Federal Express v. California Public Utilities Commission: The Ninth Circuit Court of Appeals, the Airline Deregulation Act and State Regulation of Intrastate Trucking

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TABLE OF CONTENTS

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I. INTRODUCTION

The Airline Deregulation Act ("ADA") has become the center of a legal firestorm touched off by the Ninth Circuit Court of Appeals' interpretation of the preemptive effect of the ADA. The decision reached in *Federal Express Corp. v. California Public Utilities Commission*[1] dramatically expands federal preemption of state surface transportation regulation. The Ninth Circuit decision has far reaching effects regarding the state's regulation of public safety on their highways. More than any other state, California, with its complex freeway system, needs to be able to regulate the drivers and equipment on California highways. This decision has seriously put the safety of Californians into jeopardy.

The Ninth Circuit's decision has led to confusion and criticism.[2] Indeed, there is a meaningful and broad based legal assault on its decision. The willingness of the Ninth Circuit to give broad preemptive effect to the provisions of the ADA has been a veritable call to arms for state regulatory agencies.

Regulated utilities and industries rely heavily on the clear requirements which are imposed upon them by government. The cases, statutes and regulations related to a particular regulated industry can be described as the "rules of the game." Changing the rules of the game for regulated utilities and industries can often cause problems for those entities. There is nothing more problematic for regulated utilities and industries than not knowing to which regulatory body and regulations it must answer. Although there are some who contend that the Ninth Circuit's decision disposes of the problem of regulatory duality, the legal question remains open. If changing the rules of the game for utilities is problematic imagine the effect on utilities if the rules of the game are the *wrong* rules. Divining which set of rules to follow and which regulatory agency has ju-

1. Federal Express Corp. v. California Pub. Util. Comm'n, 716 F. Supp. 1299 (N.D.Cal. 1989), *rev'd*, 936 F.2d 1075 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 2956 (1992).

2. Brief Amicus Curiae of Forty-Six States in Support of Petitioners, Federal Express v. CPUC, 112 S.Ct. 2956 (1992) (No.91-502). The same day the CPUC filed its brief for *certiorari* the forty-six states, by and through their respective Attorneys General; the National Association of Regulatory Utility Commissioners; the California Trucking Association; and the International Brotherhood of Teamsters all filed amicus curiae briefs in support of the CPUC. The only states not submitting amicus curiae briefs were: Delaware, Massachusetts, Tennessee and Wisconsin.

risdiction is fundamental to the business of regulation. The intrastate trucking industries (and certain air carriers) are faced with the dilemma of ascertaining the regulator. Even more importantly the intrastate trucking companies will conceivably be swallowed up by the now state unregulated giant - Federal Express. This paper serves as a resource for those facing issues related to the preemptive effect of the ADA and the Ninth Circuit's decision.

Federal Express, an interstate air package delivery service[3] brought action against the California Public Utility Commission (CPUC) challenging the state's regulation of Federal Express' ground transportation operations.[4] The trial court[5] held that the ADA did not preempt state ground regulation of Federal Express[6] and further that the ADA did not impliedly preempt state regulation of air carrier ground transportation operations.[7] On cross motions for summary judgment, the CPUC prevailed on both the preemption claims and the commerce clause claim.[8]

On Federal Express' appeal, a three judge panel for the Ninth Circuit reversed the district court decision, holding that the ADA required preemption[9] of state regulations concerning integral trucking operations of an air carrier which were an integral segment of the air carrier's operations.[10] The court also held that Federal Express' trucking operations were an integral segment of the air carrier's operations and therefore constituted a "service"[11] under the ADA of 1978[12], which preempted the CPUC's regulatory powers.

This Comment examines the Ninth Circuit decision and its significant expansion of the federal government's preemption powers regarding the state regulation of trucking operations of an interstate carrier. In section

3. Federal Express operates under authority pursuant to the Federal Aviation Act, 49 U.S.C. § 1371 (1988).

4. Federal Express Corp. v. California Pub. Util. Comm'n, 936 F.2d 1075, 1075 (9th Cir. 1991).

5. Federal Express Corp. v. California Pub. Util. Comm'n., 716 F. Supp. 1299 (N.D.Cal. 1989).

6. *Id.* at 1303.

7. *Id.* at 1304.

8. The preemption claim Federal Express v. CPUC, 716 F. Supp. 1299; the commerce clause claim Federal Express v. CPUC, 723 F. Supp. 1380.

9. *Federal Express*, 936 F.2d at 1075. The court never articulates the type of preemption employed to justify preemption of the purely intrastate truck operations.

10. *Id.*

11. The Airline Deregulation Act of 1978, 49 U.S.C. § 1305(a)(1) (1988). The preemption provision of the Federal Aviation Act (also referred to as the Airline Deregulation Act):

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

12. *Federal Express*, 936 F.2d at 1078.

II, the development of the federal preemption of state regulation doctrine is explored. Section III discusses *Federal Express v. CPUC*. The comment analyzes the court's rationale for its decision in section IV. Section V criticizes the decision and explores the potential impact on state regulation of highway safety and competition among the carriers.

II. FEDERAL PREEMPTION DEVELOPMENT

The *Federal Express* decision expanded the federal government's right to preempt traditional state law. The development of the different types of federal preemption needs to be explored to understand the magnitude and potential impact of *Federal Express*.

Article VI of the United States Constitution grants to the federal government the right to preempt state law.[13] The Federal government's right to preempt was created in the Supremacy Clause; however, it is through federal statutes that the right is implemented.[14] This section discusses the three kinds of preemption: express, implied and conflict preemption.[15]

A. EXPRESS PREEMPTION

Express preemption of state law occurs when Congress specifically states that a state law will be preempted by a federal statute.[16] The U.S. Supreme Court generally favors preemption only when Congress clearly states an intent to preempt.[17] The leading case on the issue of express preemption is the U.S. Supreme Court case, *Hillsborough County v. Automated Medical Lab., Inc.*[18] Hillsborough county adopted ordinances and

13. This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treatises made, or which shall be made, under the Authority of the United States, shall be the supreme law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

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

14. Elaine M. Martin, *The Burger Court and Preemption Doctrine: Federalism in the Balance*, 60 NOTRE DAME L.REV. 1233 (1985).

15. For a discussion on the three kinds of preemption: *See* O'Carroll v. American Airlines, Inc., 863 F.2d 11, 12 (5th Cir. 1989).

16. Shaw v. Delta Airlines, 463 U.S. 85, 95-96 (1983)(Congress may, in enacting federal law, explicitly determine the parameters by which it intends to preempt state law.); *see also* Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)(holding that state police power is not to be preempted by federal law "unless that was the clear and manifest purpose of Congress."); Mauer v. Hamilton, 309 U.S. 598, 614 (1940)(no inference of congressional intent to preempt unless that intent is clear); *see e.g.* Pacific Legal Foundation v. State Energy Resources Conservation and Dev. Comm'n, 461 U.S. 190, 206 (1983)(state police powers apply unless clear congressional intent otherwise).

17. *See* Ronald Rotunda, *Sheathing the Sword of Federal Preemption*, 5 CONST. COMMENTARY 311, 317 (1988) (discussing the Court's increasing reluctance to find preemption "unless Congress clearly and explicitly provides for it by statute").

18. Hillsborough County v. Automated Medical Lab., Inc., 471 U.S. 707 (1985).

promulgated implementing regulations to be applied to centers collecting blood plasma within the county. One of the ordinances required donors to be tested for hepatitis, as well as, a breath analysis for alcohol. A local operator of a blood plasma center contended that the county ordinance violated the Supremacy Clause and was preempted by federal regulations.[19] The Court upheld its belief that express intent was required to protect state interests. The Court stated that the traditional police powers of the States are not to be superseded by federal acts unless that was Congress' clear and manifest purpose.[20] Justice Marshall, writing the opinion for the Court, reasoned that "to infer pre-emption whenever a federal agency deals with a problem comprehensively would be tantamount to saying that whenever the agency decides to step into a field, its regulations will be exempt."[21] The Court has consistently held[22] that where congressional intent is ambiguous it is reluctant to find preemption.[23]

In a more recent U.S. Supreme Court decision, the Court reaffirmed its preference for express preemption in *Puerto Rico Department of Consumer Affairs v. ISLA Petroleum Corp.*[24] The case involved several oil companies that alleged the Emergency Petroleum Allocation Act (EPAA)[25] enacted in response to an Arab oil embargo, preempted gas regulations[26] instituted by Puerto Rico.[27] Congress amended the EPAA and terminated the federal government's regulatory authority.[28] ISLA claimed that federal preemption continued over Puerto Rico's regulations because Congress had intended to comprehensively regulate, through the EPAA, the price of gasoline.[29] To support the claim for preemption ISLA had no statutory language, upon which to rely, that indicated state regulatory measures were preempted. The Supreme Court held that, "There is no text here. . .to which expressions of preemptive intent might attach. . . .Without a text that can, in light of [legislative history], plausibly be interpreted as prescribing federal pre-emption it is impossible to find that a free market was mandated by federal law."[30] It is suggested from

19. *Id.* at 708.
20. *Id.* at 715 (citing Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977), (citing Rice v. Santa Fe Elevator Co., 331 U.S. 218, 230 (1947))).
21. *Id.* at 708.
22. *Rice*, 331 U.S. at 230; *Mauer*, 309 U.S. at 614. *See e.g., Pacific Legal Found.*, 461 U.S. at 206.
23. LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-25, at 479 (2d ed. 1988).
24. Puerto Rico Dep't of Consumer Affairs v. ISLA Petroleum Corp., 485 U.S. 495 (1988).
25. Emergency Petroleum Allocation Act (EPAA), Pub.L. 93-159, 87 Stat. 627, 15 U.S.C. § 751 *et seq* (1988).
26. *Puerto Rico Dep't of Consumer Affairs*, 485 U.S. at 496.
27. Kenneth Starr, et. al., *The Law of Preemption*, A.B.A. SEC. ANTITRUST 16 (1991).
28. *Puerto Rico Dep't of Consumer Affairs*, 485 U.S. at 499.
29. *Id.*
30. *Id.*

the Supreme Court's recent decision that Congressional intent to expressly preempt must be manifested in statutory language.[31]

B. Implied Preemption

Lacking the express intent of Congress to preempt state law, courts developed the method of implied preemption. If reasonable to infer that Congress intended and "left no room" for state regulation state law is preempted.[32] Preemption is implied if Congress intends to completely occupy the field. Two lines of theory have developed to determine whether Congress occupies the field. First, whether the federal government regulated a particular field entirely so as to "leave no room" for state regulation. A case illustrating this point is *Burbank v. Lockheed Air Terminal*[33] which involved a Burbank city ordinance limiting air traffic hours due to the noise it created for surrounding neighbors. The Supreme Court preempted the ordinance finding that the Federal Aviation Act and the Environmental Protection Agency, while lacking specific preemption clauses, were granted "pervasive control" of navigable airspace.[34]

The second approach concerns whether or not the field is of peculiar federal interest. An illustration of this analysis is *Hines v. Davidowitz*.[35] *Hines* involved a Pennsylvania state statute requiring aliens to register with the state authorities.[36] The Pennsylvania statute was adopted prior to enactment of a federal statute requiring a similar registration. The Court preempted the state statute because alien registration was a field that could affect international affairs and therefore was a peculiar federal interest.[37] A dominant federal interest is assumed to preclude the enforcement of the states' laws regarding the same area.[38]

C. Conflict Preemption

Finally, state law is preempted if the law conflicts with the purpose of federal law.[39] The *Florida Lime & Avocado Growers, Inc. v. Paul* case set forth a test[40] to determine whether there was a conflict between state and federal regulation. The test examines whether the state regulation

31. *Starr, supra* note 27, at 18.
32. *Rice*, 331 U.S. at 230.
33. Burbank v. Lockheed Air Terminal, 411 U.S. 624 (1973).
34. *Id.* at 638 (holding was a five-four decision).
35. Hines v. Davidowitz, 312 U.S. 52 (1941).
36. Pa. Stat. Ann. (Purdon, Supp. 1940) tit. 35, §§ 1801-1806. Hines, 312 U.S. at 59.
37. For a further discussion on this issue *see generally* Kenneth Starr et al., *The Law of Preemption*, A.B.A. SEC. ANTITRUST (1991).
38. *Rice*, 331 U.S. at 230; *Hines*, 312 U.S. at 52.
39. Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963).
40. *Hines*, 312 U.S. at 67. The test was first articulated in the *Hines* case.

"stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[41] In *Florida Lime & Avocado Growers, Inc.* Florida growers sued state officers of California. The growers contended that the California Agriculture Code which prohibited the transport and sale in California of avocados containing less than eight percent of oil by weight was unconstitutional. Appellants argued that under the Supremacy Clause the California statute was preempted by the federal standard for determining the maturity of Florida grown avocados.[42] The court held, among other things, that there was no inevitable collision between the federal and state schemes of regulation.[43] Where state and federal laws conflict the Court has determined that there is no requirement of Congressional design.[44]

A more recent conflict preemption case is illustrated in *Paper Co. v. Oulette*[45]. In *Oulette*, property owners filed a state law nuisance suit to stop a paper mill from discharging toxins into a lake.[46] The court concluded that the Clean Water Act[47] preempted the common-law state nuisance action. Although the Act provided a clause allowing private citizen suits to be brought, the Court felt that the property owners' suit would frustrate Congressional intent to create "clear and identifiable"[48] discharge standards.[49] Private actions such as this would only leave the door open to indefinite potential regulations.[50]

D. The Airline Deregulation Act

The statute the court considered in *Federal Express v. CPUC* was the ADA.[51] Section 1305(a)(1) of the ADA operates to preempt state regulation of any "law, rule, regulation, standard or other provision having the force and effect of law relating to rates, routes, or services of any aircarriers. . . ."[52] Significantly, the court analyzed whether Congress intended

41. *Paul*, 373 U.S. at 141.

42. *Id.* at 132.

43. *Id.* at 142-43.

44. *Id.* ("A holding of federal exclusion of state law is inescapable and requires no inquiry into congressional design where compliance with both federal and state regulations is a physical impossibility. . . .).

45. Paper Co. v. Oulette, 479 U.S. 481 (1987).

46. *Id.* at 484.

47. Federal Water Pollution Control Act Amendments of 1972, §§ 505(e), 510 as amended, 33 U.S.C. §§ 1365(e), 1370 (1988).

48. *Oulette*, 479 U.S. at 496.

49. *Id.*

50. *Id.* at 499.

51. 49 U.S.C. § 1305(a)(1)(1988).

52. Federal Express v. California Pub. Util. Comm'n, 936 F.2d 1075, 1079 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 2956 (1992).

to preempt Federal Express' transportation by truck of intrastate cargo.[53]

The court struggled with the interpretation of the phrase: "relat[e] to[54] rates, routes, or services of any air carrier to provide air transportation."[55] In the instant case, Federal Express used legislative history to persuade the court that Congress intended that packages carried solely by truck in California were to be preempted.[56] Congress in enacting the ADA stated that "maximum reliance on competitive market forces" would best foster "efficiency, innovation, and low prices" in addition it would foster "variety [and] quality. . . of air transportation services."[57] Congressional intent in enacting the ADA was couched in broad policy considerations.[58] The policies offered included:[59] "The prevention of any deterioration" of safety procedures; encouragement of entry into air transportation markets by new carriers and adaption of air transportation systems to the present and future needs.[60] The broad language employed in the ADA will be a continuing process for the courts to define the boundaries of the preemptive clause in the ADA.

E. Prior Case Law

The trial court relied on the U.S. Supreme Court case *Raymond Motor Transportation, Inc. v. Rice*[61] for guidance on the issue of state regulations.[62] In *Raymond* several interstate trucking companies brought suit on the grounds that Wisconsin regulations not allowing operations of sixty-five foot doubles burdened and discriminated interstate commerce. The Court held these regulations were a burden on interstate commerce. However the court articulated their view on state regulations concerning safety,

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53. *Id.*

54. Morales v. Trans World Airlines, Inc., 112 S.Ct. 2031 (1992). Note that in a recent U.S. Supreme Court decision the court held that the term "relates to" in § 1305(a)(1) must be given a broad preemptive purpose. All state laws having a construction with or reference to airline rates, routes or services are to be preempted. The court held that fare advertising provisions of the National Association of Attorneys General guidelines were preempted by the ADA. The *Morales* case is distinguished from the *Federal Express* case. The *Morales* case deals with whether Congress intended the ADA to single out the airline industry as opposed to al other industries for immunity from state enforcement of deceptive advertising laws. Whereas, Federal Express sought to determine whether Congress intended to render all activities of air carriers immune from state regulation.

55. 49 U.S.C. § 1305(a)(1) (1988).

56. *Federal Express*, 716 F. Supp. at 1299 (quoting Wardair Canada, Inc. v. Florida Dept. of Revenue, 477 U.S. 1, 6 (1986)).

57. ADA, 49 U.S.C. § 1302(a)(4), 1302(a)(9) (1988).

58. *Id.* at § 1305(a)(1).

59. *Id.*

60. For a full explanation of Congress' written intent *see* 49 U.S.C. § 1302 (1988).

61. Raymond Motors Transp. Inc. v. Rice, 434 U.S. 429 (1978).

62. *Federal Express*, 723 F. Supp. at 1383-84.

> The Court has been most reluctant to invalidate 'state legislation in the field of safety where the proprietary of local regulation has long been recognized. [I]n no field has this deference to state regulation been greater than that of highway safety regulation . . . . Thus, those who would challenge state regulations said to promote highway safety must overcome a "strong presumption of [their] validity."[63]

The *Raymond* Court explicated that the challenge to a state's highway safety regulations must overcome a strong presumption of their validity.

The following will be a synopsis of the cases the Ninth Circuit relied upon in this decision. In the U.S. Supreme Court case, *California v. ARC America Corporation*[64] a class action suit was brought by several states[65] alleging price fixing by certain cement producers. The Court, reversing the appellate court, held that state indirect purchaser laws were not preempted by federal law.[66] The Court's rationale centered on a presumption against preemption in areas traditionally regulated by the states.[67]

An additional case, *West v. Northwest Airline*,[68] also relied upon a presumption against preemption in areas traditionally regulated by the state. In *West* a passenger sued Northwest Airlines for failing to provide a seat because of overbooking.[69] The appellate court incorporated the Supreme Courts' reasoning in *ARC* and concluded that there is a presumption against preemption in areas of traditional state law claims such as common law tort and contract remedies.[70] The Court held that state law was neither expressly or impliedly preempted nor was it preempted due to conflict.[71]

Another case relied upon by the court in *Federal Express* was *Hingson v. Pacific Southwest Airlines*[72] a blind passenger brought suit against an airline because he was told that he had to sit in the front of the plane due to his handicapped status. When Hingson refused to abide by the demand, PSA had police officers escort him off the plane.[73] The court found preemption of the airlines' seating policies. The court held that such regulation of handicapped seating policies was within the meaning of services in 49 U.S.C. § 1305(a)(1).[74] However, the court held that

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63. *Federal Express*, 723 F. Supp. at 1384 (quoting Raymond, 434 U.S. at 443-44).
64. California v. ARC Am. Corp., 490 U.S. 93 (1989).
65. *ARC*, 490 U.S. at 93. The states involved were: Alabama, Arizona, California and Nebraska.
66. *Id.* at 106.
67. *Id.* at 101.
68. West v. Northern Airlines, Inc., 923 F.2d 657 (9th Cir. 1990).
69. *Id.* at 657.
70. *Id.* at 659.
71. *Id.*
72. Hingson v. Pacific Southwest Airlines, 743 F.2d 1408 (9th Cir. 1984).
73. *Id.* at 1411.
74. *Id.* at 1415.

Hingson's claim of intentional infliction of emotional distress was not preempted.[75] The *Hingson* court's rationale for not preempting the claim was based on a comparison to *Farmer v. United Brotherhood of Carpenters & Joiners.*[76] Richard Hill was a carpenter and a member of Local 25.[77] The Union provided to its members a hiring hall for employment referral of carpenters. Hill became president of the Union and subsequently had a dispute with the Union Business Agent. Hill alleged that due to the dispute the Business Agent discriminated against him in referrals to employers. It was Hill's contention that as a result of his complaints he was subjected to a campaign of personal abuse and harassment, as well as, discrimination in referral from the hiring hall.[78] The Court held that the National Labor Relations Board Act did not allow for preemption of a claim for intentional infliction of emotional distress.

In *Federal Express*, the Ninth Circuit decision of *Air Transport of America v. Public Utilities Commission of California*[79] was interpreted differently by the District Court than by the Ninth Circuit. In *Air Transport* several airlines and the Airline Trade Association brought suit challenging the California Public Utilities Commission regulation prohibiting California telephone customers from recording or secretly overhearing conversation without knowledge by the parties.[80] The airlines monitored conversations of their reservation agents and customers[81]. The *Air Transport* Court held that state regulation of telephone conversations was not preempted because reservation operations are not unique to the airline industry but are common to the car rental and hotel industries as well.[82] The Ninth Circuit held in *Air Transport* that reservations were not "services" under 49 U.S.C. § 1305(a)(1) and therefore was not preempted.

The District Court in *Federal Express* relied on this narrow interpretation of the *Air Transport* reasoning and the Ninth Circuit relied on the caution expressed in *Air Transport*. The *Air Transport* court stressed that its decision was not a final resolution of the scope of preemption under the Airline Deregulation Act.[83] The Ninth Circuit encouraged a narrow reading of its holding in *Air Transport* as allowing states to act in areas of non-

75. *Id.*

76. Farmer v. United Bhd. of Carpenters & Joiners, 430 U.S. 290 (1977).

77. *Id.* at 292.

78. *Id.*

79. Air Transport Ass'n of Am. v. Public Util. Comm'n of Cal., 833 F.2d 200 (9th Cir. 1987), *cert denied*, 487 U.S. 1236 (1988).

80. *Id.* at 200.

81. *Id.* at 202. The monitoring was argued to ensure that accurate information was given both effectively and courteously.

82. *Id.* at 207.

83. *Id.*

economic regulation.[84]

The impact of these cases on *Federal Express* is questionable. It appears that the meaning of the word "services"[85] will provide a continuing struggle for the courts. Some general principles, however, can be derived from these cases. The *ARC* and *West* cases hold that there is a presumption against preemption in cases of traditional state law, for instance common-law tort and contract law. *Hingson* strengthened protection of states' common-law tort actions by finding there was no preemption for intentional infliction of emotional harm.[86]

The impact of *Air Transport* continues to develop. The disparity of treatment in this case by the District Court and the Appellate Court is a demonstration of its ambiguity. On the one hand, the *Air Transport* court provided that "services" must be unique to an industry to require preemption, yet the court also issues a warning that its decision is not a definitive resolution of the problem.[87] The court concludes that it still allows for non-economic regulation, but what constitutes non-economic regulation is uncertain.

III. *Federal Express v. CPUC*

Federal Express brought suit against the California Public Utilities Commission to declare that the Commission's regulations imposed an unconstitutional burden on interstate commerce.[88] Federal Express also alleged the regulations were preempted by the ADA.[89] The District Court for the Northern District of California, while considering cross-motions for summary judgment, held that State regulation was not preempted by the Airline Deregulation Act.[90] Federal Express appealed this decision to the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit reversed the District Court and entered judgment for Federal Express.[91]

Federal Express is a carrier exclusively transporting cargo. In the communities it serves, a van collects the packages and delivers them to an airport, where they are transported to a "hub" for sorting. After sorting the packages are flown to a regional hub and then trucked to their final

84. *Federal Express*, 936 F.2d at 1078.

85. 49 U.S.C. § 1305(a)(1) (1988).

86. *Hingson*, 743 F.2d at 1415 (held that regulation of an air carrier's seating policies for their handicapped passengers was within the meaning of services under 49 U.S.C. § 1305(a)(1)).

87. *Air Transport*, 833 F.2d at 207.

88. *Federal Express*, 936 F.2d at 1076.

89. *Id.*

90. *Federal Express*, 716 F. Supp. at 1299.

91. *Federal Express*, 936 F.2d at 1076.

destination. Memphis is the main hub[92] while Oakland, California is a regional hub.

Packages routed through the Regional Oakland hub and bound for Los Angeles are transported in one of the following ways: (1) by air the main hub in Memphis then to Los Angeles by air; (2) by air to Los Angeles directly from Oakland; or (3) by truck to Los Angeles directly from Oakland in the event of inclement weather or lack of capacity on the plane.[93] Any package that does not fit on the night flight from Oakland to Los Angeles are trucked to Los Angeles.[94] The bulk of these packages fall within interstate commerce; some trucks, however, transport purely intrastate packages.

Federal Express relies on alternative modes of transportation to meet it's speedy delivery requirements.[95] Time is of the essence in Federal Express' business - a delay of even thirty minutes can be crucial.[96] Federal Express could not meet its deadlines without the use of several modes of transportation.

To meet its delivery needs Federal Express operates over 2,600 trucks in California licensed by the CPUC. Federal Express paid quarterly fees based on its estimated gross operating revenues until early 1987.[97] The CPUC had authority to regulate common carriers on California's highways.[98] The CPUC regulates tariffs,[99] bills of lading, freight bills and "accessorial services" documents issued by common carriers.[100] The CPUC allows for carrier variances and considers its regulatory program adaptive.[101]

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92. *Id.* Each evening 700,000 packages are sorted and re-routed at the Memphis facility. Over 200,000 packages each week have both their origin and destination within California.

93. *Id.*

94. *Id.* at 1077. One truck runs from Oakland to Los Angeles and two trucks run from Los Angeles to Oakland.

95. *Id.*

96. *Id.* Federal Express guarantees delivery by 10:30 a.m. If the package is even one minute late Federal Express grants a full refund.

97. *Id.* These fees were assessed by the P.U.C. under, [Cal.Pub.Util.Code] § 5003.1. §§ 5003.1 and 5003.2 require "exempt" carriers to pay a fee currently equal to 1/10 of 1% of gross operating revenues which underwrite the cost of the CPUC's safety-related programs.

98. *Id.* The P.U.C.'s authority is granted under the California Constitution, Art. XII; § 4 Cal. Pub. Util. Code §§ 1063 and 3501.

99. *Id.* The P.U.C. issues orders governing tariffs of the common carriers, General Order 80-C, February 7, 1990; tariffs for suspension, General Order 113-B, July 2, 1980; and public inspection, General Order 139, September 1, 1976.

100. *Id.*

101. *Id.*

IV. FEDERAL EXPRESS V. CPUC RATIONALE

A. MAJORITY OPINION

Federal Express appealed to the Ninth Circuit on two grounds. First, California's regulation was an excessive burden on interstate commerce; second, state regulation was preempted by act of Congress. The court concluded that the first ground did not need to be addressed because statutory preemption existed.[102] Since the legal conclusion on the second issue was dispositive, there was no need for further proceedings.[103]

In distinguishing the *Air Transport*[104] case the court reasoned that *Air Transport* should be interpreted as allowing the state to act in only non-economic regulation. Since only economic regulation is challenged in the instant case, the *Air Transport* holding is not applicable.[105]

The court also reasoned that despite the ADA's[106] broad language it should not be taken literally but should be restricted by common sense and common practice.[107] Looking to the statute's purpose and "[I]n context of other laws,"[108] the court held the Airline Deregulation Act did preempt the CPUC from regulating Federal Express' ground transportation operations.[109] The majority made the distinction that Federal Express' trucking operations are so integral to the business' overall operations that it could not separate the trucking and air carrier operations.[110]

Additionally, the court held that the CPUC had overstepped the agency boundaries established by Congress. The court felt that the CPUC's regulation of rates, discounts, overcharges, bills of lading and freight bills were economic and beyond the granted scope of authority.[111] Furthermore, the CPUC's regulatory scheme was not a restatement of tort or contract law [112] and the their regulations went far beyond safety concerns and therefore the state had no authority to regulate. However, the court also explained that California's safety requirements for trucks traveling on the California highways did apply to Federal Express.[113] Significantly, the court reasoned that the CPUC's regulations were economic in orientation because regulation of a business' bill of lading directly affects

102. *Id.*
103. *Id.*
104. *Air Transport*, 833 F.2d at 200.
105. *Federal Express*, 936 F.2d at 1078.
106. 49 U.S.C. § 1305(a)(1) (1988).
107. *Federal Express*, 936 F.2d at 1078.
108. *Id.* It should be noted that the court does not cite authority for this proposition.
109. *Id.*
110. *Id.* "[T]hey [the trucking operations] are part and parcel of the air delivery system."
111. *Id.*
112. *Hingson*, 743 F.2d 1408.
113. Federal Express, 936 F.2d at 1078.

a carrier's services and that determines cost.[114]

Finally, the court explained its interpretation of the Federal Aviation Act's purpose in an attempt to confirm their "plain meaning" interpretation of the statute.[115] The goal of preemption of the Act is to prohibit states "[F]rom enacting any law, establishing any standard determining routes, schedules, or rates, fares or charges in tariffs of, or otherwise promulgating economic regulations, for any carrier certified by the Board."[116] The court looked to the Federal Aviation Act of 1958 and concluded that it granted the federal government the authority for "promotion of adequate, economical, and efficient service by air carriers at reasonable charges."[117] The Court raises as evidence several of the Congressional aims in the 1977 amendments to the 1958 act. Congress desired a "sound regulatory environment" so decisions would be: (a) promptly dispatched (b) "an expedited all-cargo air service system"[118] would be encouraged and (c) development of an "integrated transportation system."[119] Based on these congressional goals the court decided that Federal Express was exactly the integrated system foreseen by Congress. Under the court's analysis even the intrastate use of trucks does not destroy Federal Express' status as an air carrier.

B. Dissent

Judge Singleton filed the dissent in this case.[120] Judge Singleton felt that Congress did not intend that the states be preempted from regulating Federal Express' shipments that were purely by truck and were intrastate in nature.[121]

Judge Singleton began his dissent with an analysis of Congressional intent. Singleton argued that the majority is not applying the plain meaning of the statute and incorrectly relies on the word "services" instead of relying on the phrase, "services of any *air carrier*".[122] An air carrier as defined by Congress is a person engaged in *air transportation.*[123] Congress defined air transportation, in part, as *interstate* aircraft transporta-

114. *Id.* "The terms of service are as much protected from state intrusion as are the carrier's rates."

115. *Id.* Earlier in the opinion, the court states that the language of the statute should not be taken literally.

116. *Id.* at 1078, 1079 (quoting H.Conf.Rep. No. 1779, 95th Cong., 2d Sess. 94).

117. *Id.* at 1079. (quoting 49 U.S.C. § 1302(c) (1988).

118. *Id.* (quoting 49 U.S.C. §§ 1302(a)(5), 1302(b)(1) (1988).

119. *Id.* (quoting 49 U.S.C. § 1302(b)(2) (1988).

120. *Id.* at 1075, J. Singleton sitting by designation.

121. *Id.* at 1079 (Singleton, J., dissenting).

122. *Id.*

123. *Id.* (quoting 49 U.S.C. § 1301(3)(1988)).

tion.[124] The most compelling evidence of the Congressional intent regarding an integrated transportation system is its definition of "interstate" transportation. Congress defined interstate air commerce as commerce which is transported either entirely by air or, in part, by other modes of transportation.[125] Singleton argued that to determine which activities are exempt it is necessary to identify the packages that never see the interior of a plane.[126] This point is crucial because the state conceded that transportation of any package carried either solely by air or partially by air and another mode of transportation are indeed exempt.[127] Based on these considerations, the dissent found that the transportation of packages *entirely* by truck within California is not an air carrier service.[128]

Singleton made a cogent argument against the majority's conclusion that Federal Express' trucking and air activities are so integrated that California's attempt to regulate the trucking will necessarily regulate the air operations.[129] At its most extreme any business that mixes exempt and non-exempt activities may not be regulated by the state.[130] Singleton in his argument looked to the future problems in distinguishing what percentage of exempt and non-exempt activities it will take for the activity to lose regulation by the state.[131]

The dissent's policy considerations are also persuasive. The majority was influenced by the fact that only a small portion of goods are carried solely by truck;[132] however, this decision leaves the door wide open for Federal Express to increase freely its trucking operations. It will provide Federal Express with an enormous advantage over other companies which must comply with state regulations such as purely trucking companies. Furthermore, the dissent argued, if the majority was intent on making this kind of decision it should have established some guidelines, such as: (1) how many airplanes must Federal Express fly to Sacramento each month to insulate the trucking operations from state regulation?; (2) how many packages must be carried — one or thousands?

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124. *Id.* (quoting 49 U.S.C. § 1301(10) (1988)).

125. 49 U.S.C. § 1301(23) (1988) " 'Interstate air commerce'. . .mean[s] the carriage by aircraft of persons or property. . .whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation." *Id.*

126. Federal Express, 936 at 1080 (Singleton, J., dissenting). Singleton makes a interesting analogy between packages that never see a plane to caterpillars having the potential to become butterflies.

127. *Id.*

128. *Id.*

129. *Id.*.

130. *Id.*

131. *Id.*

132. *Id.* (according to the dissent).

Based on these considerations, the dissent would have affirmed the trial court's decision. Federal Express' air operations and other transportation of goods using both air and other forms of transportation should be preempted. However, purely trucking operations within the state should be state-regulated. The dissent argued that the commerce clause issues raised needed to be explored and therefore should be remanded for further findings of fact and law.

V. CRITIQUE OF THE *FEDERAL EXPRESS* DECISION

The Ninth Circuit's decision in *Federal Express* is potentially one of the most expansive decisions affecting the field of transportation in years. This case effectively expands not only the federal government's preemption of state law, but also allows Federal Express to expand its trucking operations without fear of state regulation. The decision reached by the Ninth Circuit will have detrimental results both on safety and carrier competition .

A. PLAIN MEANING STATUTORY CONSTRUCTION

Recently the courts have struggled to interpret the meaning of "services" within § 1305(a)(1). The *Hingson* court found that an airline's seating policies was within Congress' meaning of "services."[133] This classification is understandable because seating policies are an unextricable component of an airline's services. The *Air Transport* court decided that airline reservation systems were not within the meaning of services for two reasons: they were not unique to the airline industry[134] and they were non-economic in nature.[135]

Perhaps the most egregious error made in the Ninth Circuit's decision was its disregard for the plain meaning of the statute.[136] The majority dismisses the plain meaning found within the statute by stating "[D]espite the very broad and apparently all-inclusive language of the statute, common sense and common practice have forbidden that the statute be taken literally and have restricted its range."[137] The majority decided that services were preempted by the statute if they are economic in nature.[138] The majority makes an illogical leap and concludes that regulation of a business' bill of lading relates to the terms which the air carrier offers its service. To regulate a service is to determine cost.[139] However,

133. *Hingson*, 743 F.2d at 1415.
134. *Air Transport*, 833 F.2d at 207.
135. *Federal Express*, 936 F.2d at 1078.
136. 49 U.S.C. § 1305(a)(1) (1988).
137. *Federal Express*, 936 F.2d at 1078.
138. *Id.*
139. *Id.*

it is difficult to imagine that Congress intended that an intrastate truck's bills of lading would be construed as effecting an air carrier's service. It is even more difficult to conceive that Congress intended the state's regulation of safety, insurance and licensing to be preempted. If non-economic regulation is the only regulation that is tolerated than under the majority's analysis no regulation of the airline industry will be permitted, directly or indirectly, because it would be impossible to find a regulation that was non-economic.

One *must* look to the plain and literal meaning of a statute. In this instance congressional intent is made clear by examining definitions of air carrier, air transportation or interstate transportation.[140] The court should have examined 1301(3)[141], (10)[142] and (23)[143] of the Act, which clearly state Congress' intent of § 1305(a)(1). Instead, the court ignored these definitions which are vital to understanding the scope of § 1305(a)(1). If 1305(a)(1) is read in context with § 1301(3), (10) and (23) it is clear that cargo carried exclusively by truck is not within the definition of interstate air commerce and therefore is not preempted by 1305(a)(1).

The U.S. Supreme Court has recently spoken on the issue of "relating to" and "services" within § 1305(a)(1) in, *Morales v. Trans World Airlines*.[144] This case involved whether enforcement of the NAAG guidelines on fare advertising through a state's general consumer protection laws is preempted by the ADA. The court found that these guidelines were preempted because almost everyone of the provisions included a direct reference to "air fares."[145] The court listed the guidelines of NAAG and they all literally referred to "air fares." This is a far different fact pattern than found in *Federal Express*. In *Federal Express* the CPUC's regulations never mention "air fares."

The *Morales* court went further to say that "some state actions '[m]ay affect [airline fares] in too tenuous, remote or peripheral a manner' to have pre-emptive effect."[146] The *Federal Express* case falls within this last category. At no point does the CPUC regulations mention air fares. The CPUC regulations have far too remote an effect on "services" for the state regulations to be preempted. The *Morales* case came out after the Ninth Circuit's decision in *Federal Express*, but illustrates that the CPUC's

140. *See infra* notes 132-134.

141. 49 U.S.C. § 1301(3) (1988). " 'Air carrier' means any citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in air transportation. . . ."

142. 49 U.S.C. § 1301(10) (1988). " 'Air transportation' means interstate, overseas, or foreign air transportation or the transportation of mail by aircraft."

143. 49 U.S.C. §§ 1301(3),(10) & (23) (1988).

144. Morales v. Trans World Airlines, 112 S.Ct. 2031 (1992).

145. *Id.* at 2039

146. *Id.* at 2040 (quoting Shaw, 463 U.S. at 100, n. 21).

regulations are too tenuous to be considered a "service" according to case law interpretations of 1305(a).

B. No Express, Implied or Conflict Preemption

The Ninth Circuit's decision to give the government preemption power over intrastate trucking operations of an air carrier was not substantiated by express, implied or even conflict preemption. It is impossible to see this decision as anything more than active judicial policy making.[147] Such judicial reasoning becomes judicial activism when it makes or applies policies not found in the Constitution or statutes.[148] Our federal system maintains a high regard for states' rights and a judge should not lightly dispense with those rights.[149]

The court's holding that the CPUC regulation of Federal Express was preempted under 49 U.S.C. § 1305(a) is not substantiated under express preemption. It is understood that Congress did preempt air carriers transporting goods entirely by air or partially by air and partially by other modes of transportation.[150] There is no express intent, however, that Congress intended to preempt goods carried intrastate entirely by truck. The statute provides for preemption of "air transportation".[151] Air transportation is defined as "interstate, overseas or foreign air transportation."[152] At no point does the statute expressly provide for preemption of the motor carrier services of an air carrier. It has been established that where congressional intent is ambiguous it is reluctant to find preemption.[153] The Supreme Court holdings in *Hillsborough* and *ARC* discourage preemption regarding traditional police powers of the States, unless that was the clear and manifest purpose of Congress. Intrastate trucking, in light of the Supreme Court's reasoning, should not be preempted. If Congress were going to dispense with a traditional state power it seems reasonable that they would manifest their intent expressly so that it would be clear they were usurping jurisdiction.

Implied preemption was also lacking in the preemption of the CPUC's regulation of Federal Express. For preemption to be implied the court needed to find an intent by Congress to preempt a field covered by state law.[154] However, there is no evidence of Congress' intent to preempt

147. See *supra* note 27 at 40-55, explaining judicial movement away from implied preemption towards clear statements of preemption to protect the notion of federalism.

148. *See* BORK, *infra* note 171, at 184.

149. *See* Starr, *supra* note 27, at 50.

150. 49 U.S.C. § 1301(23) (1988).

151. 49 U.S.C. § 1305(a)(1) (1988).

152. 49 U.S.C. § 1301(10) (1988).

153. *Pacific Legal Found.*, 461 U.S. at 206.

154. Wardair Canada, Inc. v. Florida Dep't of Revenue, 477 U.S. 1, 6 (taxation of airline fuel by the states was not preempted by the FAA).

state regulation of the purely trucking operations of a carrier. The only mention of ground transportation is found in Congress' definition of "interstate air transportation" and "interstate air commerce."[155] The inclusion of the term ground transportation in these definitions is only in reference to operations that are both by air *and* ground transportation. It cannot be implied based on these definitions that "purely" ground intrastate transportation was impliedly preempted by Congress. There is no evidence that Congress intended that purely ground transportation was to be included in the definition of air carrier. As the District Court suggested although the legislative understanding "may be short-sighted" it is up to Congress alone to make a correction.[156]

The District Court also perceptively compared[157] the fact that other legislation by Congress on transportation revealed no intent by Congress to preempt interstate ground transportation by the federal government.[158] In fact, the Motor Carrier Act of 1980 expressly reserved the authority of the states to regulate their own intrastate truckers.[159] The government's regulation is not so comprehensive that it "left no room" for state regulation. The court creates a strained analysis to find implied preemption. Especially when the judiciary analyzes preemption questions with a "presumption that Congress did not intend to pre-empt areas of traditional state regulation."[160] In the *Burbank*[161] case the Court was dealing with navigable air space, which the FAA and EPA concededly have pervasive control over. However the *Federal Express* case does is not concerned with air space, but with purely intrastate trucking operations. Regulation of intrastate trucking has traditionally been in the hands of the states.

Regulation of intrastate trucking is not a peculiar federal interest. This is evidenced by the Motor Carrier Act which expressly reserved to the states regulation of their intrastate trucking. Not only is regulation of intrastate trucking not a peculiar federal interest it is a traditional state power. The Court in *Hines* found preemption of a Pennsylvania alien registration statute because alien registration could affect international affairs and by its nature was a peculiar federal interest.[162] It is quite

155. 49 U.S.C. §§ 1301(23), (24) (1988). The reference in these definitions refer to movement of commerce in part by aircraft and in part by "other modes of transportation."

156. *Federal Express*, 716 F. Supp. at 1304.

157. *Id.*

158. *See* Interstate Commerce Act, 49 U.S.C. 10101 et seq. (1988); Motor Carrier Act of 1980, Pub.L. 92-296, 94 Stat. 793; Bus Regulatory Reform Act of 1982, Pub.L. 97-261, 96 Stat. 1102 (all have allowed state regulation of intrastate motor travel).

159. Motor Carrier Act of 1980, Pub.L. 92-296, 94 Stat. 793.

160. Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 740 (1985).

161. *Burbank*, 411 U.S. 624.

162. *Hines*, 312 U.S. 52.

understandable that the Court found a statute that could possibly affect international affairs to be a peculiar federal interest. The CPUC regulations, however, do not reach this magnitude. The CPUC regulations are a peculiar state interest, the regulations not only regulate bills of lading, but also fund the state's licensing and safety of intrastate trucking. Based on these considerations it is evident that there also is no implied preemption.

Lastly, there was no evidence of conflict preemption in the Ninth Circuit's finding of preemption. It was neither physically impossible for Federal Express to comply both with the federal government's and the CPUC's regulations nor did the CPUC's regulations "stand as an obstacle to the purposes and objectives of Congress." As a matter of fact, the Ninth Circuit's decision to preempt some air carrier's motor operations will impede Congress' intent to create a competitive market while maintaining low prices.

The CPUC expressed that their regulatory scheme was adaptive.[163] Federal Express argued that they did not know which of their packages would remain in trucks traveling intrastate and therefore could not derive fees to be paid to the CPUC; they complained that this would be too burdensome.[164] However, the CPUC had already been accommodating Federal Express' needs.[165] The CPUC had allowed Federal Express to simply estimate their shipments of intrastate truck carriage and fees would be assessed according to these estimates. Therefore, even if there had been some conflict the CPUC could have reorganized its regulatory scheme to comply with a no conflict policy. Additionally, by maintaining regulation over Federal Express' intrastate ground operations the CPUC would be fostering Congress' objectives of creating a competitive market.

The District Court made a sagacious analogy in determining whether conflict preemption existed between the state and federal regulations. The court made an analogy to the Interstate Commerce Act[166] which deprives the Interstate Commerce Commission (ICC) jurisdiction over motor carriers when air transport is involved.[167] Additionally, the ICC is denied jurisdiction over motor carriers performing in emergencies as a substitute for air transportation.[168] The court explained that these exceptions from jurisdiction suggest Congress' intent to keep ground transportation and air transportation in separate regulatory schemes, except in the most ex-

163. *Federal Express*, 936 F.2d at 1077.

164. *Federal Express*, 723 F. Supp. at 1381.

165. *Id.* "Indeed, during the calendar years 1985 and 1986 and through the first quarter of 1987 Federal Express paid quarterly operating fees to the CPUC under a formula arrived at by the CPUC and apparently agreed to by the plaintiff." Id.

166. Interstate Commerce Act, 49 U.S.C. § 10526(a)(8)(B) (1988).

167. *Federal Express*, 716 F. Supp. at 1305.

168. Interstate Commerce Act, 49 U.S.C. § 10526(a)(8)(C).

traordinary circumstances.[169] The ICC analogy seems quite logical in determining Congress' intent and should be used in interpreting 49 U.S.C. § 1305(a).

C. CPUC'S SAFETY REGULATIONS WERE NOT GIVEN PROPER WEIGHT

The Tenth Amendment[170] "confirms that federal powers were intended to be limited and that the powers not lodged in the national government remained to the states."[171] Clearly this case represents a clashing of two powerful conservative issues - federalism and laissez faire capitalism.[172] The fight between these philosophies continues and perhaps will only intensify as government expands. Much controversy has arisen since the creation of the constitution concerning the federal government's preemptive powers. In fact, opposition to the U.S. Constitution centered on the fear that the national government would usurp state powers.[173] More fear, perhaps, should be expressed over the power of the judiciary to usurp the states' rights.

The Ninth Circuit's decision has caused confusion, their statement that Federal Express was bound by California's safety requirements "only economic regulation is challenged."[174] Whether the court intended that the CPUC retain its authority to regulate safety, insurance and licensing is unclear.[175] The CPUC's regulation of safety, insurance and licensing protects all California citizens regardless of whether they are customers of the carrier. The regulation of a carrier's rates, routes and services is to protect a carrier's customers from market monopoly.[176] Due to the ambiguous nature of the Ninth Circuit's decision forty-six of the fifty states submitted amicus curiae briefs in support of the CPUC because, inter alia, of their concerns over safety.

The CPUC cooperates with the Department of Motor Vehicles ("DMV"), the California Highway Patrol ("CHP") and the Department of Industrial Relations ("DIR") to maintain safety on the California high-

169. *Federal Express*, 716 F.Supp at 1305.

170. U.S. CONST. amend. X. The Tenth Amendment provides that,

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

171. ROBERT H. BORK, THE TEMPTING OF AMERICA 184 (1990).

172. For a discussion on deregulation and re-regulation *see* PAUL DEMPSEY, FLYING BLIND: THE FAILURE OF AIRLINE DEREGULATION 46-49 (1990).

173. JOSEPH F. ZIMMERMAN, FEDERAL PREEMPTION: THE SILENT REVOLUTION 110 (1991).

174. *Federal Express*, 936 F.2d at 1078.

175. CAL. PUB. UTIL. CODE § 5003.2(a) authorizes the CPUC to regulate safety, insurance and licensing. CAL. PUB. UTIL. CODE § 5003.2(a) (West 1989).

176. CAL.PUB.UTIL.CODE § 5001.5(b) The purposes of safety, insurance and licensing are distinct from the purpose of regulation of rates. CAL. PUB. UTIL. CODE § 5001.5(b) (West 1989).

ways.[177] The CPUC has the authority to impose penalties, as well as, to suspend or revoke operating authority and to see that motor carriers comply with the state traffic laws, the DMV Pull Notice program, equipment listing, driver safety, driver education and vehicle maintenance requirements and requirements documenting compliance with safety standards.[178] The CPUC's safety, insurance and licensing regulations were never specifically discussed in the Ninth Circuit's decision and therefore it is unclear whether the Ninth Circuit intended that these regulations be preempted.

The trial court did address the safety regulations of the CPUC.[179] The trial court held that the California legislature recognized the role in safety the CPUC plays, as evidenced by their legislating more responsibility to the CPUC in monitoring vehicle safety and driver qualifications.[180] The quarterly fees[181] paid to the CPUC are used for California's maintenance and safety programs.[182] The trial court recognized that the California legislature perceived the CPUC's safety regulations "as a significant public benefit."[183] Furthermore, the trial court explained that the U.S. Supreme Court has determined that safety, "is essentially a matter of public policy, and public policy can, under our constitutional system be fixed only by the people acting through their elected representatives."[184] The California legislature's perception of the importance of safety, based on the Supreme Court's analysis, is quite compelling.

The trial court also correctly relied on the U.S. Supreme Court case, *Raymond Motors Transportation, Inc. v. Rice*.[185] The *Raymond* court concluded that those challenging a state's highway safety regulations must first overcome a strong presumption of their validity.[186] The trial court recognized this presumption and therefore held that Federal Express did not overcome the strong validity of the CPUC's regulations. The Court in *Raymond* further solidifies the necessary presumption by adding that "[i]n no field has this deference been greater than that of highway safety regulation."[187] The Ninth Circuit dismissed this issue immediately

177. *Federal Express*, 723 F. Supp. at 1383.

178. CAL. PUB. UTIL. CODE § 1063.5, 3553, 3557 (1989).

179. *Federal Express*, 723 F. Supp. at 1383-84.

180. *Id.* at 1383.

181. The fees are paid based on a carrier's gross operating receipts. CPUC has indicated that over 20,000 intrastate motor carriers in California pay such fees.

182. *Federal Express*, 723 F. Supp. at 1383.

183. *Id.* at 1384.

184. *Id.* (quoting Brotherhood of Locomotive Firemen and Eng'rs v. Chicago Rock Island and Pac. R.R. Co., 393 U.S. 129 (1968)).

185. Raymond Motors Transp. Inc. v. Rice, 434 U.S. 429 (1978).

186. *Id.* at 443-44.

187. *Id.* at 443.

by saying there was an excessive burden, but never addresses their rationale.

It is hard to believe that Congress intended to preempt the States' police powers, especially in California which is home to perhaps the most unique and complex highway system in the United States. To pull the authority to regulate safety from the CPUC will surely have devastating effects on the highway safety of California. It is imperative that each state be able to regulate their own special safety needs. Imagine the federal government implementing a safety, insurance and licensing program that would accommodate the needs of disparate cities such as Los Angeles, California and Ashville, North Carolina.

D. *Analysis Does Not Address CPUC's Argument*

The court never addressed the CPUC's argument, as evidenced by their statement, "every truck carries packages that are in interstate commerce by air."[188] The CPUC concedes that packages carried via air or only partially by air are preempted. Again, its argument was regarding packages travelling solely by truck within California. There is no contention as to the trucking being an integral component of the air-modal movements but movements made entirely by truck are not integrated within the operation of the air carrier. The district court also correctly found that post-1978 legislation reserves to the states the regulation of intrastate motor movements.[189] Notably, the majority perceives that the CPUC's regulatory schemes such as bills of lading, freight charges and promotional pricing "relate to" the carrier's service.[190] This is true with respect to the all air or partial air movements, but not to the movements made exclusively by truck.

E. *Judicial Activism*

The Ninth Circuit opinion represents the most destructive kind of judicial activism. The opinion constitutes *de facto* legislation of policy. While preemption of the states' regulatory practices may be beneficial so that a private company such as Federal Express does not have to incur costs to comply, the judicial creation of such a policy is completely at odds with the concept of federalism.[191] Without a clear and manifest purpose to

188. *Federal Express*, 936 F.2d at 1078.

189. *Federal Express*, 716 F. Supp. at 1304 (allowing regulation of intrastate motor travel to remain in the hands of the states the Interstates Commerce Act 49 U.S.C. § 10101, including the Motor Carrier Act of 1980, Pub.L. 96-296, 94 Stat. 793)

190. *Federal Express*, 936 F.2d at 1078.

191. *Morales*, 112 S.Ct. at 2055 (Stevens,J. dissenting, joined by Rehnquist, C.J. and Blackmun, J.); Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 522 (1981).

preempt the judiciary takes the role of the legislature thereby exceeding its authority.

The ADA included a series of public interest considerations. Some of these considerations did include the development and maintenance of a sound regulatory environment[192] and the encouragement and development of an integrated transportation system.[193] The court fails to mention perhaps the most important public interest consideration - the prevention of unfair, deceptive, predatory, or anti-competitive practices in air transportation and furthermore the avoidance of unreasonable industry concentration and monopoly power.[194] By disregarding these policy considerations the majority has quite effectively given Federal Express an unfair advantage over competing intrastate truck companies. The congressional policy considerations have been violated and the affect of the court's holding has condoned the very policy considerations congress had tried to legislate against. Federal Express has been given a decided advantage in the intrastate truck delivery service.

F. The Decision Has Propagated Two Bills

The *Federal Express v. CPUC* decision has propagated two bills. These bills are H.R. 3221[195] and H.R. 4668.[196] H.R. 3221 seeks to codify the *Federal Express v. CPUC* decision. The bill would preempt State laws relating to the regulation of rates for surface transportation of motor and air carriers. Conversely, H.R. 4688 would seek to clarify that the Federal Aviation Act of 1958 was not intended to prohibit the states from regulating the air carrier's intrastate motor carriage operations.

It is not surprising that H.R. 3221 has received a plethora of opposition. Among those opposing this bill is the National Association of Regulatory Utility Commissions (NARUC).[197] Regulating the intrastate transportation of common carriers is just one of NARUC's duties.[198] It is also the obligation of NARUC to assure services and facilities for the public's convenience and necessity at rates that are just and reasonable.

NARUC opposes H.R. 3221 because it will effectively confer private benefits on the intrastate trucking operations of a very few express delivery companies, meanwhile the thousands of smaller trucking companies

192. 49 U.S.C. § 1302(a)(5) (1988).
193. § 1302(b)(2).
194. § 1302(a)(7), (a)(7)(A).
195. H.R. 3221, 102d Cong., 1st Sess. (1991).
196. H.R. 4688, 102d Cong., 2d Sess. (1992).
197. Norman D. Shumway, The National Association of Regulatory Utility Commissioners, 102d Cong., 2d Sess. (1992).
198. NARUC is a quasi-governmental, non-profit organization founded in 1889. Membership in NARUC consists of governmental agencies of the fifty states, the District of Columbia, Puerto Rico and the Virgin Islands.

will still have to meet the CPUC regulations. For instance, the trucking companies within California who conduct purely intrastate trucking operations must still abide by the CPUC regulations. These trucking companies, although not using any air operations are still in competition with Federal Express for business within California. Federal Express no longer must satisfy the CPUC's regulations. H.R. 3221 will clearly put the intrastate trucking companies at a substantial disadvantage. In fact, the Ninth Circuit has transformed Federal Express into a state unregulated giant. This giant will undoubtedly put many of the intrastate trucking companies out of business.

It is not difficult to fathom the concerns of NARUC in regard to H.R. 3221. This bill will only serve to exaggerate the consequences of the Ninth Circuit's decision. The bill will effectively eliminate the small trucking companies within California from being able to compete with companies such as Federal Express.

VI. Conclusion

Perhaps the most prevailing affect of the *Federal Express* case will be the creation of an atmosphere of unfair competition for the intrastate trucking companies who must still abide by federal and state regulations. These other carriers do not now have the advantage, as does Federal Express, to disregard state regulation. This advantage does not bode well for the future of other carriers and could mean monopolization by Federal Express.

The *Federal Express* case has a devastating effect: the weakening of already severely diminished state's rights. There is no argument that the vitality of the Tenth Amendment has been almost completely encroached by the Supremacy Clause. Therefore the preemption of one of the last bastions of state regulation, intrastate trucking of an air carrier, is a travesty. Especially when the preemption has not been substantiated by express, implied or conflict preemption.

If the court intended that the CPUC's safety regulations be preempted this too will have a devastating effect on the highway safety in California. The loss of funding from Federal Express and the other similar carriers will be a significant loss of income for the state of California's safety regulation and enforcement.

Finally, the court left no guidelines by which to delineate state regulation and federal regulation when there is a mixture of exempt and nonexempt activities. After reading the holding it would seem that federal preemption will be required anytime a carrier uses trucks in their operations, but as the dissent illustrated this taken to the extreme would lead to

ridiculous results.[199] It will be interesting to see how this is resolved in future cases and also to observe how the *Federal Express* decision will have on other motor carriers.

199. *Federal Express*, 936 F.2d at 1080. Thus, if Federal Express diversifies into the florist or pizza business in San Francisco and uses its fleet of trucks to deliver flowers or pizza in the Bay Area, presumably the selling of flowers or pizza become activities preempted from state regulation whether planes play any part in the delivery or not.