Therefore let us first turn our attention to the constitutional limitations upon the federal power over commerce, and attempt to delineate the proper sphere of federal control in relation to aeronautics. This will then reveal the extent of the state power of regulation, and we may conclude by seeking to show that there need be no serious conflict.

A brief reminder of certain fundamental principles of constitutional law is necessary in order to understand the problems we are to consider.

Power over commerce is divided into three parts.⁶

Two of these parts lie in the cases where the power of the states⁷ and the power of Congress⁸ are respectively exclusive. The third part is that in which the state may act in the absence of legislation by Congress.⁹

This third part of the power over commerce presents two major difficulties:

1. The inability to clearly define the line between the cases wherein state action is precluded by the very nature of the subject to be regulated, and the cases wherein the state may exercise its power in the absence of federal regulation.

2. The inability to distinguish a valid from an invalid exercise of the police power of a state, when tested by the effect which it will have upon interstate commerce.¹⁰

The answer to any particular situation must be determined in the light of the facts and all other circumstances bearing upon the

6. Mr. Justice Story first announced these principles in *Houston v. Moore*, 5 Wheat. (U.S.) 1, 5 L. Ed. 19.

7. The powers over commerce not delegated to the federal government by the Constitution are reserved to the States. *Thurlow v. Mass.*, 5 How. (U.S.) 504, 12 L. Ed. 256; *Sinnot v. Davenport*, 22 How. (U.S.) 227, 16 L. Ed. 243; *Ill. Central R. Co. v. De Fuentes*, 236 U. S. 157, 59 L. Ed. 517, 35 S. Ct. 275.

8. "Where a subject is national in character and admits and requires uniformity of regulation, affecting alike all the states, Congress alone can provide the regulations." *Louisiana P. S. C. v. Texas and New Orleans R.*, 284 U. S. 125, 76 L. Ed. 201, 52 Sup. Ct. 74. "In such a case the power is exclusive, and the states may not act even though Congress has not exercised its legislative authority." *Cincinnati, N. O., and T. R. Co. v. I. C. C.*, 162 U. S. 184, 40 L. Ed. 935, 16 S. Ct. 700.

9. *Covington and C. Bridge Co. v. Kentucky*, 154 U. S. 204, 38 L. Ed. 962, 16 S. Ct. 1087. Mr. Justice Brown rendered the opinion. This is developed as a practical analysis for illustrative purposes. It is to be understood that the power of the State in this regard extends only to subjects *not* inherently national in character, and is also superseded by federal regulations.

10. *State v. Mo. Pac. R. Co.*, 212 Mo. 658, 111 S.W. 500 quoting and adopting Cooley, *Constitutional Limitations*, 7th Ed., page 856: "—it is settled doctrine that, if a state law, referable to the police power, only incidentally or indirectly affects interstate commerce, it is good under the provisions of the Constitution—unless Congress has occupied the exact field by a federal law, in which event the state legislation must give way. The line of distinction between that which constitutes an interference with commerce, and that which is a mere police regulation is sometimes exceedingly dim and shadowy, and it is not to be wondered that learned jurists differ when endeavoring to classify the cases which arise."

case. With the method of attack in mind, however, we may turn to certain precedents with more understanding in the application of suggested analogies.

The exclusiveness of federal jurisdiction within that part of the power over commerce which it exercises concurrently with the states is limited. In the first place, there must first exist the federal regulations before those of the states are either replaced or precluded. In other words, the mere existence of the power to regulate suffers an entirely different status than the valid exercise of the power. This is made clear by Mr. Chief Justice Hughes, speaking in *Townsend v. Yeoman*, 301 U. S. 441, l.c. 458; 81 L. Ed. 1210, when he said:

“---the mere existence of the federal power (under the Commerce Clause), no conflict with its exercise being shown, does not deprive the States of their authority to safeguard their local interests by legislation which does not directly burden transactions in interstate or foreign commerce.”

This is the familiar “Silence of Congress” doctrine. The recent case of *H. P. Welch Co. v. New Hampshire*¹¹ furnishes a good illustration. The state had a statute which declared unlawful the operation of motor vehicles for specified transportation by drivers who had been continuously on duty for more than twelve hours. The violation of the statute for which the state revoked the appellant’s certificates occurred after the passage of the Federal Motor Carrier’s Act, but before the Interstate Commerce Commission had made its order pertaining to hours of duty under the authority of the act. The Supreme Court said it could not be inferred that Congress intended to supersede any state safety measure prior to the taking effect of a federal measure found suitable to put in its place.

Though it is true that a state may not presume to act in relation to a field occupied by the Federal government, nevertheless the intent of Congress to occupy the field exclusively must clearly appear.¹² If this intent does not so appear, then the state law is superseded only to the extent that it is inconsistent with or replaced by the federal regulation. This is especially true where the public health or safety is concerned.¹³

11. *H. P. Welch Co. v. New Hampshire*, 306 U. S. 79, 83 L. Ed. 500, 59 S. Ct. 438.

12. “The intent of Congress to exclude states from exerting their police power in connection with interstate commerce must be clearly manifest to exclude state action.” *Napier v. Atlantic Coast Line R. Co.*, 272 U.S. 605, 71 L. Ed. 432, 47 S. Ct. 207.

13. “Congressional intention to displace local laws in the exercise of the commerce power is not to be inferred unless clearly indicated, especially where the public safety and health are concerned.” *Maurer v. Hamilton*, 309 U.S. 598, 84 L. Ed. 169, 60 S. Ct. 726.

Within the field of concurrent jurisdiction, the state may enact local police regulations which are designed to protect the health or safety of its people even though Congress has occupied the field by federal legislation, provided that the police regulations only incidentally affect interstate commerce. This is subject to the general rule that it does not conflict with the federal law. Thus the Supreme Court said in *Savage v. Jones*, 225 U. S. 201, 56 L. Ed. 1182:

“—when the local police regulation has real relation to the suitable protection of the people of the state, and is reasonable in its requirements, it is not invalid because it may incidentally affect interstate commerce, provided it does not conflict with legislation enacted by Congress.”

The states are supreme in their power to regulate strictly intrastate commerce, of course. Certain fields for such regulation are suggested by both Mr. Morris and by Mr. Logan. The only argument advanced for depriving the state of any jurisdiction in these fields is reviewed and endorsed by Mrs. Willebrandt. It is the uniformity of regulation theory. This theory depends for its validity upon the fundamental fact that the subject matter to be regulated is inherently national in character. Insofar as such subject matter is not in all aspects national in scope, to such degree must this interpretation of the commerce clause fail to apply.¹⁴ It is felt that Mr. Logan and Mr. Morris have successfully established that there is some part of aviation which must admit of state control. The most zealous advocate of federal control must admit that *so far* the federal program, effective and admirable as it is, still leaves room for state activity. The zoning of airport areas is but one of numerous examples. Therefore the question is one of degree, and not of principle.

Further answering the contention that the uniformity of regulation theory requires an exclusive federal control, we may draw upon the question of admiralty jurisdiction for another analogy. Of course the basis of the federal authority over matters maritime lies in an express constitutional grant securing plenary powers to the national government. Therefore the position of this jurisdiction is even stronger than jurisdiction over air commerce which is not interstate. But it is interesting to note that state legislation may supplement or modify maritime law in accordance with the accepted

14. Chief Justice Hughes, speaking in the *Schechter* case, 295 U.S. at page 456, 79 L. Ed. at page 1589: “If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the Federal authority would embrace practically all the activities of the people and the authority of the state over its domestic affairs would exist only by sufferance of the Federal Government. Indeed, on such a theory, even the development of the state's commercial facilities would be subject to Federal control.”

criteria on nonconflicting and noninterfering law.¹⁵ Thus, for example, the states may regulate vessels in ports and harbors as necessary for accommodation or safety.¹⁶

There is no legal or practical reason why state legislation may not supplement national law in such a way that fundamental uniformity is maintained, and at the same time safety measures suited to local conditions are established. It is submitted that the limitations set forth above indicate approval for such action by the states in the eyes of the law.

The limitations on state legislation are indicated to some extent by the foregoing discussion. State laws will be invalid if they constitute a burden upon interstate commerce. They will be invalid if discriminatory, arbitrary, or capricious. It is truly said that due process and equal protection under the laws constitute the boundaries of any governmental exercise of the police power. "Reasonable" regulatory practices are required by all courts. These principles are so well known and so firmly established that elaboration or citation of authority is unnecessary.

Before proceeding to an examination of the practical considerations involved in coordinating state and federal control, the argument for state regulatory activity may be stated briefly as follows: If the states have something to contribute to the growth and safety of aviation, then it is unwise to refuse that contribution. Provided the state programmes do not conflict with any legislation of the federal government, and can maintain reasonable uniformity, then smothering of state activity is an unwarranted sacrifice upon the altar of "holy exclusive federal" jurisdiction. No advocate of state participation wants to interfere with the job the Federal government is doing for it is recognized that this is an important and splendid work. Not many practical aeronautic authorities want to interfere with the job the states are doing.

In order to justify their position, however, the states must act cooperatively both among themselves and as supporters of the federal program. Unless these things are done, then they have no standing, and their professed good intentions may be disregarded. States

15. *Just v. Chambers*, 61 S. Ct. 687, 85 L.Ed. 569. March 1941 "—the principle was maintained that a state in the exercise of its police powers may establish rules applicable on land and water within its limits, even though these rules incidentally affect maritime affairs, provided that the state action 'does not contravene any acts of Congress, nor work any prejudice to the characteristic features of the maritime law, nor interfere with its proper harmony and uniformity in its international and interstate relations.'" See also the opinion of Judge Addison Brown in the *City of Norwalk*, 55 F. 98. It is submitted that this statement is also valid in regard to rules applicable in the air.

16. *The New York v. Rea*. 18 How. (U.S.) 223, 15 L. Ed. 359.

which are sincere in the desire to promote aviation generally must be affirmatively cooperative with the Federal government or they do not deserve to have power over any part of the whole field. These ends should be kept in mind as we examine the method and scope of state control.

The two most important practical considerations which argue in behalf of state regulation are:

1. Budgetary, constitutional, and personnel limitations have operated to limit the scope of federal activity.
2. The impetus to the fostering and encouraging of aviation, and the help which will be given to the federal program by intelligent state participation.

In theory, therefore, there is a need for supplementary state regulation which will supply the needs indicated above. The answer to this need, as a practical matter, has been suggested by the article and report referred to. It lies in the enactment of a uniform regulatory code for all the states. It is obvious that if each of the forty-eight states undertook to supply these needs as it saw fit, utter confusion would result even though each was sincerely bent on achieving the desired results. There are in existence certain bodies and people in certain offices upon whom the responsibility for this work falls. The State Coordination Section of the Civil Aeronautics Administration, the Aeronautical Committee of the American Bar Association, the Aviation Committee of the Commissioners of Uniform State Laws, and the National Association of State Aviation Officials are such bodies. The airlines and the varied business interests involved in the production of aircraft should have an interest in such work. The persons who occupy such positions are undoubtedly familiar with the problems they will confront, and capable of their solution.

The Uniform State Regulatory Act was a solid accomplishment. It is felt that the reaction of the states to this act has shown that future similar drafts will be welcome. But this act at present does not go far enough to give sufficient aid to the states, or to aviation.

Another source of information and suggested regulation has been in the suggestions prepared by the Civil Aeronautics Administration, through the Technical Development Division publications. The work of the various sections of this Division is of uniformly high character, and can be of invaluable assistance to the states. Unfortunately, however, the legislation of the states is for the most part inadequate to meet the standards established, and so take advantage

of the benefits offered by the federal program. One example serves to illustrate this situation.

In the requirements which must be met before the Administration will license an instrument approach for an airport, stringent zoning of areas adjoining the airport is necessary. In the absence of state laws, municipalities or counties must enact the zoning regulations. This process is slow and unsatisfactory. State regulations in this regard would solve the problems in a uniform and efficient manner.¹⁷ The beneficial results of such regulation would then be to enable the airports in a state to benefit by federal licensing, and also contribute to the necessary expansion of the federal airways system.

The National Association of State Aviation Officials and the Aeronautical Law Committee of the American Bar Association are in an excellent position to foster the development of a Uniform State Regulatory Act. These bodies are in a position to contribute greatly to the sane growth of supplementary, uniform state legislation.

The third responsibility resting upon the states is that they do everything possible to aid and abet the letter, the spirit and the purposes of the present Civil Aeronautics Act of 1938. State officials should be as active in enforcing federal regulations as are the federal officials themselves. There is no question but that recent developments in aviation owe a great debt to the federal program. The growth of the air transport, aircraft construction, and allied industries has been of great commercial value to all the states. The importance of the promised expansion of civil and military aviation portends an unprecedented increase of aeronautical activity. Unless the states are to be left so far behind that they shall never catch up with this growth, they must take an active part in promoting it. The obvious course for the states to pursue in this regard is one of cooperation with the federal agencies.

The effects of such cooperation will be most apparent if state officials assist in the enforcement of federal regulations. For the separate jurisdictions to take the position that federal rules are to be enforced by federal officials, and to disparage the efforts of an inadequate federal personnel, is unforgivable. To accept the benefits

17. A comprehensive discussion of the problems involved in zoning laws is presented by Mr. Charles S. Rhyne, 11 *Journal of Air Law and Commerce* 297, l.c. 314 et seq. It should be pointed out, however, that though regulations are usually made by municipal authorities under a state enabling act, the power thus exercised is delegated by the state, but not exclusive of the state. The state retains full power to enact legislation of this type. Freund, "Police Powers", sec. 10.

of federal promotion, and yet refuse to assume the responsibility of fostering air safety, is lack of cooperation in its most insidious form. All state officers, airport officials, and municipal operators should diligently assist in the prosecution of violators of the federal rules. By reporting infractions of the rules, and furnishing evidence and testimony in investigations, great service will be rendered in promoting safety. As air traffic increases, this becomes increasingly important.

As has been stated, state legislation is prevented by law from directly conflicting with federal legislation which has been enacted to cover the same subject matter. Scrupulous observation of this principle is necessary in order to avoid borderline jurisdictional disputes. This does not mean that carefully devised rules of aircraft operation designed to meet local conditions are undesirable or invalid, however. If confined within the constitutional limitations indicated above, it is felt that such regulations will constitute a contribution to air commerce, rather than a burden. Though the need for enacting regulations to meet local requirements will result in a lack of uniformity to a certain extent, this inconvenience is overshadowed by the protection and safety thus achieved.

As pointed out by Mr. Logan, it is ridiculous to condemn all state legislation because some might be unsound. It is unwise to throw away the whole barrel because of one bad apple, especially when, by concerted, planned action it could be eliminated. If those who have the responsibility of directing state action be on the alert, there is no need for conflict.

In conclusion, therefore, it is submitted:

The several states and the Federal government exercise dual control over air commerce under our Constitution and form of government. The dominant authority is the Federal government.

State laws, drafted to compliment federal regulations, and providing for variations of detail designed to meet safety requirements in the light of local conditions, are desirable. These need not result in an abuse of the principle of uniformity.¹⁸

Cooperative action by the states is imperative for the best interests of aviation, whether viewed from a state or national perspective.

18. *Minnesota Rate Cases*, 230 U.S. 352, 57 L.Ed. 1151, 33 Sup. Ct. 729: "There are certain subjects having the most obvious and direct relation to interstate commerce, which nevertheless, with the acquiescence of Congress, have been controlled by state legislation from the foundation of the government because of the necessity that they should not remain unregulated, and that their regulation should be adapted to varying local exigencies; hence, the absence of regulation by Congress in such matters has not imported that there should be no restriction, but rather that the states should continue to supply the needed rules until Congress should decide to supersede them."

Such cooperative action by the states will provide a stimulus to the federal program and to aviation generally, and also prepare the way for future expansion of the federal system.