State Versus Federal Regulation of Commercial Aeronautics

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STATE VERSUS FEDERAL REGULATION OF COMMERCIAL AERONAUTICS

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I. CONCEPTS AND ISSUES

Commercial air traffic is one of the most highly regulated of American industries; federal, state and even local governments have regulated different aspects of the industry. The basis of federal authority in the field is the Federal Aviation Act of 1958. This scheme of law has been described as “comprehensive,” “intensive and exclusive;” an examination of the Act indicates that this sweeping language is probably justified.

Several states have enacted laws dealing with aeronautics; some have even created their own aeronautics agencies. The states having these agencies recognize the supremacy of federal authority in certain areas and try to avoid conflict; however, broad grants of authority are often given to the state agencies in areas state legislatures regard to be primarily of local interest. The federal agencies, by contrast, are primarily interested in the development of a national-international scheme of air carriage based on sound economic conditions and characterized by a high degree of safety. The federal objectives may be at odds with a state commission that is primarily concerned with the development of commercial air service within a single state. Since the state and federal agencies receive their statutory mandates from different legislative bodies with different policy

2 Lockheed Air Terminal, Inc. v. City of Burbank, 457 F.2d 667, 670 (9th Cir. 1972); aff’d, 411 U.S. 624 (1973).
4 See 113 Cong. Rec. 18298, 18299 (1967). (Letter from Charles Murphy, Chmn. CAB).
goals, different emphases and decisional criteria between these agencies will be common."

The relative areas in which the federal and state governments can regulate have caused confusion and litigation for many years. Frequent points of contention include the right of the states to regulate and tax interstate carriers operating within a single state and the authority of the federal agencies to regulate intrastate carriers that affect interstate commerce. Views concerning these jurisdictional problems are diverse; ideas range from those asserting that the entire field of air law has been preempted by Congress to those that would allow the states to regulate any air carriage carried on within its borders.

A. Constitutional Background

To fully appreciate the problems involved in the field of the regulation of aeronautics, certain constitutional concepts, most particularly the commerce clause of the United States Constitution, must be discussed. The commerce clause, which is the basis of federal authority in the regulation of aeronautics, provides that Congress shall have the power "[t]o regulate commerce with foreign [n]ations, and among the several sites. . . ." The Supreme Court first defined "interstate commerce" in Gibbons v. Ogden. In Gibbons, the Court described interstate commerce broadly as all "intercourse" between the states. The Court also noted that the power of Congress to regulate interstate commerce is "plenary and complete" and that this power may be exercised to its fullest extent without limitation.

While the Court in Gibbons delineated the extent of Congress' power over interstate commerce, it did not clarify the scope of the term. An important step toward defining the scope of interstate commerce was made in The Daniel Ball when the Court held that not only may Congress regulate commerce crossing state lines, but that certain intrastate activities could be brought within the concept

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7 U.S. CONST. art. I, § 8, cl. 3.
9 22 U.S. (9 Wheat) 1 (1824).
10 Id. at 189.
11 77 U.S. (10 Wall.) 557 (1870).
of interstate commerce as well. A ship that operated exclusively on a river within the state of Michigan was found to be regulatable by Congress through its interstate commerce powers; the ship carried goods destined for and brought from points outside Michigan. Accordingly, any link of interstate commerce, even an intrastate link, can be regulated by Congress.18

The federal authority created by the interstate commerce clause extends to any activity that substantially affects interstate commerce or the exercise of federal authority over that commerce. The substantial effects standard was established by the Supreme Court's decision in Wickard v. Filburn.19 Congress passed the Agricultural Adjustment Act of 1938 on the basis of its commerce powers. The Act limited the amount of grain that farmers could grow and put into interstate commerce. The Court found that the small amount of wheat grown for home consumption by one Ohio farmer affected interstate commerce enough to allow congressional regulation.20 Another Supreme Court case, Katzenbach v. McClung,21 further elucidates this issue. In 1964, Congress passed the Civil Rights Act that forbade racial discrimination in public facilities. A local restaurateur was found to be in violation of the Act. The restaurant was shown to have received most of its food from out of state sources. This, together with the inhibitory effect on the interstate travel of Negroes caused by the discrimination, had enough affect on interstate commerce to allow the congressional regulation.

The plenary power of Congress to promote, protect and regulate interstate commerce and transportation is clear. The scope of this power in view of the substantial effects test is virtually without limit. The potential power of Congress through the interstate commerce clause may touch almost any activity occurring within or between states. There is, however, "no constitutional rule which compels Congress to occupy the whole field."22 Congress is free to circum-

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18 See United States v. Yellow Cab Co., 332 U.S. 218 (1946) where a cross-town cab delivering interstate passengers between railroad stations was found to be in interstate commerce. In Interior Airways, Inc. v. Wren Alaska Air Lines, Inc., 188 F. Supp. 107 (D. Alas. 1960), the court noted that the Congress could, under the commerce powers, regulate intrastate air commerce.
scribe its regulation and occupy only a portion of the field. When
this is accomplished, the states may regulate outside the limited field
controlled by Congress.17

State and local governments have traditionally been allowed to
regulate some facets of interstate commerce. This is especially true
when the regulated events are primarily of local interest. The Su-
preme Court in Cooley v. Board of Wardens18 expressed this concept
well:

The power to regulate commerce, embraces a vast field, containing
not only many, but exceedingly various subjects, quite unlike in
nature; some imperatively demanding a single uniform rule, operating
equally on the commerce of the United States in every port;
and some . . . as imperatively demanding that diversity, which alone
can meet the local necessities of navigation.19

In Cooley, a local enactment requiring that a pilot familiar with
the peculiarities of the local waters guide all shipping within the
port of Philadelphia was found to be a subject suitable for state
regulation. When local regulations burden the flow of interstate com-
merce beyond what the Court views as permissible, however, the
regulation will be found unconstitutional.20 In Southern Pacific Com-
pany v. Arizona for example, a local safety statute that limited the
number of cars a train could pull within the state of Arizona was
found to adversely affect railroad traffic in the surrounding states.21

If the subject is one that requires uniformity of regulation, the
power of Congress is exclusive and even if Congress chooses not to
exercise that power, state regulation will not be allowed. If, how-
ever, the area of interstate commerce does not require uniformity,
the local authorities may exercise power over it unless and until
Congress has occupied the field.

It is in those areas of interstate commerce that do not require
uniformity that the concept of federal preemption becomes impor-
tant. The doctrine of federal preemption has its roots in the sup-
remacy clause of the United States Constitution.22 "It establishes

17 Id.
18 54 U.S. (12 How.) 299 (1851).
19 Id. at 319.
21 325 U.S. 711 (1945).
22 U.S. CONST. art. VI, cl. 2 provides, that "[t]his Constitution, and the Laws
of the United States which shall be made in pursuance thereof . . . shall be the
as a principle of our federalism that state and local laws are not enforceable if they impinge upon an exclusive federal domain.\textsuperscript{13a}

The courts have held that preemption occurs when Congress has adopted a scheme for the regulation of a given subject matter that reflects an intent by Congress to make that regulation exclusive.\textsuperscript{14}

If this intent can be found, the states are deprived "of jurisdiction over the matter embraced by the Congressional Act, regardless of whether state law coincides with, is complementary to, or opposes federal Congressional expression."\textsuperscript{15a}

The major Supreme Court decisions dealing with the problem of federal preemption concur in the view that a congressional intent to preclude state law is necessary.\textsuperscript{16} There is also agreement that this intent must be "clearly manifest;"><span class="reference">M. "clearly manifest" intent can be express or implied.\textsuperscript{22}

Few problems arise when Congress has clearly expressed its purpose. A clear statement of intent by Congress, however, is unusual.\textsuperscript{23} More often than not, the intention of Congress must be determined through judicial interpretation. The Supreme Court in \textit{Rice v. Santa Fe Elevator Corp.}\textsuperscript{26} outlined some of the more important factors courts may consider in determining whether congressional intent to preempt is to be implied: (i) the pervasiveness of the federal regulation, (ii) the dominance of the federal interest in the field of regulation and (iii) the objectives of the federal regulation and whether non-federal regulation obstructs the full execution of these aims.

The significance of established constitutional principles to the regulation of air carriage is apparent. The exceedingly broad view taken of interstate commerce by the Supreme Court could allow the field of aeronautics to be regulated solely by the federal gov-

\textsuperscript{13a} Supreme Law of the Land; and the Judges in every state shall be bound thereby, anything in the Constitution or Laws of any State to the contrary notwithstanding.\textsuperscript{23}

\textsuperscript{14} Lockheed Air Terminal, Inc. v. City of Burbank, 457 F.2d 667 at 670 (9th Cir. 1972), aff'd, 411 U.S. 624 (1973).


\textsuperscript{26} Napier v. Atlantic Coast Line R. Co., 272 U.S. 605 (1926).

\textsuperscript{27} Id. at 611.

\textsuperscript{28} C. \textit{Antieau}, \textit{Commentaries on the Constitution of the United States} at 23 (1st ed. 1960).

\textsuperscript{29} Id.

\textsuperscript{30} 331 U.S. 218 (1947).
ernment. This result could come about by the courts reaching either or both of two conclusions: (i) that national uniformity is needed in the area or (ii) that, even though national uniformity is not necessary, the existing federal enactments in the field have expressly or impliedly preempted concurrent state regulation.

No court has found that the characteristics of commercial aviation are such that uniformity is necessary in all areas of regulation; therefore, if federal regulation is to be found to be exclusive, it will probably be through congressional intent expressed in existing federal legislation.

B. The Federal Aviation Act of 1958

Current federal legislation in the field of air law is dominated by the Federal Aviation Act of 1958.\textsuperscript{81} This Act repealed the previous federal law on the subject, the Civil Aeronautics Act of 1938.\textsuperscript{82} The 1938 Act created a comprehensive scheme for the regulation of both the economic and safety aspects of air carriage under the auspices of the Civil Aeronautics Authority. The 1958 Act reenacted most of the provisions of its predecessor, the primary objective of the new Act being to create a new administrative body, the Federal Aviation Agency, that was to regulate air safety.\textsuperscript{83} The economic provisions of the 1938 Act were reenacted virtually without substantive change.\textsuperscript{84} The Civil Aeronautics Authority, now the Civil Aeronautics Board, was to continue its function of regulating air carrier economics under the new system. Since the 1938 and 1958 Acts are so similar, especially in regard to economic regulation, it may be concluded that the intent of Congress expressed in the Civil Aeronautics Act of 1938 will still be relevant in analyzing the present scheme of federal regulation.

The main stimulus for the enactment of the Civil Aeronautics Act of 1938 was the chronic economic condition then existent among the air carriers, a condition that Congress attributed to cutthroat competition. It was widely believed that this lack of economic stability adversely affected the level of safety in the industry as well.\textsuperscript{85} Congress viewed the existing federal legislation in the field

\textsuperscript{82} 52 Stat. 973 (1938), 49 U.S.C. c. 9 (1948).
\textsuperscript{83} S. REP. No. 1811, 85th Cong., 2d Sess. at 1 (1958).
\textsuperscript{84} Id. at 2, 9; H. R. REP. No. 2360, 85th Cong., 2d Sess., at 15 (1958).
\textsuperscript{85} S. REP. No. 1661, 75th Cong., 3d Sess. (1938); H. R. REP. No. 2254, 75th
as being inadequate to meet the problem. The solution, as Congress saw it, was to concentrate in one definitive agency the regulation of air carriage. A House Report on the 1938 Act observed:

To divide them [the regulatory powers] among separate agencies would be extremely costly and would lead to inefficiency and duplication of effort.

Similarly, the primary stimulus for the enactment of the Federal Aviation Act of 1958 was the undesirable state into which the quality of safety regulation of aeronautics had fallen. Again, Congress found that the reason for the condition was:

... because responsibility for its [safety regulation] planning has until quite recently been scattered among a plethora of inter-agency committees and boards instead of being concentrated in one overall authority.

Congress concluded, as it had in 1938, that the characteristics of aeronautics demand a single regulatory body with uniform standards to efficiently minister to the needs of the air transport industry.

Although it is apparent that Congress desired a system of uniform regulation of air carriage within the agencies of the federal government, little mention is made of the federal government’s relationship to the states in either of the federal aviation acts or their legislative histories. The statements that are made are confused and conflicting on this point. For instance, a Senate report on the 1938 Act stated:

The recognized and accepted principles of the regulation of public utilities, as applied to other forms of transportation, have been incorporated in S. 3845.

This statement implies that the states were to assume the same degree of control over the operations of air carriers as they enjoyed.

Cong., 3d Sess. (1938); H. R. REP. No. 2635, 75th Cong., 3d Sess. (1938). See also Westwood and Bennett, A Footnote to the Legislative History of the Civil Aeronautics Act of 1938 and Afterward, 42 NOTRE DAME LAW 309 (1967).

3 The Air Commerce Act of 1926, 44 Stat. 568, 49 U.S.C. § 177 (1934) was the predecessor to the 1938 Act.


40 S. REP. No. 1661, 75th Cong., 3d Sess. at 2 (1938).
over surface carriers. Certainly, the states exercised considerable authority over railroads, motor carriers and water carriers under the Interstate Commerce Act. The same Senate report, however, notes that “[t]he legislation is adopted to the special characteristics of transporation by air. . . .” This statement does not indicate that the Civil Aeronautics Act should be interpreted as analogous to the Interstate Commerce Act in regard to the concurrent power of the states. A House report on the 1938 Act stated that the problems of regulating air transport were “unique” because the policy of the Air Commerce Act of 1926 was designed not merely to regulate the operation of interstate air carriage, but was also to regulate the design and manufacture of aircraft, the qualifications for pilots, the air-traffic rules and the construction of airways, airports and other navigational facilities. Thus, the extraordinary concern and involvement of the federal government in the past was seen as an important factor to be considered in any future legislation. The same House report also recommended that these differences in the degree of authority exerted by the federal government over aeronautics as compared to other modes of transport be evident in the new Act. The opinion that the air transport industry bears a “unique” and extremely close relationship to the federal government is also apparent in the legislative history of the 1958 Act. Although the statements of Congress are

64 In People v. Western Air Lines, Inc., 42 Cal. 2d 621, 268 P.2d 723 at 737 (1954), cert. denied, 348 U.S. 859 (1954), the California Supreme Court noted: It is true, as defendant points out, that Congress did not use language in the Civil Aeronautics Act of 1938, such as that employed in different legislation asserting its control over other kinds of common carriers in which it was expressly stated that such regulations shall not be construed to interfere with the exclusive exercise by each state of the power to regulate intrastate commerce. See Section 1 (2), Interstate Commerce Act, 49 U.S.C.A. § 1 (railroads); § 202 (b), Part II, Interstate Commerce Act, 49 U.S.C.A. § 302 (motor carriers); § 303 (j), Part III, 49 U.S.C.A. § 903 (water carriers).

68 Id.
69 S. Rep. No. 1811, 85th Cong., 2d Sess. at 5 (1958). The Supreme Court is entirely in accord with the congressional purposes of creating uniformity of regulation in an industry that bears a special relationship to federal authority. In Chicago and Southern Air Lines, Inc. v. Waterman Steamship Corp., 333 U.S. 103 (1948) the Court said at page 107: We find no indication that the Congress either entertained or fos-
not without equivocation, the better view is that aeronautics should not be regarded, for regulatory purposes, as a surface carrier, but will be subjected to a greater degree of federal control.

Statements made in the 1938 and 1958 Acts themselves tend, at least superficially, to add clarity to the scope of federal regulation. Both Acts divide the regulatory role of the federal government into two broad parts: (i) economic controls and (ii) safety controls. The Civil Aeronautics Board's economic regulatory powers are limited to "air transportation." This term is described in both Acts as "interstate, overseas, or foreign air transportation or the transportation of mail by aircraft." This definition is not significant in itself, but is in contrast to the limitation placed on federal control over air safety. In the field of safety regulation, the Federal Aviation Agency may extend its power over "air commerce" which is defined as:

... interstate, overseas, or foreign air commerce or the transportation of mail by aircraft or any operation or navigation of aircraft within the limits of any federal airway or any operation or navigation of aircraft which directly affects, or which may endanger safety in interstate, overseas, or foreign air commerce.

The important distinction lies in the fact that federal economic regulation may extend only to interstate, overseas or foreign commerce, while safety regulation extends beyond this to operations that "directly affect" interstate commerce. Since Congress made

the distinction, it can be assumed that the federal government was intended to have a different scope of authority in each field. It may further be assumed that since Congress chose to extend federal authority over those things that "directly affect" air safety, Congress intended there to be more extensive regulation in that field than in economic regulation. How much more extensive is unclear. Congress did not spell out what "affects" the Federal Aviation Agency could legitimately regulate in the name of air safety. Also, the fact that those facets of air carriage that affect interstate commerce are not included within the definition of "air transportation" does not necessarily mean that federal economic controls could never be exerted over those things that economically affect interstate commerce by judicial interpretation. Certainly, current judicial opinion includes things affecting interstate commerce as being regulatable by Congress. Other sections of the Federal Aviation Act of 1958 that are frequently cited as pertaining to the issue of state versus federal control of air carriage do not reveal a consistent pattern.

As ambiguous as Congress' position is regarding the extent of federal regulation in the field of aeronautics, some congressional intentions can be ascertained: (i) some degree of unified regulation is necessary in both the economic and safety areas; (ii) Congress regards the air transport industry in a different light than it does other forms of transportation; and (iii) although Congress intended that federal authority be extensive, some state regulation, especially in the field of economics, was also contemplated.

Since Congress failed to expressly delineate the line between state and federal regulation in the field of air carriage, judicial and

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53 See supra notes 13-15 and text accompanying.

54 According to the Federal Aviation Act of 1958, the United States "is declared to possess and exercise complete and exclusive national sovereignty in the airspace of the United States." 49 U.S.C. § 1508 (a) (1970). Each citizen of the United States is granted the "right of freedom of transit through the navigable airspace of the United States." 49 U.S.C. § 1304 (1970). "Navigable airspace" is defined as all "airspace above the minimum altitudes of flight prescribed by regulations issued under this chapter, and shall include airspace needed to insure safety in take-off and landing of aircraft." 49 U.S.C. § 1301 (24) (1970). These sections indicate possible federal preemption. Other sections, however, indicate state participation in the regulation of aeronautics. Section 1324 (b) of the Act recognizes the existence of state aeronautics agencies and demands federal cooperation with them. The savings clause in section 1506 is also frequently cited as recognizing state participation.
quasi-judicial extrapolation on the subject must be analyzed. The courts that have reviewed jurisdictional issues involving federal aviation legislation have tended to follow Congress' lead and have divided the cases into those pertaining primarily to safety and those involving economic issues.

II. AIRSPACE CONTROL, THE TREND TOWARD PREEMPTION

A. Air Safety

Before the Civil Aeronautics Act of 1938 was enacted, a great deal of confusion existed regarding the extent of federal regulation of safety in aeronautics. One of the earliest decisions on the matter, Neiswonger v. Goodyear Tire & Rubber Co., indicated that the Air Commerce Act of 1926 controlled both interstate and intrastate air navigation. The federal district court in Neiswonger found that "the circumstances and conditions under which air commerce is carried on" necessitated a unified system of regulation. The need for uniformity in the regulation of safety in aeronautics was also noted in another federal district court decision, Swetland v. Curtiss Airports Corp. The court in Swetland feared that effective regulation by the federal government under the 1926 Act would be made exceedingly difficult if the states were allowed to adopt different regulations for intrastate air traffic. Since all aircraft, interstate and intrastate, use the same airways and facilities, concurrent authority over the aircraft using them was not feasible.

The desire for uniform regulation under the auspices of the federal government was not shared by many state courts. The Massachusetts Supreme Court, for instance, in Smith v. New England Aircraft Co. held that the federal government could only regulate interstate commerce, and that the police powers of the states entitled them to create air safety rules for entirely intrastate air traffic.

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The Civil Aeronautics Board is a quasi-judicial body.

35 F.2d 761 (N.D. Ohio 1929).

Id. at 763.


41 F.2d 929 (N.D. Ohio 1930).


A great deal of this conflict of opinion was laid to rest after the Civil Aeronautics Act of 1938 was enacted. Under this Act, the federal government could promulgate safety regulations over "air commerce" which was defined by Congress to include any operation that "directly affects" or that "may endanger safety" in interstate commerce. This definition made it possible for the courts to extend federal jurisdiction beyond the limits of purely interstate air commerce.

A more exact indication of the scope of federal authority in regulating air safety was made by the Tenth Circuit in *Rosenhan v. United States.* In this case, defendant-pilot was operating an aircraft wholly within the state of Utah. Defendant's aircraft had been issued a certificate of airworthiness by the Utah State Aeronautics Commission, but had failed to procure one from the federal government. Defendant alleged that since his operations were entirely intrastate, he could not be regulated by the federal authorities. The court in *Rosenhan* found that the congressional grant of authority in the Civil Aeronautics Act of 1938 included the power to regulate intrastate flights on federal airways. Two years later in *United States v. Drumm,* the Federal District Court for Nevada further broadened the scope of the federal government's power to regulate air safety. At this issue in *Drumm* were two flights made by defendant; one interstate, the other intrastate, between points within California. Defendant did not have a federally issued pilot's license or an airworthiness certificate for his aircraft. He claimed he was not subject to Civil Aeronautics Authority regulations because he did not use CAA facilities and stayed away from CAA airports and off federal airways. The court in *Drumm,* however, found that "any operation of any aircraft in the airspace . . . either directly affects, or may endanger safety in interstate, overseas, or foreign commerce. . . ."

The *Rosenhan* and *Drumm* decisions established that Congress, in the 1938 Civil Aeronautics Act, impliedly intended to exert its broad power to protect interstate commerce over air navigation occurring entirely within a state, whether or not federal facilities were involved. Problems still remained, however, since neither

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62 131 F.2d 932 (10th Cir. 1942).
64 Id. at 155.
court indicated whether this exertion of federal power excluded the states from concurrently regulating safety in intrastate air operations.

Until the enactment of the Federal Aviation Act of 1958, many state courts were able to establish a role for state regulation of air safety. Significant local authority over air safety ended with the passage of the 1958 Act. Congress realized that the nature of air carriage demanded uniform, consistent rules of operation; the major purpose of the 1958 Act therefore was to unify the decentralized efforts of the federal government in providing safety.

The courts have generally construed the Federal Aviation Act of 1958 as allowing only federal regulation of safety in air navigation. For example, the Second Circuit Court of Appeals in *Air Line Pilots Association International v. Quesada* stated:

> The Federal Aviation Act was passed by Congress for the purpose of centralizing in a single authority . . . the power to frame rules for the safe and efficient use of the nation's airspace.

A more recent decision by the Ninth Circuit concluded that the whole tenor and purpose of the Act was to "create and enforce one unified system of flight rules."

It is apparent that, in the field of safety control, Congress and the courts have excluded the states from any appreciable regulatory role, i.e. the area has been preempted. Air carriage, as a mode of transportation, by its nature, is most significant on an interstate and international scale. What operations occur within a single state may "directly affect" or "endanger safety" in interstate commerce. Therefore, Congress exerted, to the fullest extent, its regulatory powers under the interstate commerce clause.

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68 See *Strother v. Pacific Gas & Electric Co.*, 94 Cal. App. 2d 525, 211 P.2d 624 (1949); *City of Shreveport v. Conrad*, 212 La. 737, 33 So.2d 503 (1947); *Erickson v. King*, 218 Minn. 98, 15 N.W.2d 201 (1944). But see *Linam v. Murphy*, 360 Mo. 1140, 232 S.W.2d 937 (1950) where a state court held that federal safety regulations are applicable to both interstate and intrastate air carriage.


70 *United States v. Christensen*, 419 F.2d 1401 at 1404 (9th Cir. 1969).
B. Environmental Protection

As the size and use of aircraft have increased, there has been a corresponding increase in the adverse environmental factors, particularly noise, created around airports. When state and local governments began to try to abate the problem, the possibility of conflict with federal aviation legislation again arose. The field of safety regulation is closely related to the field of environmental control as it relates to aircraft. Both areas of law heavily involve regulation of the use of the navigable airspace.

The traditional police powers of the states allow them to regulate those things that affect the safety, health or welfare of the local population. The exercise of these police powers is a strong interest of the states and federal legislation will not be deemed to have precluded their use unless there is a clear congressional intent to do so pursuant to a legitimate congressional concern.\(^7\) The California Supreme Court in *Loma Portal Civic Club v. American Airlines, Inc.*\(^7\) found there was no federal preemption in the field of aircraft noise control. In *Loma Portal*, a group of local residents sought to enjoin the use of certain landing approaches by interstate air carriers because the flights were excessively noisy and potentially dangerous. When defendant-carriers claimed that a local court could not interfere with their flights because the area of law was preempted, the California Supreme Court noted: (i) nowhere in the relevant federal legislation had Congress exhibited an express desire to exclude concurrent state control; (ii) the states were presently allowed to participate in the regulation of several areas of aeronautics; and (iii) the United States Supreme Court had never found any implied intent on the part of Congress to exclude the states from this area of traditional state control.\(^7\) In a more recent case, *William v. Arizona Superior Court*,\(^7\) the Arizona Supreme Court reached a similar conclusion under a similar fact situation. The Arizona court conceded that the federal government had pre-


\(^7\) 61 Cal. 2d 582, 39 Cal. Rptr. 708, 394 P.2d 548 (1964).


\(^7\) 494 P.2d 26 (Ariz. 1972).
empted safety regulation, but it held that this preemption did not necessarily extend to regulation in the area of noise control. The court in *Williams* concluded that since federal regulation in this field was not pervasive, consistent or non-conflicting local regulation is not precluded.5

The federal courts that have reviewed attempts by local governments to regulate aircraft pollution have reached conclusions directly opposed to the state courts. The majority of the federal courts have recognized that local governments may exercise their police powers, but these courts have also observed that the exercise of the police powers may not extend into a field of dominant federal interest, i.e. the regulation of the "navigable airspace." Any local efforts to abate noise that involve an alteration of the altitudes or the times at which aircraft may operate, the places over which aircraft may fly or the equipment they may or may not use will necessarily affect the comprehensive body of regulations the Federal Aviation Agency has created to control the navigable airspace. The federal district court in *City of Newark v. Eastern Airlines, Inc.*7 took note of the problems that would arise if local pollution controls were instituted:

If the courts undertook, by judicial decree, to promulgate regulations and establish flight patterns peculiarly applicable to each major airport . . . the uniformity contemplated by the Civil Aeronautics Act and essential to a comprehensive regulatory system would soon be impaired. The entire development of the air transportation system would be hampered by a myriad of judicially prescribed regulations of only local application.8

The fear of the results of locally inconsistent regulation was also voiced by the district court in *American Airlines, Inc. v. The Town*  

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6 United States v. City of New Haven, 447 F.2d 972 (2d Cir. 1971); American Airlines, Inc. v. City of Audubon Park, 407 F.2d 1307 (6th Cir. 1969); Allegheny Airlines v. Village of Cedarhurst, 238 F.2d 812 (2d Cir. 1956). Some state courts have also found federal preemption in the field; see Air Transport Assoc. of America v. City of Inglewood, 12 Avi. L. REP. 17,818 (Cal. Dist. Ct. 1972); Opinion of The Justices, 271 N.E.2d 354 (Mass. 1971).


8 Id. at 758.
The court in Hempstead went on to note that the pervasive regulation of safety in aeronautics necessarily carries over into the regulation of environmental problems created by aircraft:

The actual exercise by the Congress of the power to regulate in this field is so pervasive as to preclude valid enactment of the Hempstead Ordinance. It would be difficult to visualize a more comprehensive scheme of federal regulation, subsidization and operation participation than that which Congress has provided in the field of aviation.

This "comprehensive scheme of federal regulation" was intensified in 1972 by an amendment to the Federal Aviation Act that gave the administrator of the Federal Aviation Agency special regulatory powers over aviation pollution problems.

In a recent decision, Lockheed Air Terminal, Inc. v. The City of Burbank, the Supreme Court flatly stated that Congress had preempted control over aircraft-inspired pollution problems, thus resolving the previously existing federal-state conflict on the matter. Involved in the Lockheed case was a city ordinance that forbade pure jet aircraft from taking off or landing at the Hollywood-Burbank Airport between the hours of eleven p.m. and seven a.m. The Court found that the intent of Congress to exclude such local regulation could be implied from the two factors emphasized in the Newark and Hempstead cases: (i) the pervasiveness of federal regulation in the area, and (ii) the obstruction of the uniform airspace management demanded by the Federal Aviation Act of 1958.

The trend in the judicial interpretation of federal legislation in the use of airspace is strongly toward exclusivity of federal control. Federal environmental protection measures bear only an indirect relation to air safety, yet the area has been preempted. It is apparent that any regulation directly or indirectly affecting safety in "air-commerce" must originate with the federal government, whether the regulated activity is interstate or entirely intrastate in nature.

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III. ECONOMIC REGULATION,
THE CURRENT BATTLEGROUND

The pervasiveness of federal authority in the fields of air safety and the use of airspace may also touch upon the field of economic regulation. The relationship between the two fields is illustrated by the legislative history of the Civil Aeronautics Act of 1938. One of the primary reasons Congress was so concerned with the lack of economic stability in the air transport industry was because it was believed that economic adversity initiated cutbacks in areas affecting safety. The same point is illustrated by the facts existing in the Lockheed Air Terminal case. The Supreme Court found federal preemption in Lockheed Air Terminal largely because of the dominant federal regulation of the use of airspace. Integrally wound up in airspace management is the scheduling and routing of commercial air carrier flights which are economic regulatory features. The Burbank ordinance prohibited pure jet take-offs or landings between eleven p.m. and seven a.m.; the impact of this local regulation fell upon the schedules of air carriers as well as upon federal pollution measures. Every court reviewing the permissibility of the ordinance, including the Supreme Court, expressed concern that locally inconsistent regulation would obstruct the federal goals of national uniformity. Since the Civil Aeronautics Board and the Federal Aviation Agency are required to create a degree of national uniformity in their respective areas of expertise, the question arises whether the scope of federal authority in each area can logically be separated if the congressional objectives are to be met.

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See supra note 35 and text accompanying.


The fact that a great deal of federal exclusivity exists in the field of airspace use does not mean that state courts cannot grant monetary remedies to parties injured by aircraft noise pollution. The Supreme Court in United States v. Causby, 328 U.S. 257 (1945) established that the burden placed upon a property's use by low and noisy overflights was a compensable "taking" under the Fifth or Fourteenth Amendments. In Aaron v. City of Los Angeles, 11 Av. Cas. 17,642 (Cal. Super. Ct. 1970), the California Superior Court acknowledged that the federal government had preempted control of the "navigable airspace;" however, this does not preclude a finding by a state court that there has been a taking of private property. Merely because the federal government creates regulations allowing aircraft to fly inordinately low over plaintiff's property in the course of landing, does not mean the state cannot provide a remedy. The position of the
Congress has, in certain areas, exercised its full power over interstate commerce in the economic realm. It was established by the federal district court for New Jersey in *In Re Veteran's Air Express Co.* that Congress has completely preempted control of the registration and conveyancing of interests in aircraft, an area having predominate economic characteristics. It was found that the comprehensive federal law on the subject covers any interest in any aircraft, even if used entirely within one state. A state recorded lien, for instance, provides no notice to later creditors and is ineffective against a lien recorded under federal law. This pervasive federal concern, however, is not evident in all areas of economic regulation. Other areas are subject to varying degrees of concurrent state control.

A. Taxation

In *Northwest Airlines, Inc. v. Minnesota,* Justice Jackson, con-
curing in the majority opinion, ably expressed the prevailing attitude toward state taxation of the air transport industry:

Congress has recognized the national responsibility for regulating air commerce. Federal control is intensive and exclusive. Planes do not wander about 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.

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.93

The anomaly created by this reasoning is apparent. On the one hand, the area of safety regulation, which is characterized by an intensive federal concern and desire for uniformity, is dominated by a system of federal law that cannot tolerate concurrent state regulation; on the other hand, the area of economic regulation, also characterized by an intensive federal interest and desire for uniformity, allows concurrent local regulation in the form of taxation.94

Neither the Federal Aviation Act of 1958 nor its predecessors made provision for a nationally uniform system of taxation. As a result, the states have very liberal taxing powers over commercial aeronautics. It has never seriously been doubted that a carrier engaged in intrastate operations may be taxed by the state in which it operates.95 Apparently, the states can also tax interstate air carriers. In Braniff Airways, Inc. v. Nebraska State Board of Equalization and Assessment,96 Nebraska levied an ad valorem tax on the interstate carrier's equipment. Assertions by Braniff that the state taxation was a burden on interstate commerce and that exist-

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93 Id. at 303.
94 See Ardito, State and Local Taxation of Scheduled Local Airlines, 16 J. Air L. & Com. 162 (1949).
ing federal aviation legislation was preemptive in the field of taxation were unsuccessful.96

The states' powers in the field of taxation are clearly the most extensive form of regulation the states enjoy in the entire field of air law. There appears to be little difference, as far as taxation goes, between air transport and surface transport. Uniformity, in this area, has not been thought to be necessary or desirable. The primary reason for this is the belief that interstate air carriers must pay their own way for the facilities, legal protections and markets the states provide. To allow the interstate carriers to escape local taxation would burden the resources of the states and would put the intrastate operators, which can be taxed by the states, at a disadvantage.97

Even though the states enjoy extensive taxing authority over interstate air carriers, the commerce clause is an important limiting factor on these powers. It is generally recognized that interstate air commerce may be burdened to some extent by local taxation. This, however, is acceptable only as long as the local tax is not discriminatory or multiple in effect and bears a reasonable relationship to the services provided by the locality.98 To do this, an adequate apportionment formula must be derived; i.e., if a carrier operates within several states, no single state may assess a tax on that carrier's property beyond a specified fraction of the property's value proportionate to the use occurring within the state. In Flying Tiger Line v. County of Los Angeles,99 the local government sought to assess an ad valorem tax on one hundred per cent of the value of the interstate carrier's property. The Supreme Court of California found the tax unconstitutional in view of the possibility of mul-

96 The same defenses were raised and defeated in Northwest Airlines, Inc. v. The State of Minnesota, 322 U.S. 292 (1943). In a more recent Supreme Court case, Evansville-Vanderburg Airport Authority District v. Delta Airlines, 405 U.S. 707 (1972), the local tax was struck down; the Court, however, did not accept the argument that the federal government had preempted the field.


triple taxation. If other states assessed a similar tax on Flying Tiger, even on an apportioned basis, the cumulative tax would be in excess of the total value of the property. The Supreme Court in *Northwest Airlines, Inc. v. State of Minnesota*\(^{100}\) allowed Minnesota to assess an ad valorem tax on one hundred per cent of Northwest Airlines' fleet. The Court found that the special relationship between an interstate carrier and its domicile and home port, which was in this case Minnesota, allowed the tax. Beyond this exception, however, the apportionment rule will be applied.

A second important limitation placed on local taxation of interstate air carriage is that only certain events are appropriately taxable by local governments. Otherwise, the tax will be struck down as bearing too directly on interstate commerce. In a recent Supreme Court case, *United Airlines, Inc. v. Mahin*,\(^{101}\) an Illinois use tax on the storage and withdrawal from storage of aviation fuel was found to be constitutional. The events taxed took place entirely within the state of Illinois. The fact that the ultimate function of the stored and later withdrawn fuel was to provide motive power for carrying on interstate commerce, the Court reasoned, was not such a direct burden on interstate commerce that the tax could not be sustained.\(^{102}\) Other appropriate events for state taxation on interstate air carriage include: the sale of aviation fuels\(^{103}\) and meals for consumption on interstate flights;\(^{104}\) ad valorem taxes on property owned, stored, possessed or used within the state;\(^{105}\) franchise taxes on the privilege of doing business within the state;\(^{106}\) and taxes

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\(^{100}\) 322 U.S. 292 (1944).


\(^{103}\) Eastern Air Transport, Inc. v. South Carolina Tax Com'n, 285 U.S. 147 (1932); Transcontinental and Western Air, Inc. v. Lujan, 36 N.M. 64, 8 P.2d 103 (1931).


for the use of facilities within the state.\textsuperscript{107}

State or local taxes that bear too directly on interstate commerce will not be upheld. An air carrier must have a sufficient intrastate contact before a state can levy a tax on it.\textsuperscript{108} In United States Airways, Inc. v. Shaw,\textsuperscript{109} the state of Oklahoma sought to levy an excise tax on all gasoline consumed in the state. This tax was found to fall directly on the use of an instrumentality of interstate commerce, and was therefore found to be unconstitutional.\textsuperscript{110} Likewise, an interstate air carrier with no significant intrastate business is immune from local franchise taxes.\textsuperscript{111}

Most local taxes on interstate air carriers will be sustained if a reasonable apportionment scheme is created and there is a sufficient intrastate nexus with the property or privilege taxed. The burden on the interstate air transport industry is obvious. Since there is no uniform scheme of taxation, no two states will necessarily have the same system of apportioning taxes; neither will the taxable events be the same. Under this system, or the lack thereof, the possibility of multiple taxes, complexity and confusion are great.\textsuperscript{112} Also, inconsistent local taxation can interfere with the Civil Aeronautics Board's rate structure.

Problems similar to those mentioned above led Congress to preempt state taxation of interstate air carrier passengers. In a recent amendment to the Federal Aviation Act of 1958, Congress said:

No state . . . shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the


\textsuperscript{109} 43 F.2d 148 (W.D. Okla. 1930). Accord, Mid-Continent Air Express Corp. v. Lujan, 47 F.2d 266 (D. N.M. 1931).


sale of air transportation or on the gross receipts derived therefrom . . . ."\(^{113}\)

The litigation that preceded the enactment of this law illustrates the confusion and burden locally inconsistent taxation can have on the air carrier industry."\(^{114}\) In enacting the recent amendment, Congress recognized the need for a uniform system of taxation in one area, "\(^{115}\) yet other forms of local taxation were specifically exempted."\(^{116}\) How Congress might act in the future is therefore not clear. The problem, however, has been recognized. Since both "air commerce" and "air transportation" are used in this statute, it may be concluded that Congress has recognized that activities entirely within the states may have adverse economic effects on the national air transport system."\(^{117}\)

B. Routes, Service, Rates and Certificates

The extensive authority state and local governments have over air carriage in the field of taxation is more limited in other areas of economic regulation. The principle reason for this lessening of state regulation is the extensive federal legislation in the area. The Federal Aviation Act of 1958 speaks directly to the regulation of the routes air carriers will use, the services they will provide and the rates they will charge, as well as the procedures and qualifications for certification, and the business practices and relationships the carriers will be allowed to engage in."\(^{118}\) This extensive scheme of federal legislation and the regulations promulgated by the Civil Aeronautics Board pursuant to the Act exhibit a strong federal interest in this field of law. In spite of the degree of federal interest


\(^{116}\) Pub. L. No. 93-44, § 7(b) (June 18, 1973), 87 Stat. 90 (amending Title XI, Federal Aviation Act of 1958, adding § 1113(b)).

\(^{117}\) See Allegheny Airlines, Inc. v. City of Philadelphia, 12 Avi. L. Rep. 18,060 (Pa. S. Ct. 1973). This is the first case to interpret the new congressional legislation. The court found this field of law to be preempted.

in regulating the economic aspects of air carriage, neither the CAB nor the courts have been willing to find federal preemption in this area as they were able to do in the area of safety regulation. The reasons for this phenomenon are two: (i) specific statutory language in the Federal Aviation Act limits federal jurisdiction in dealing with economic factors and (ii) what is conceived by the CAB and the courts to be in the public interest.

1. Intrastate Carriers

The authority of the states over air carrier economics is most clearly established in the regulation of carriers that limit their operations to a single state. A recent decision of the District of Columbia Circuit Court of Appeals, *Texas International Airlines, Inc. v. Civil Aeronautics Board,* \(^{119}\) illustrates the statutory limitations placed on federal authority in the field of economic regulation. In *Texas International,* two interstate-CAB certificated carriers, Braniff and Texas International, asked the Civil Aeronautics Board to investigate an intrastate-state certificated carrier, Air Southwest, to determine whether federal jurisdiction should be placed upon the state carrier. The interstate carriers asserted that the competition and resulting diversion caused by Air Southwest affected the operations of the CAB regulated carriers and that therefore the Civil Aeronautics Board ought to regulate the state carrier. The theory advanced by the interstate carriers would have extended federal authority in the field of economic regulation to the constitutional maximum and virtually preempted concurrent state regulation as had been done in the area of safety regulation. The circuit court, however, refused to adopt the interstate carriers’ theory and emphatically endorsed the position that the distinction between the definitions of “air transportation” \(^{120}\) and “air commerce” \(^{121}\) in the Federal Aviation Act was deliberately made by Congress. Since the definition of “air commerce,” which describes federal authority in regulating safety, includes the “affects” on interstate commerce and thus extends federal power to its constitutional limit, it must be assumed the definition of “air transportation,” which describes federal authority in economic regulation, does not include the “affects” on interstate commerce. Therefore, the court in *Texas Inter-

\(^{119}\) 473 F.2d 1150 (D.C. Cir. 1972).


national reasoned that Congress did not intend to extend federal authority to the full constitutional limits under the commerce clause and that there is some room for state regulation. The opinion of the circuit court in the Texas International case has been consistently supported by the Civil Aeronautics Board and the majority of courts reviewing the issue.

Although the statutory limitation in the Federal Aviation Act is undoubtedly the primary reason why the Civil Aeronautics Board and the courts have chosen not to extend federal power in the economic area, a more subtle, but no less important reason should be discussed. Any judicial body reviewing conduct pursuant to the Federal Aviation Act must consider, as an important factor, the public interest. Therefore, what is interpreted to be in the public interest will have a great bearing on the reviewing body's ultimate determination. A former chairman of the Civil Aeronautics Board has observed that state regulation and intrastate carriers are beneficial to the public since these factors "have had a salutary effect upon air travel" by way of improved service, lower fares and

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122 See Texas International Airlines, Inc. and Braniff Airways, Inc. v. Air Southwest Co., CAB Dockets 23047, 23122, Order 71-6-79 at 6 (June 15, 1971); CAB brief, Texas International Air Lines, Inc. v. CAB, 473 F.2d 1150 (D.C. Cir. 1972).


125 See C.A.B. v. State Airlines, Inc., 338 U.S. 572 (1950). This case discusses the importance of the "public interest" as a factor in CAB decision-making. Promotion of competition is usually in the public interest. See Airport Com'n of Forsyth County v. C.A.B., 300 F.2d 185 (9th Cir. 1962); United Air Lines, Inc. v. C.A.B., 198 F.2d 100 (7th Cir. 1952); Western Air Lines, Inc. v. C.A.B., 184 F.2d 545 (9th Cir. 1950). See also Gellman, The Regulation of Competition in United States Air Transportation, 24 J. AIR L. & COM. 410 (1957) and 25 J. AIR L. & COM. 148 (1958); Richmond, Creating Competition Among Airlines, 24 J. AIR L. & COM. 435 (1957).
an increased volume of traffic. These salutary effects have been largely the result of state certificated intrastate carriers competing with established CAB regulated carriers. Certainly, this factor weighed heavily upon the Texas Supreme Court in *Texas Aeronautics Commission v. Braniff Airways, Inc.* when the court approved the TAC’s certification of an intrastate carrier. The primary issue in the *Texas Aeronautics Commission* case was whether, and to what extent, the applicant-intrastate carrier could fulfill the public interest by providing new and better service to Texas markets.

The effects of intrastate carriers competing with interstate carriers on intrastate routes is not entirely positive. As asserted by the interstate carriers in *Texas International*, intrastate competition has diverted a significant amount of business away from the interstate carriers. The adverse effects this diversion can have on CAB certificated carriers is illustrated by a recent Civil Aeronautics Board order. In this order, Pacific Airlines, an interstate carrier, applied for an exemption so that it could take up additional markets to offset its losses on intra-California routes due to competition from Pacific Southwest, an intrastate carrier. In granting the exemption, the Board noted:

> [T]he statutory criteria for exemption are met in this case. As previously detailed, Pacific is in the unique situation of being subjected to strong competition by a carrier not subjected to federal regulation, and Pacific’s present difficulties with respect to its system operations are attributable in substantial part to this competition. As a result, the balanced transportation system which we have attempted to establish in California, with service to thin as well as the dense traffic points, may be seriously impaired.

Clearly, intrastate competition must not only be considered in light of the public interest, but whether that competition interferes with the aims and objectives of the Federal Aviation Act. At least one

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It should be noted that in Sosa v. Young Flying Service, Inc., 277 F. Supp. 554 (S.D. Tex. 1967) the Texas Aeronautics Act was found not to conflict with federal law.


Id. at 5. See CAB Order 25483, Doc. 18713, 18759 (Aug. 7, 1967); CAB Order 24895, Doc. 17528 (March 24, 1967); CAB Order 23957, Doc. 17527 (July 15, 1966), where the adverse effects of intrastate competition are noted.
federal court has stated that this obstruction, especially when federal subsidies are involved, could lead to federal regulation.\textsuperscript{131}

What the courts and the Civil Aeronautics Board will allow the states to economically control as intrastate air traffic is very limited. Even though a carrier's operations may be entirely within the boundaries of a state, it may be considered to be in interstate commerce if it transports a significant amount of interstate traffic. In the case of \textit{Civil Aeronautics Board v. Friedkin Aeronautics, Inc.},\textsuperscript{132} the intrastate carrier concerned had made arrangements with interstate carriers to carry passengers coming into and leaving the state of California. The transport of these interstate passengers, the Ninth Circuit held, changed the character of the airlines' services from intrastate to interstate.

Apparently, it is not even necessary that the carrier have knowledge of the origin or destination of its passengers. The district court reviewing the case of \textit{Civil Aeronautics Board v. Canadian Colonial Airways, Inc.},\textsuperscript{133} found the intrastate operations of Canadian Colonial to be subject to regulation by the Civil Aeronautics Board. In the \textit{Canadian Colonial} case, the Board exerted its regulation over a carrier operating only within New York, but which transported passengers who were to ultimately take other means of transportation in leaving the state. The intrastate carrier in \textit{Canadian Colonial} was found to be operating in interstate commerce, even though there was no evidence it was actually aware of the interstate character of its clientele.

The Civil Aeronautics Board has said that the states may regu-

\textsuperscript{131} C.A.B. v. Island Airlines, Inc., 235 F. Supp. 990, 1009 (D. Haw. 1964), aff'd, 352 F.2d 735 (9th Cir. 1965):

\textit{Any substantial loss of revenue would materially increase the claims of the two carriers for subsidy support by the CAB and would also impair the ability of Aloha to repay its CAB guaranteed loans and thus might require payment by the CAB.}

\textit{It thus clearly appears that the impact of inter-island flights by Island, with its low rates, would have a substantial effect upon interstate air commerce, viz., it would apparently necessitate an increased mail subsidy to the two presently certificated carriers, Hawaiian and Aloha, and would put in jeopardy the repayment of Aloha of its CAB-guaranteed loans. To deny CAB jurisdiction would substantially interfere with the execution of aims and objectives of the Act and would not be to the best interests of the United States in the regulation of air transportation thereunder.}

\textsuperscript{132} 246 F.2d 173 (9th Cir. 1957).

\textsuperscript{133} 41 F. Supp. 1006 (S.D.N.Y. 1940).
late only "purely intrastate" air operations and that only a "de minimis" amount of interstate traffic will be tolerated.\footnote{Applications of Southwest Airlines, Inc. and Air California, Inc., CAB Order 71-8-57, Docs. 22680 and 22721 (Aug. 12, 1971); Texas International Airlines, Inc. and Braniff Airways, Inc. v. Air Southwest Co., CAB Order 71-6-79, Docs. 23047 and 23122 (June 15, 1971).} The CAB opinion on the subject indicates that intrastate carriers, if they wish to avoid federal regulation, must not only avoid any ticketing or other arrangements with connecting carriers, but must also make special efforts to avoid carrying more than a de minimis amount of interstate traffic. In a recent order of the Civil Aeronautics Board involving an alleged intrastate air carrier operation in Florida, the Board elaborated on the de minimis rule:

We note that Southeast represents that the proposed flights will be confined wholly to the airspace over the state of Florida; that the proposed operations will be conducted without any arrangements with interstate carriers for joint, through-plane service; that the service will not be advertised in out-of-state media; and that even if some out-of-state visitors are carried there will be a break in the journey of these passengers, between the flight from another state to Florida and the flight on Southeast. If Southeast's operations are in fact conducted in the foregoing manner, carrying no more than a de minimis volume of interstate traffic . . . the flights will not constitute air transportation subject to the Board's jurisdiction.\footnote{Application of Southeast Airlines, Inc., CAB Order 70-7-57, Doc. 21864 at 3 (July 13, 1970). See also United States v. Yellow Cab Co., 332 U.S. 218 (1946); Southerland v. St. Croix Taxicab Assoc., 315 F.2d 364 (3d Cir. 1963).} 158

2. Interstate Carriers

The foregoing discussion would seem to indicate that the sphere of state economic regulation of air carriage was quite limited—only those operations entirely within a state, with no significant out of state contacts, may escape CAB regulations. The stringent de minimis rule would appear to exclude from state regulations any activities of interstate carriers. This, however, is not the case. The Supreme Court in \textit{Colorado Anti-Discrimination Commission v. Continental Airlines, Inc.}\footnote{372 U.S. 714 (1963).} found that at least a part of the Federal Aviation Act's economic regulations are not preemptive, even in regard to interstate, CAB certificated air carriers. In this case, a Negro plaintiff alleged that Continental engaged in discriminatory hiring practices in Colorado and asked the state commission to give
relief. The Supreme Court, in finding the Federal Aviation Act’s anti-discrimination provisions to be non-preemptive, stated:

Notwithstanding this broad authority [of the CAB and the FAA], we are satisfied that Congress in the Civil Aeronautics Act of 1938 and its successor had no express or implied intent to bar state legislation in this field . . . .137

The “field” the Supreme Court referred to in Colorado Anti-Discrimination Commission may readily be limited to the area of civil rights and not construed to include the general field of economic regulation of air carriage. There is evidence, however, that state economic regulation of interstate carriers extends well beyond the field of civil rights.

In February 1951, the Civil Aeronautics Board “urged” the interstate carriers flying the Los Angeles-San Francisco route to raise their fares by approximately three cents per mile. The request was made so that the rates in this market would conform to the national air coach fare pattern.138 Western Air Lines and California Central Air Lines accordingly raised their rates. The California Public Utilities Commission, however, challenged the legality of the increase since the carriers had not first secured the PUC’s authorization as demanded in the state’s constitution.139 The CAB regulated carriers retorted that economic regulation of interstate air carriers was preempted by the Civil Aeronautics Act. The California Supreme Court, in People v. Western Air Lines, Inc.140 resolved the issue in favor of the state public utilities commission. The California court found that the Federal Aviation Act did not require that interstate air carriers be treated differently than any other type of common carrier, and that therefore the intrastate operations of the air carriers could be regulated by the states. The fares that the interstate carriers had instituted at the request of the CAB were held to be illegal.

The *Western Air Lines* case has received broad support from

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137 Id. at 723-24.
139 Calif. Const. Art. XII §§ 17, 20, 21, 22, 23.
state and federal courts and even the CAB. The Supreme Court has at least acquiesced in the opinion. It is also generally recognized that the states may require interstate carriers to procure a state license or certificate to operate on intrastate routes. A recent survey by the National Air Transportation Conference indicates that twenty-three states require some form of license be secured by CAB certificated carriers before they can operate within the state.

In a recent brief filed by the Civil Aeronautics Board, this position was taken:

The Board has never questioned the right of a state to require a Board-certificated carrier to secure a state certification for the carriage of intrastate traffic between points... which are in that state, and it may be that a state could deny such a certificate..."
The position taken by the Civil Aeronautics Board and the courts regarding state regulation of rates and certification of interstate carriers operating over intrastate routes is consistent with those cases finding that the federal economic powers are limited to true interstate commerce. The distinction between the terms “air commerce” and “air transportation” as defined in the Federal Aviation Act of 1958 is always cited to support state regulation in those two areas. The notion of the *de minimis* rule, however, is not consistent. Certainly, a CAB certificated carrier will not seek to avoid interline agreements that will ultimately take passengers out of state; neither would these carriers seek to contain their advertising and other operations within a single state. That the Civil Aeronautics Board could regulate these intrastate fares and prohibit state certification under the *de minimis* rule is obvious; why concurrent and often conflicting state authority in these fields is allowed is not clearly stated.

The confusion regarding state-federal relationships in the area of the economic regulation of interstate air carriers is further clouded by another recent decision, *Allegheny Airlines, Inc. v. Pennsylvania Public Utilities Commission.*147 Allegheny Airlines had been operating over an intra-Pennsylvania route between Harrisburg and Williamsport pursuant to both CAB and Pennsylvania PUC certificates for over twenty years. Allegheny received CAB approval to drop the Harrisburg-Williamsport route from its schedule. The state PUC demanded that the carrier also get its permission before the cancellation took place. Although the Third Circuit’s opinion abstains from deciding the merits of the case,148 the brief filed by the Civil Aeronautics Board is enlightening149 and consistent with other statements made by the Board.150 In brief, the CAB took the position that the areas of routes and scheduling of interstate carriers is preempted by federal law. The Board asserted

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147 465 F.2d 237 (3d Cir. 1972).
148 Under the circumstances (Allegheny had allowed the state of Pennsylvania to regulate it for over twenty years), the circuit court exercised its discretion to abstain from deciding the merits so that a state-federal conflict could be avoided. See also Bonanza Air Lines, Inc. v. Public Serv. Com’n of Nev., 186 F. Supp. 674 (D. Nev. 1960).
that the economic regulatory sections of the Federal Aviation Act of 1958 are a pervasive regulatory scheme and that concurrent state requirements stand as obstacles "to the accomplishment and execution of the full purposes and objectives of Congress...." The Board recognizes the problem of the definitional sections of the Act, but overcomes it by stating:

To be sure, the Federal Aviation Act does not in terms extend to intrastate air carriage nor preclude the states from regulating any intrastate aspects of interstate air carrier's operations. But that is only the starting point. Rather, the entire scheme of the [federal] statute must ... be considered ...".

The CAB's assertion is definitely based on an implied preemption theory: although Congress did not expressly intend to exclude concurrent state regulation in the area, an objective analysis of the entire regulatory scheme and the congressional objectives notes the necessity of preemption. Since the CAB is charged with "[t]he development of a national air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States...”, obstacles created by a single state to the national system must be eliminated.

The Board substantiates its assertion that Congress has impliedly preempted this field of economic regulation with the "intertwine-ment" theory advanced by the Supreme Court in Colorado v. United States, and as applied to the Federal Aviation Act by the Nebraska Supreme Court in Frontier Air Lines, Inc. v. Nebraska Department of Aeronautics. The facts in Colorado v. United States were very similar to those existing in the Allegheny Air Lines case. The Interstate Commerce Commission has granted the petition of an interstate rail carrier to abandon an intra-Colorado segment. The state disputed the ability of the Commission to authorize the action. Although the Interstate Commerce Commission's authority

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152 Id.
153 The brief cites Hines v. Davidowitz, 312 U.S. 52 (1941) at this point. Hines is a strong implied preemption case.
only extended to interstate commerce, the Court upheld the Commission's action:

This railroad, like most others, was chartered to engage in both intrastate and interstate commerce. The same instrumentality serves both. The two services are inextricably intertwined. The extent and the manner in which one is performed, necessarily affects the performance of the other. Efficient performance of either is dependent upon the efficient performance of the transportation system as a whole.157

Frontier Air Lines involved an interstate air carrier that had procured a Civil Aeronautics Board order to abandon unprofitable intra-Nebraska routes. The Nebraska Supreme Court noted, in upholding the action of the Board, that the intertwinement of an interstate carrier's interstate and intrastate routes was essentially a national concern:

That Congress has adopted a general plan to regulate aviation in interstate commerce is apparent. If the Nebraska State Railway Commission under the guise of regulating intrastate commerce can require service to be continued on routes or segments of routes suspended or deleted by the Federal Board created by the Act of Congress to regulate such service every other state may do the same. Under those circumstances the general plan of regulation adopted by Congress would be wholly nullified. The subject is obviously national in character and uniformity of regulation throughout the nation is required.158

This overview of the economic regulations of interstate air carriage presents a clouded and confusing picture. While federal authority is clearly exclusive in the area of the interstate operations of interstate carriers, the lines between state and federal authority in the regulation of intrastate operations of interstate carriers is not so sharply drawn. The Civil Aeronautics Board and the courts have distinguished between the various functions of the interstate carriers operating intrastate; routes and scheduling are deemed to demand national uniformity while rates and certification procedures

do not. The inconsistency is obvious. The same factors demanding uniformity in one area of the economic regulation of interstate air carriers would seem to operate in the others. Certainly, the federal scheme regarding rates is no less pervasive than that governing routes; neither would the intertwining of federal and state interests appear to be any less in one area than the other. A single federal Act and a single congressional purpose pervades the entire area. The Second Circuit in *Lichten v. Eastern Airlines, Inc.*169, in interpreting a tariff provision of an interstate carrier, recognized this:

A primary purpose of the Civil Aeronautics Act is to assure uniformity of rates and services to all persons using the facilities of air carriers. To achieve this, it is essential, in the judgment of Congress, that a single agency, rather than numerous courts under diverse laws, have primary responsibility for supervising rates and services.169

Although the view taken in *Lichten* seems to be more closely in accord with the congressional intent expressed in the Federal Aviation Acts of 1938 and 1958, this does not belie the fact that the contrary view expressed in *People v. Western Air Lines* currently enjoys wide acceptance.

IV. Conclusion

Current Supreme Court interpretation of the commerce clause would allow Congress to create exclusive federal regulation in the entire field of aeronautics, whether the regulated activities occur between states or are confined to a single state. Congress intended to utilize a great deal of this potential authority when it created the Aeronautics Acts of 1938 and 1958. Because air transport is essentially interstate and international in scope, Congress recognized its responsibility to create a uniform body of law to regulate the industry.161 The interstate character of the aeronautics industry, together with the importance to the development of the national economy

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169 189 F.2d 939 (2d Cir. 1951).
of an adequate interstate air network free from significant economic and safety problems has given rise to an extraordinary federal interest in commercial aeronautics. The result has been an industry that is so heavily regulated by the federal government that it is virtually a public utility. 1

These concerns of Congress are strongly reflected in the field of safety regulation and airspace management. The safety and environmental control provisions contained in the Federal Aviation Act and in FAA regulations have been found to be so pervasive by the courts that an intent by Congress to exclude concurrent state regulations has been implied.

The trend toward federal preemption that dominates the area of airspace control has not been followed in the economic realm. The reason cited most often for this fact lies in the definitions of “air transportation” and “air commerce” appearing in the Federal Aviation Act that are assumed to indicate an intent by Congress to restrict federal economic authority over air carriage. Some degree of concurrent state authority was also assumed to have been contemplated. Reliance on this assumption has generated a tremendous amount of uncertainty and litigation since no consistent pattern of federal-state regulation has been articulated.

The best example of this confusion is the economic regulations of interstate air carriers. The distinction, in the economic regulation of these carriers, between rates and certification on the one hand, and routes and services on the other, is illogical and should be ended. The Civil Aeronautics Board has the statutory authority and a congressional mandate to exclusively control the affairs of the interstate carriers, even when operating over intrastate routes. The \textit{de minimis} rule and the intertwinement theory, advanced by the CAB and the courts on occasion, are much more in line with the interests Congress hoped to promote in enacting federal aviation legislation than the unrealistic and irregularly used interstate-intrastate distinction based on the Federal Aviation Acts’ definitional section.

The definitional argument, however, has much more validity when intrastate carriers are at issue. Here, federal interests are indirect and the \textit{de minimus} and intertwinement ideas are less appli-
A state's interest in regulating carriers that operate exclusively within its borders, especially when it can be shown the carrier has a positive economic effect, will be given great weight by the courts. If, as the majority of the courts and the CAB have reasoned, the distinction between the terms "air transportation" and "air commerce" demand some degree of concurrent state economic regulation, that state control should be limited to intrastate carriers operating exclusively within one state. It is only in this relatively confined area that federal interests, as expressed in the Federal Aviation Act, are not substantial enough to exclude local authority.

Even if confined to purely intrastate air carriage, the wisdom of this concurrent state control may be doubted. The congressional histories of the 1938 and 1958 Aviation Acts, although not directly supporting complete federal preemption, do show a great concern for creating uniformity in both the safety and economic areas. The two fields, while they are artificially separated in federal legislation, are in actuality highly interrelated. Consistent and sound economic policy is as necessary to the development of a national air transport network as are policies regulating the use of airspace. For example, the diversion suffered by Pacific Air Lines in California due to intrastate competition by Pacific Southwest Air Lines is significant and injurious to the national system. Not only may routes and service to some areas be altered, but the rate and subsidy system worked out by the CAB may be affected.

No court, however, has been willing to find that these adverse economic effects alone will allow federal authority to move into the field of purely intrastate air carriage under present federal law. The CAB, noting this weakness in the existing Federal Aviation Act, stated:

The adverse impact of intrastate operations upon interstate carriers might well make their regulation by the Board desirable in order to achieve the overall goals of the Federal Aviation Act and warrant Congress in broadening the regulated class.168

There can be little doubt that independent and inconsistent state action is likely to interfere with the federal program of a balanced, competitively controlled, national-international system of commercial aviation. While it is true there are certain advantages due to

168 CAB Order 71-6-79, Docs. 2304-7 and 23122 at 8 (June 15, 1971).
increased competition and the superior knowledge and concern state aeronautics agencies may have of local problems, these facts are not conclusive. No economic need or essential public interest requires the assertion of state regulation. There is no reason why federal authority is not or could not be made adequate to deal with local as well as national problems. The CAB could be as fully acquainted with the requirements of service within the state as the state agency itself. Also, there is no reason to believe the CAB could not stimulate the benefits of competition as some intrastate carriers have done.

The inestimable benefits of a unified and coordinated development of aeronautics is more important than the positive effects of concurrent state control. Congress ought to amend the Federal Aviation Act to give the federal government equal power in both the safety and economic fields as well as including provisions coordinating state taxation of interstate carriers. A clear statement by Congress recognizing the national concern for the economic development of the air transport industry should find expression in federal law. This legislative statement would not only aid in economic development, but would end once and for all the confusion that has been the hallmark of air carrier economic regulation.

104 Ryan, Economic Regulation of Air Commerce by the States, 31 Va. L. Rev. 479 at 526 (1945).

105 Congress has the power under the commerce clause to regulate any activity related to aeronautics.