State Control of Aeronautics

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CHARLES L. MORRIS*

In the July, 1940 issue of the Journal of Air Law1, Mrs. Mable Walker Willebrandt set forth, with characteristic vigor and clarity, the case in favor of exclusive federal control over aeronautics. If a mere layman were to undertake to cross swords with a legal scholar of Mrs. Willebrandt's rank, no doubt exists as to who would be victor. Hence, this layman will attempt to lay greater emphasis on facts and fallacies than on legal doctrines. The writer finds encouragement for this task in the opening and closing statements of Mrs. Willebrandt's discourse.

In her third paragraph, a question of long standing is reiterated: "Has the Federal Government . . . the right, to the exclusion of the forty-eight sovereign states, to regulate and control aviation?"2 The article then argues forcefully the affirmative.

However, the last four paragraphs depart abruptly from the otherwise didactic tone and almost plead, "Why not view the legal question realistically, and recognize that the role of the state is no longer to regulate? . . . Why not . . . cooperate in ripening even what some may regard as 'squatter's rights' of the Federal Government . . . ?"3

If it be that Mrs. Willebrandt is so mistrustful of her legal foundations as to conclude with a non-legal personal opinion, perhaps the present writer is none too presumptuous in stepping forward to debate the issue on a similar basis.

His qualifications for the tilt are drawn from Mrs. Willebrandt's own article which points out that, aside from the District of Columbia, Connecticut has a greater percentage of area blanketed by Federal Airways than any other state in the Union. Yet Connecticut, again quoting from the article, is "still asserting a vigorous policy of state control" even though she "has only twenty-five per cent of her territory left where her state licensed planes may fly."4

Where, then, is a better place to try and examine control? Since it is obvious that Connecticut does not agree with Mrs. Willebrandt

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1. (1940) 11 JOURNAL OF AIR LAW 204.
2. Supra note 1.
3. (1940) 11 JOURNAL OF AIR LAW 204, 217.
4. (1940) 11 JOURNAL OF AIR LAW 204, 213.
“that the role of the states is no longer to regulate,” who can question the qualifications of that state to set forth the arguments in favor of state control?

First, let a famous ghost be laid. We concur in two fundamental concepts, viz: (1) the need for uniformity is apparent, insofar as lack of uniformity will cause injustice or hardship to transient or interstate flying; (2) the need for adequate federal supervision is freely acknowledged, in order to accomplish this uniformity.

We also concur with Mrs. Willebrandt’s expressed theme, “that state law or regulation is becoming unnecessary, save where it can assist or facilitate federal control.” We would go further and omit the word “becoming” but we would also add: “supplement” federal control. Connecticut is willing, in fact desirous, to adopt as her own any and all federal rules and regulations that effectively control aeronautics within her borders. Connecticut also is anxious to aid in the adequate enforcement of these federal rules and regulations.

Unlike Mrs. Willebrandt, however, Connecticut believes that the Federal Government is unable to furnish adequate protection in all phases of aeronautics, either because of (1) constitutional limitations, (2) budgetary limitations, (3) lack of inclination, or (4) the fact that the Government must, perforce, draft its rules in such manner as to do a fair job throughout the whole gamut of flying conditions that will be encountered in the three million square miles of this country, and it therefore can do a good job only in areas possessing average flying conditions for the country.

As an example of the latter item, federal regulations establish 500 feet as the minimum flying altitude except when over cities or towns. Certainly, an aircraft over the plains states is just as safe at two hundred feet as at five hundred feet, except when flying downwind or when the landing-gear is retracted. On the other hand, Connecticut’s wooded terrain, broken only with occasional small clearings, creates an extreme danger for aircraft even at five hundred feet, necessitating flight three times that altitude. In the plains states, the five hundred foot rule might be found to be an unnecessary hardship, serving no safety purpose. Over rugged terrain, the five hundred foot minimum is not sufficient for safety, is voluntarily multiplied several fold by all pilots, and therefore could be done away with. It operates effectively only over territory where an engine failure at four hundred and fifty feet would cause an accident but at five hundred feet would not.

5. Supra, note 3.
6. (1940) 11 JOURNAL OF AIR LAW 204, 208.
Connecticut has taken no supplementary local action in this particular situation for many reasons, but concerning flight over cities, action has been taken. The Federal Authority sets one thousand feet as the minimum over all towns and cities, with the further provision that the pilot must fly higher if he cannot reach a safe landing area from that altitude. Connecticut recognizes that in her particular territory a forced landing, which is no easy matter over open country, is many times worse when the pilot must first clear a city or town. The problem is obviously different than that confronted in many states where a suitable landing area is usually found immediately on the outskirts of the community. Therefore, Connecticut has established a two thousand foot minimum rule over all built-up sections. Common practice is to give nothing more than a warning to non-resident first-offenders who fly over a Connecticut city between one and two thousand feet, for nonresidents cannot be expected to know of this more strict local requirement. Of resident pilots, however, strict adherence is required.

Another case might be cited—that of the limited-commercial pilot. In the plains states, the holder of a limited-commercial certificate might conceivably be qualified after twenty-five hours of flying to carry passengers for several hundred miles cross-country for hire. In rugged Connecticut terrain, we believe he should not hang out his shingle and give rides for hire until he has had at least one hundred hours, and even then he should stay within ten miles of his home port. Along the Maine shore line, where fogs roll in at almost a minute's notice, possibly a five mile limit should be placed until the pilot has demonstrated a thorough acquaintance with meteorology as applied particularly to fog. But the federal regulation must strike a reasonable average of country-wide conditions, hence, sixty hours of flying, ten-mile radius (too strict in some circumstances, not strict enough in others).

And one final case. In sparsely settled central and western states, there may be a very real hardship in requiring a pilot to travel several hundred miles, once a year, to take a physical examination. Therefore, for these states, a two-year interval may be justifiable. In the interests of safety, however, we believe a physical examination should be taken more frequently; in Connecticut the hardship of one examination a year is considerably less than the hardship of one in two years in other localities, for no inhabitant of Connecticut resides more than forty miles from a qualified medical examiner.

In general, therefore, it can be stated that a given federal regu-
islation is either too severe for justice or too lax for safety. Some exceptions may be found: clearance above or below clouds, approved school requirements, aircraft structures and repairs thereto. The most notable exception to be found is the federal airport requirements, which make corrections for the various altitudes at which airports may be built. But where else is such a *sectional* approach to be found? By and large, every federal rule might well be re-examined in the light of this generality.

This lack of a sectional approach is undoubtedly one of the reasons why the Civil Air Regulations have been so variously amended. To be sure, a small percentage of those changes have been due to a conflict between provisions of the 1938 Act. Nothing of such magnitude possesses perfect draftsmanship at the outset. Neither can it anticipate subsequent legislation; changes must follow the progress of the art. But by far the largest number of amendments have been brought about by the outcry of aggrieved persons.

It cannot be denied that the drafters of the Regulations considered all previous rules, surveyed all national needs, and constructed a code as suitable as their capable minds could conceive. Yet, fine as the results were, some individuals felt that certain provisions imposed undue hardships upon them. At the same time others considered these same sections insufficient. Since the former usually made the greater outcry, rules were often relaxed to quiet the then current outburst. This in turn often stirred up an equally vociferous protest from another quarter. Aviation may be interstate in character, but its control must take into consideration the varying sectional peculiarities.

This changeableness of the CAR leads to another general problem, i.e., is promotion, or control, the more important governmental function? Students of our government will agree that in the colonies and our early national history, *promotion* was a private, individual problem, while government exercised *control* for the general public welfare. It is only recently that governmental *promotion* for public welfare has become a part of this nation's social consciousness. Perhaps it is a sound evolution—that question may be left for students of political science. But it is here submitted that proper control is in itself promotion.

Possibly this can best be demonstrated by Connecticut's own case. It has been strongly argued that Connecticut's aeronautical program has retarded the development of aviation in that state. This argument usually emanates from one of two sources, (1) a theorist who, in attempting to disprove the value of state control, has not
aligned theory with fact through a careful study of Connecticut's records and procedures, or (2) an individual who has had his personal liberties restricted by state laws to a degree greater than contemplated by federal rules.

The latter person is prejudiced—in fact, is often the type that is "ag'in all law and order," and would complain of even the federal rules if those of the state did not divert his attention. Therefore, we will here endeavor to reply only to the former group by supplying, in some measure, their shortage of facts.

But first, let us try briefly to establish that state control has improved Connecticut's safety record. The result is partially inconclusive for though the federal authorities have been repeatedly requested to supply accident information segregated by states, this has not been done to our knowledge; hence detailed analysis is impossible. It has been stated by competent authority, however, that states with a good aviation agency show an accident rate appreciably more favorable than those without. The inference may be drawn then that up to a certain point, the more active the agency, the better the record. This appears to be borne out by the following two provable facts: (1) Connecticut has not had within her borders\(^7\) a single fatal aircraft accident involving either a student under instruction or a holder of a Connecticut Student Pilot License flying solo, since April, 1931. Careful definition is used, for a student under primary instruction does not hold a Connecticut Student license.\(^8\) However, we have had no fatality involving either classification; (2) Connecticut has not had within her borders\(^9\) a single fatal aircraft accident involving a Connecticut licensed private pilot since the Department was organized in 1927.

Is there any other state with a comparable safety record?

Having endeavored thus to establish the reason for state control, let us now consider whether it has actually resulted in promotion. To do so, we present the following facts from the Federal Airport Survey Report\(^10\) which gives state per capita pilot and aircraft figures:

1. The national average of aircraft was, at the time of the

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7. The phrase, "within her borders" may appear to be quibbling, since Connecticut is so small that many of her pilots might have been involved in fatal accidents while on short flights outside the state. Actually, our Department endeavors to record all accidents to all Connecticut pilots, whether in or out of the state, and the records still show no such fatality. But in order to be sure that there is no error of fact based on possibly incomplete out of state reports, the qualifying phrase is used.

8. The Connecticut law has always permitted unlicensed persons to take dual flying instruction with a qualified pilot—a provision that was only recently incorporated into the CAR.


10. Figure 15, "Airport Survey: Letter from the Civil Aeronautics Authority;" 76th Congress, 1st session; House Document No. 245; March 25, 1939.
report, slightly over four airplanes per fifty thousand people; Connecticut's average was a trifle higher than this. Of the twenty-six states east of the Mississippi River, and the District of Columbia, only seven had a higher percentage, four were nearly equal to Connecticut, and sixteen had a smaller percentage. While no apology for this is called for, it is submitted for the record that in the closely-populated eastern states where distances between centers are relatively short, the usefulness of the present conventional aircraft is restricted to a small cross-section of the population; rented aircraft serve the general public need.

2. The national average of pilots, at the time of the report, was eight per fifty thousand people; Connecticut's average was ten plus. East of the Rocky Mountains there were only two states and the District of Columbia that equalled or bettered this figure.

**TABLE I**

Information Transposed from Federal Airport Survey Report
"Number of Aircraft and Pilots Per Fifty Thousand Population By States as of January 1, 1939"

<table>
<thead>
<tr>
<th>AIRCRAFT</th>
<th>PILOTS</th>
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</thead>
<tbody>
<tr>
<td>National Average</td>
<td>National Average</td>
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<tr>
<td>4+</td>
<td>8+</td>
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<tr>
<td>Averages of states east of the Mississippi equal to, or better than, the national average:</td>
<td>Averages for states east of the Rocky Mountains equal to, or better than, Connecticut's average:</td>
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<tr>
<td>Delaware</td>
<td>District of Columbia</td>
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<tr>
<td>10+</td>
<td>25+</td>
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<tr>
<td>District of Columbia</td>
<td>Florida</td>
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<tr>
<td>9+</td>
<td>17+</td>
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<tr>
<td>Florida</td>
<td>Delaware</td>
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<td>7+</td>
<td>12+</td>
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<tr>
<td>Maine</td>
<td>Connecticut</td>
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<td>6+</td>
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<td>Michigan</td>
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<td>Indiana</td>
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<td>Rhode Island</td>
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<td>New Hampshire</td>
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<td>4+</td>
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</table>

We believe, then, that we are justified in posing the question: does this constitute a stifling of aeronautical development?

Lest a misunderstanding arise from constant reference to Connecticut records and procedures, let it be understood that we do not necessarily recommend that all states religiously copy every parcel of our aviation code. The value of state control is its ability to adapt itself to sectional needs; our laws were drawn with our own requirements in mind. As federal rules do not conform to these needs, so many of our procedures might be unnecessary, unwise, or impos-
sible of accomplishment in other sectors. We do believe, however, and the record seems to bear it out, that each state is better qualified, on the whole, to know and cope with its own problems than is the Federal Government.

To return to the question of federal control vs. federal promotion, one fundamental fallacy appears to exist in the Civil Aeronautics Act of 1938. Section 30111 of that Act says, “The Administrator is empowered and directed to encourage and foster the development of civil aeronautics and air commerce in the United States, and abroad, and to encourage the establishment of civil airways, landing areas, and other air navigation facilities. The Administrator and the Air Safety Board shall cooperate with the Authority in the administration and enforcement of this Act.”

12. Italics supplied.

Here we have, in one paragraph, a most complex problem. If a person desires to encourage a tree to grow rapidly and as large as possible, he doesn’t restrict its growth by heavy pruning. If, however, he seeks to encourage the production of well-formed fruit or flowers, his pruning is much more severe. When there is combined in one person the dual responsibility of encouragement and regulation, tremendous judgment is demanded in balancing the two in proper proportion. If the desire for a large tree is in the ascendancy (as is currently the case in Washington) the supervising agent must remove any and every restriction to its growth. Furthermore, it is imperative that the nurseryman have clearly in mind which result he seeks; a reversal of his goal every year or two must certainly seriously affect the tree.

It is this very problem that confronts aviation. Is it sound policy to charge “encouragement” and “enforcement” to the same person or group of persons? Is it not sounder from a governmental standpoint, to require “enforcement for the common weal”, by which is meant that regulation will cease at the point where its private restrictions exceed its public benefits (not necessarily its private benefits)?

This leads directly to another reason for state control. If the federal agency emphasizes the promotional part of its duties to the detriment of regulation, it should be, and is, the duty of the state to step in and supplement the federal rules and administration (precisely as Mrs. Willebrandt says). On the other hand, if regulation is adequately cared for by action suitable to each of the forty-eight states, those states that believe in promotion by control, would have
no further responsibility. At the same time, states favoring promotion pure and simple would be in no-wise retarded in their task.

In this connection, the writer was asked: "If the Federal Government could constitutionally, and would policy-wise, do all the things Connecticut is doing, would you still want to continue your present program of control?" The answer was, "No, not if we could be assured that those policies would be lasting and if any problems peculiar to our state or section would be adequately cared for by specific regulation." From a practical standpoint, neither of these stipulations can be accomplished. Hence, we believe in state control.

It must not be inferred, however, that we are opposed to all federal control. Earlier in this article, the need for basic uniformity in aviation was emphatically recognized. It would lead to utter confusion if forty-eight states were to establish forty-eight different standards of aircraft construction or repair. It would be inexpedient to allow states to drop physical requirements for pilots below a certain minimum. And it would be literally a fatal error, if there were lack of uniformity in air traffic regulations. But we see no reason, if one state wants a physical examination every six months, and another believes that its citizens will be better served by following the federal maximum of one year, why either should be restricted in its choice. Nor do we believe that if one state desires to inspect airplanes once a month (and can do so without undue hardship) while another is satisfied with the federal requirements, why any deterrent should be placed upon the more thorough state.

In other words, uniformity is essential at all points where deviation would cause hardship or hazard to interstate flying. But, uniformity is not essential in administrative matters nor in matters not affecting interstate flight; in fact, even in Washington, administrative methods have considerable lack of uniformity from year to year. Instead of agreeing with Mrs. Willebrandt that there should be a "national law excluding state law," the writer believes that the national law should be designed to unify state law, and should otherwise concern itself only with scheduled air carriers, aids to air navigation, and the manufacturing industry.

In short, we return to our original statement that, "the Federal Government is unable to furnish adequate protection in all phases of aeronautics, either because of (1) constitutional limitations, (2) budgetary limitations, (3) lack of inclination, or (4) the need for

13. (1940) 11 JOURNAL OF AIR LAW 204.
striking an average of nationwide conditions. It is the states’ task to remedy these deficiencies.

Before briefly considering a few specific points in Mrs. Willebrandt’s article, the writer begs leave to insert two questions.

Section 30214 of the Civil Aeronautics Act says, “The Administrator is empowered to designate and establish civil airways . . .” on which no aircraft shall be flown except in accordance with certain federal requirements and restrictions. As a point of information, we ask, is it constitutional for one individual, not elected by the people, to appropriate to the Federal Government, by the mere scratch of a pen, all rights to the air space over a sovereign state, without his action so much as being reviewed or ratified by the people’s representatives? Leaving this question for constitutional lawyers, we will assume for the sake of this article that the answer is affirmative. We then ask, if an aircraft is engaged in private intrastate flight on a civil airway, does it “endanger safety in interstate commerce” even if it is about to fall completely apart in mid-air? In other words, can the Act lawfully control the structural condition of private aircraft?

Mrs. Willebrandt is not clear on that point. She states, “An uncertified pilot flying an aircraft that is not airworthy in intrastate commerce may directly affect or endanger safety in interstate air commerce. . . . It thus becomes necessary . . . for the Federal Government to control him.”16 The word “him” does not apply to the aircraft but rather to the pilot. The pilot’s acts may surely cause a hazard to interstate commerce; an unairworthy aircraft being flown by a qualified pilot in strict conformity with traffic regulations, almost as surely will not.

From the standpoint of practical considerations, we need not worry too much about this latter question for now. Most states require federal aircraft licenses or certificates. Even Connecticut, which does not so require by statute, has no federally unlicensed aircraft flying within its boundaries, for under its statutes, an aircraft must prove its airworthiness before receiving a Connecticut registration. A federal certificate is considered adequate proof of fundamentally safe design and construction. State inspection assures proper maintenance. If a federal certificate is not in force, however, the owner must submit complete structural data and analyses. This procedure is so infinitely more complex than securing a federal certificate that the latter course is inevitably followed.

15. (1940) 11 JOURNAL OF AIR LAW 204, 214.
16. Italics supplied.
Thus Connecticut avoids costly duplication, recognizes the work of the federal engineers, supplements their efforts, and tosses under federal control every aircraft within her boundaries. She does not, however, as Mrs. Willebrandt claims, give to the Federal Government “exclusive jurisdiction” over those or any other aircraft even on the civil airways. The Federal Government has no such exclusive control although its powers appear to have been, perhaps unconstitutionally, extended by what Mrs. Willebrandt aptly terms “a rather unusual use of definitions.” The state shares fully in the control of airway traffic. The state may take action against any person for a violation of state law, on or off a civil airway, even to the extent of placing under arrest the pilot of a scheduled interstate airliner that is not carrying mail. It may prosecute the pilot of a mail-carrying aircraft provided the transportation and delivery of the mails is not interfered with by such action.

These practices merely exemplify the theory that ordinarily police power resides in the states. Incidental interference with interstate commerce or other powers of the Federal Government does not invalidate its use. As these principles have been long recognized in the regulation of other methods of transportation, particularly railroads, it seems proper to apply them to aeronautics as well. Hence it is apparent that the Federal Government cannot be considered to have “exclusive” control over flying even on the civil airways, assuming those airways to be constitutionally established. Insofar as control of aircraft not on the civil airways is concerned, the Civil Aeronautics Authority, by its own admission.

18. (1940) 11 JOURNAL OF AIR LAW 204, 208. Italics supplied.
19. Patterson v. Kentucky, 97 U.S. 501, 504 (1878). “In the American constitutional system, the power to establish the ordinary regulations of police has been left with the individual States, and cannot be assumed by the national government.” Cooley, Constitutional Limitations 574.
20. “A statute enacted in the exercise of the police power of a state is not necessarily violative of the interstate commerce clause of the federal constitution because it incidentally affects such commerce to a limited degree.” Cureton v. State 138 Ga. 91, 94, 70 S.E. 756 (1911); Gaines v. Holmes 154 Ga. 344, 354, 114 S.E. 327 (1922); Chicago v. Hebard 301 Ill. 570, 134 N.E. 27 (1922); Harmon v. City of Chicago, 110 Ill. 400 (1884). Cooley, Constitutional Limitations, 1277; McQuillan, 2d Ed. § 836.
21. The state may make “regulations with regard to the speed of railroad trains in the neighborhood of cities and towns; with regard to the precautions to be taken in the approach of such trains to bridges, tunnels, deep cuts and sharp curves; and, generally, with regard to all operations in which the lives and health of people may be endangered, even though such regulations affect to some extent the operations of interstate commerce.” Crutcher v. Kentucky 141 U.S. 47, 61 (1890).
22. Bureau of Air Commerce, Questions on the Air Traffic rules of the Civil Air Regulations, multigraph form No. 8950, page 5, question 21; U.S. Dept. of Commerce, Air Commerce Bulletin, Vol. 9, No. 8, Feb. 15, 1938, p. 180; Hon. Clinton M. Hester, Jan. 17, 1939, before National Aeronautical Association, St. Louis: “There is nothing the Federal Government can do about some kinds of unsafe flying . . . so long as he (the pilot) uses no federal airways and crosses no state lines . . . . The states can attack that evil where the Federal Government cannot, and, we are glad to report, there is every disposition on the part of the states to cooperate with us.”
has no authority whatsoever save that delegated to it by the respective states.

Mrs. Willebrandt makes the erroneous statement that the Civil Aeronautics Act of 1938 "so practically covers the field that there is very little left for the states to do in aviation except, perhaps, establish and maintain airports, and cooperate with the Federal Government." In Connecticut the "very little" that we do includes:

1. monthly reinspection of all aircraft;
2. construction and maintenance of more airmarkings per square mile than any other state in the Union;
3. more rigid supervision of, and control over student flying;
4. "flight tests" for every pilot, instead of allowing private pilots to go cross-country and become a hazard to interstate commerce merely on the say-so of their instructors;
5. teacher training courses in aviation for public school teachers;
6. adequate specialized training for all medical examiners;
7. physical reexamination at reasonably short intervals;
8. investigation of all accidents more serious than "mishaps" (not just serious and fatal accidents);
9. notification prior to expiration of federal or state licenses;
10. restrictions on airport uses according to their suitability;
11. higher qualifications for limited commercial pilots;
12. zoning of airports to prevent or remove hazards to flight (interstate flight included);
13. testing of pilots and inspection of aircraft at the "home port," instead of requiring them to conform to rigid inspection-day schedules;
14. and last, but by far not least, investigation of alleged violations and prompt, positive action where justified. (Shortage of federal personnel tends to restrict this most essential work.)

Besides the foregoing and others more minor in their nature, a large part of our effort is turned into airport channels, which Mrs. Willebrandt passes off with an inconsequential "perhaps."

In conclusion, Mrs. Willebrandt says that even the skeptic must concede that the Federal Government is acquiring squatter's right "over all the flyable surface of the land, without reference to state lines." That has undeniably been widely true in the past, but it is interesting to observe that many states which in the past were considered "promotional," now take an active part in regulation as well. As aviation grows, we believe this tendency will increase in geometric proportion—and rightly so. The Federal Government will find itself unable to cope with mass or sectional problems. To quote Mrs. Willebrandt, the states will be forced to "assist or facilitate (and we add, supplement) federal control."