

# FEDERAL, STATE AND LOCAL JURISDICTION OVER CIVIL AVIATION

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## INTRODUCTION

As civil aviation moves with amazing rapidity toward peacetime use of the many wartime achievements in the aviation field, one of the most important subjects is governmental jurisdiction over civil aviation. Leaders in the field of civil aviation are watching anxiously the legislative developments on Federal, state and local levels as "complete freedom of National and International trade and commerce depends entirely upon man-made laws."<sup>1</sup> That defects exist in present laws is readily apparent from the pending proposals to broaden Federal, state and local jurisdictions in the aviation field. On the Federal level, the McCarran<sup>2</sup> and Lea<sup>3</sup> Bills are a rather sweeping rewrite and expansion of Federal jurisdiction to plug the loopholes in existing laws which experience has demonstrated an urgent need for. There is also proposed legislation in the tort liability field<sup>4</sup> and the airport field.<sup>5</sup> On the state level, the current legislative campaigns to secure adoption of the Model State Aeronautics Department Act,<sup>6</sup> a Model State Airport Act, a Model State Airport Zoning Act,<sup>7</sup> and a Uniform State Air Carrier Bill<sup>8</sup> are evidence of a concerted drive to assert state jurisdiction over various phases of civil aviation. On the local level, there is intensive activity, chiefly in the airport and airport zoning fields, to adapt local legal powers and regulations to the "Air Age" which is upon us.

The purpose of this article is to examine the jurisdictions which the Federal, state and local governments have already asserted in the field of civil aviation rather than to discuss in detail the merits of suggested changes which these pending legislative proposals would effect.

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<sup>1</sup> L. Welch Pogue, Chairman, Civil Aeronautics Board in "Aviation as a Law Moulding Force," an address delivered Nov., 1942, before the Nebraska State Bar Association, printed in 21 NEB. L. REV. (Proceedings Section, Dec. 1942 issue) 53, 55.

<sup>2</sup> S. 1, 79th Cong., 1st Sess. (1945).

<sup>3</sup> H. R. 674, 79th Cong., 1st Sess. (1945).

<sup>4</sup> H. R. 532, 79th Cong., 1st Sess. (1945).

<sup>5</sup> S. 2, 79th Cong., 1st Sess. and H. R. 3615, 79th Cong., 1st Sess. (1945). This legislation has been passed by both the House and Senate and is pending before a Conference Committee as of this writing.

<sup>6</sup> See discussion of this Bill *infra* in the consideration of state safety jurisdiction and Steers, *The Development of State Aviation Agencies* (1945) 18 STATE GOVERNMENT 8.

<sup>7</sup> See discussion of these two acts *infra* under the consideration of state and local jurisdiction.

<sup>8</sup> See discussion of this Bill *infra* under the section on state economic jurisdiction.

## I. FEDERAL JURISDICTION

(A) *Sources and Scope*

Federal legislation in the aviation field took the form of appropriations for air mail service<sup>9</sup> up until the adoption of the Air Commerce Act of 1926.<sup>10</sup> By this Act, jurisdiction was assumed over safety matters in the field of civil aviation. These covered examination and licensing of pilots and mechanics, registering and licensing of airplanes, issuance of certificates of airworthiness for airplanes, inspection of aircraft, air traffic rules and rating of airports.<sup>11</sup>

The Congress had amended the Air Commerce Act slightly<sup>12</sup> and adopted more air mail legislation, with some of the latter containing various economic regulations applicable to air mail carriers,<sup>13</sup> before 1938 when it adopted the Civil Aeronautics Act<sup>14</sup> to supersede all the air mail legislation and most of the Air Commerce Act.<sup>15</sup>

The jurisdiction asserted by the Federal Government over aviation in the Civil Aeronautics Act of 1938 is twofold in its coverage. First, the Act provides for the regulation of certain economic aspects<sup>16</sup> of air services, such as the issuance of certificates of public convenience and necessity, the supervision of rates, consolidations of air services, and interlocking relationships. In other words, the economic regulatory aspects of the Civil Aeronautics Act of 1938 deal with governmental control and supervision over the business activities of air transportation. The safety regulations<sup>17</sup> provided for in the Act are concerned with such measures as the airworthiness of airplanes, the competency of airmen, safety at airports, and control over airplanes while engaging in flight. The Act also gives the President, the Secretary

<sup>9</sup> The Air Mail Act of 1925, 43 STAT. 805 (1925) 39 U. S. C. §461 (1928). See DAVID, *THE ECONOMICS OF AIR MAIL TRANSPORTATION* (1934) 8, and RHYNE, *CIVIL AERONAUTICS ACT ANNOTATED* (1939) 14-19, for reference to appropriations for army carriage of the mail before civil aviation took over this task in 1925.

<sup>10</sup> 44 STAT. 568 (1926) 49 U. S. C. §171 (1928). See LEE, *LEGISLATIVE HISTORY OF THE AIR COMMERCE ACT OF 1926* (1928), where the author discusses or includes the following: (1) The text of the Air Commerce Act of 1926, the Committee reports and other material relating to its legislative history; (2) articles and reports, together with two unpublished court decisions, relating to legal problems presented by civil air navigation; (3) materials relating to state legislation upon civil air navigation, including the text of the Uniform State Aeronautics Law and a digest of State regulatory legislation; (4) the text of the two international conventions relating to civil air navigation, which the United States has signed but not ratified.

<sup>11</sup> See 1928 U. S. Av. R. 365-431 for the full text of the first Air Commerce Regulations issued under the Air Commerce Act of 1926.

<sup>12</sup> 45 STAT. 1404 (1929), 48 STAT. 933 (1934), 49 U. S. C. §171 (1934). Also *The Air Commerce Act of 1926—Amendments of 1934* (1934) 5 AIR L. REV. 346-350; SCHMECKEBIER, *THE AERONAUTICS BRANCH, DEPARTMENT OF COMMERCE: ITS HISTORY, ACTIVITIES AND ORGANIZATION* (1930); Williams, *Federal Legislation Concerning Civil Aeronautics* (1928) 78 U. OF PA. L. REV. 798.

<sup>13</sup> See SPENCER, *AIR MAIL PAYMENT AND THE GOVERNMENT* (1941) 40-100; GOODMAN, *GOVERNMENT POLICY TOWARD COMMERCIAL AVIATION* (1944) DAVID, *supra* note 9, and RHYNE, *supra* note 9, at 24-36.

<sup>14</sup> 52 STAT. 973 (1938), 49 U. S. C. §401 (1940).

<sup>15</sup> See RHYNE, *supra* note 9.

<sup>16</sup> Title IV, secs. 401 to 416 of the Act, 49 U. S. C. §§481-495 (1940). See also the Economic Regulations issued pursuant to the Act by the Civil Aeronautics Board.

<sup>17</sup> Title VI, secs. 601 to 610 of the Act, 49 U. S. C. §§551-560 (1940). See also the Civil Air Regulations issued pursuant to the Act by the Civil Aeronautics Board. 14 CODE FED. REGS. (CUM. SUPP.) §01 *et seq.*

of State, and the Civil Aeronautics Board jurisdiction over international aviation matters.<sup>18</sup>

That Congress envisioned aviation as a matter that is international and national in scope is indicated by the Congressional direction to the Board (Authority)<sup>18a</sup> to consider as "being in the public interests and in accordance with the public convenience and necessity," the following:

"The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense."<sup>19</sup>

The Civil Aeronautics Act was passed under the Commerce Clause of the Federal Constitution after various other Federal Constitutional powers had been considered.<sup>20</sup>

In an early study, the Federal Aviation Commission had recommended the adoption of a constitutional amendment giving to the Federal Government exclusive control over all phases of civil aeronautics within the United States, if the states did not adopt uniform regulatory laws within a reasonable length of time.<sup>21</sup> In 1919, by formal treaty, all nations were declared to own the space over the lands within their respective borders,<sup>22</sup> and some writers had suggested that the Federal Government gain exclusive control over aeronautics by use of the treaty powers.<sup>23</sup> This would be done by invocation of the doctrine of the famous case of *Missouri v. Holland*.<sup>24</sup> In that case, the Supreme Court of the United States held that when the Federal Government made a treaty with Canada as to migratory birds, such treaty superseded all state legislation in conflict therewith. The District Courts had

<sup>18</sup> See Rhyne, *Legal Rules for International Aviation* (1945) 31 VA. L. REV. 267, at 286 *et seq.*

<sup>18a</sup> The title was changed from Civil Aeronautics Authority to Civil Aeronautics Board by Presidential Reorganization Plan No. IV in 1940. See SECOND ANNUAL REPORT OF THE CIVIL AERONAUTICS AUTHORITY (1940) 57-60.

<sup>19</sup> Sec. 2(a) of the Act, 49 U. S. C. §402(a) (1940).

<sup>20</sup> "The Congress shall have power . . . to regulate commerce with foreign nations, and among the several states, and with the Indian tribes"; Art. I, Sec. 8, Cl. 3. See *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1 (1824) (supremacy of power of Congress to regulate interstate commerce); *Minnesota Rate Cases*, 230 U. S. 352, 399-400 (1913); *United States v. Carolene Products Co.*, 304 U. S. 144 (1938) (extent of power of the Congress to regulate interstate commerce).

<sup>21</sup> REPORT OF THE FEDERAL AVIATION COMMISSION, SEN. DOC. NO. 15, 74th Cong., 1st Sess. (Jan. 30, 1935) 237-238.

<sup>22</sup> *Hearings before the Committee on Interstate and Foreign Commerce on H. R. 5234 and H. R. 4652*, 75th Cong., 1st Sess. (March-April, 1937) 87-89, 250, 256. (The International Convention on Aerial Navigation held in Paris in 1919.)

<sup>23</sup> BOGERT, *PROBLEMS IN AVIATION LAW* (1921) 306; Greer, *Aviation from a Legal Point of View* (1929) 15 A. B. A. J. 308; Logan, *Recent Developments in Aeronautical Law* (1934) 5 J. OF AIR L. 548, 563; Note (1934) 5 AIR L. REV. 346, 347. See also Wigmore, *Did the Federal Government Acquire Exclusive Aerial Jurisdiction Two Years Ago* (1933) 4 J. OF AIR L. 232-235. He states: "In the Pan-American Convention on Commercial Aviation, signed at Habana on February 20, 1928, and ratified by the President March 6, 1931, occurs the following innocent-looking sentence (article 32): 'The contracting States shall procure as far as possible uniformity of laws and regulations governing aerial navigation.'" Dean Wigmore raises the query whether under the case of *Missouri v. Holland*, 252 U. S. 416 (1920) the above treaty could not enable the Federal Government to acquire exclusive aerial jurisdiction. Also see McCormick, *Exclusive Federal Jurisdiction Over Aviation via International Treaties* (1935) 6 AIR L. REV. 13-33.

<sup>24</sup> 252 U. S. 416 (1920).

previously held that the Federal Government could not control migratory birds by a Federal statute passed under the Commerce Clause.<sup>25</sup>

Use of the admiralty power had also been suggested as a basis for Federal regulation of civil aeronautics.<sup>26</sup> The "Air Commerce Act of 1926" was patterned upon the water navigation laws, but its regulatory power is based upon the power to regulate interstate commerce.<sup>27</sup>

While Federal aviation statutes are based upon the Commerce Clause,<sup>28</sup> the extent to which the Congress has asserted Federal jurisdiction over civil aviation depends upon the terms of the legislation which it has adopted. This legislation is examined in the next two sections.

### (B) *Safety Jurisdiction*

The extent of Federal jurisdiction over safety factors is based on the definition of "air commerce" which, according to the Civil Aeronautics Act of 1938 includes:<sup>29</sup>

1. Interstate, overseas, and foreign air commerce;
2. The transportation of mail by aircraft;
3. Any operation or navigation of aircraft within the limits of any civil airway;
4. Any operation or navigation of aircraft which directly affects interstate, overseas, or foreign air commerce; and
5. Any operation or navigation of aircraft which *may endanger safety* in interstate, overseas, or foreign air commerce.

It must be emphasized that the latter two provisions grant to the Federal agency the power to regulate any flying which may affect or endanger safety in interstate commerce, whether such flight be of an interstate or an intrastate character. It should be further noted that the interstate flight to be protected may be within or without the system of Federal civil airways. It is difficult even to imagine any flight that is not at least a potential menace to interstate flight when one considers the hundreds of thousands of miles in interstate commerce flown annually by the scheduled commercial airlines alone.

Under this broad definition of "air commerce" the Board promulgated regulations requiring a Federal license for *all* aircraft<sup>30</sup> and *all* airmen<sup>31</sup> regardless of

<sup>25</sup> *United States v. Shauver*, 214 Fed. 154 (E. D. Ark. 1914); *United States v. McCullagh*, 221 Fed. 288 (D. Kan. 1915).

<sup>26</sup> See LEE, *op. cit. supra* note 10; Bogert, *op. cit. supra* note 23, at 304; Ewing, "Right of Flight" (speech delivered at Law School of University of Alabama, 1931, published in 1932 in pamphlet form). H. R. 14601, 71st Cong. (May 13, 1930) was an aircraft regulation bill based on this power. Knauth, *Aviation and Admiralty* (1935) 6 AIR L. REV. 226; Notes: (1934) 5 AIR L. REV. 346-350; (1914) 28 HARV. L. REV. 200; (1915) 3 CAL. L. REV. 143-144. *Report of the Committee on Jurisprudence and Law Reform of the American Bar Association, Proposed Federal Air Act* (1911) 36 A. B. A. J. 379-386. Veeder, *The Legal Relation Between Aviation and Admiralty* (1931) 2 AIR. L. REV. 29.

<sup>27</sup> See LEE, *op. cit. supra* note 10.

<sup>28</sup> See *supra* note 20.

<sup>29</sup> Sec. 1(3) of the Act, 49 U. S. C. §401(3) (1940).

<sup>30</sup> Sec. 610(a) (1) of the Act, 49 U. S. C. §560 (1940), implemented by the Civil Air Regulations, 14 CODE FED. REGS. (CUM. SUPP.) §60.31.

<sup>31</sup> Sec. 610(a) (1) of the Act, 49 U. S. C. §560, implemented by §60.30 of the Civil Air Regulations, 14 CODE FED. REGS. (CUM. SUPP.) §60.30.

whether either or both are engaged in interstate or intrastate commerce, regardless of whether the flight is of a commercial or non-commercial nature, and regardless of whether the flight takes place on or traverses a civil airway. In other words, any airman or aircraft engaged in flying of any sort in the airspace overlying the United States is required pursuant to the Safety Regulations to have a Federal license.

In the only two cases thus far challenging the extensiveness of this exercise of Federal power, the Federal Courts have sustained the regulations, upholding their application to: (1) an aircraft flying purely intrastate within a Federally designated civil airway and having no Federal certificate of airworthiness although having one issued by the state;<sup>32</sup> (2) an operator who, having no Federal pilot's certificate (as well as disregarding certain other provisions of the Federal regulations) made two non-scheduled off-the-airways flights, one such flight being wholly within one state.<sup>33</sup> In the latter case, the *Drumm* case,<sup>34</sup> the operator was penalized for violation of the regulations even on his intrastate flight. In the former case, the *Rosenhan* case,<sup>35</sup> the court made the point that Congress did not limit the question of safety to a manifestation of actual danger; rather, it could and did exert its power to eliminate all *potential* elements of danger.

An important question in the problem of Federal-State Jurisdiction which is directly related to the issue decided in the *Drumm* case is whether the assertion of power by Congress over an area of intrastate commerce deprives the states of power to regulate the same subject or closely related subjects. Whether the assertion of Federal power over all aircraft and airmen flying in any part of the airspace of the United States prevents the states from exerting any control over the same factors was not in issue in the *Drumm* case and has not, therefore, been judicially determined. It is quite possible that a decision on this question may not be forthcoming for a number of years in view of the fact that the tendency of state law with respect to such safety factors has been to follow the Federal licensing requirements. Most states require a Federal license for aircraft and airmen. A great many of the state laws merely provide that the Federal license be registered with some agency of the state. A few states require both a Federal and a state license and in most of these instances, the state license is, in effect a certificate of registration or "recordation" of the Federal license. Other states require either a Federal or a state license and in only four states is a state license alone sufficient to engage in intrastate flights.<sup>36</sup> These state laws are examined later herein in detail in discussing state safety jurisdiction.

There is a substantial body of precedent of long standing to be found in Supreme Court decisions to the following effect: Congress may regulate intrastate commerce in order to regulate interstate commerce, even to the exclusion of a state's power to

<sup>32</sup> *Rosenhan v. United States*, 131 F. (2d) 932 (C. C. A. 10th, 1942).

<sup>33</sup> *United States v. Drumm*, 55 F. Supp. (D. Nev. 1944) 151.

<sup>34</sup> *Ibid.*

<sup>35</sup> *Supra* note 32.

<sup>36</sup> See WATERMAN, *THE ROLE OF THE STATES IN POSTWAR AVIATION* (Bur. of Pub. Administration, Univ. of Cal, 1945) 48-50.

legislate concerning commerce within the state's boundaries where (1) the regulation of such intrastate commerce is necessary in order to regulate effectively interstate commerce; and (2) where Congress manifests a clear intent to regulate the subject matter to the exclusion of the state or where the state and Federal Regulations cannot both be given effect because of repugnancy.<sup>37</sup>

The *Drumm*<sup>38</sup> case indicates that the Federal government has power to regulate the licensing of airmen or aircraft engaged in intrastate flight.

While there is no express prohibition in the Civil Aeronautics Act forbidding state regulation of safety matters, it is possible that the extremely broad powers asserted over such matters by Congress might be interpreted by the Supreme Court as indicative of Congressional intent to occupy the field exclusively.<sup>39</sup> An examination of the criteria which has been accepted by the Supreme Court in the past as sufficient to indicate such intent is a problem in constitutional law beyond the scope of this article.

With respect to safety regulations, all authorities agree that uniformity of regulation is not only desirable but absolutely essential to the public welfare. Exclusive regulation by the Federal government obviously would assure such uniformity. Even the most rabid defenders of states' rights admit that variations of any proportion in state safety regulations could serve only to impede aviation progress. Such authorities propose, therefore, uniform supplementary legislation on the part of each of the states, and these proposals are examined later herein in discussing state jurisdiction. These so-called "Uniform Laws," it must be admitted, are well known for their lack of uniformity.<sup>40</sup> In 1939, the Committee on Aviation of the American Bar Association withdrew its approval of a Uniform State Regulatory Act because of doubt that uniformity could ever secure by means of such statutes.<sup>41</sup> Even granting the advocates of uniform legislation by the states the unwarranted assumption that all of the forty-eight states would pass an identical statute,<sup>42</sup> there is no way to insure uniformity of interpretation by the courts or the state aviation agency, nor to insure uniformity in the regulations issued under such statutes.

The most useful function the state could serve with respect to safety matters would be that of assisting the Federal government in the enforcement of the Civil Air Regulations if such a function is within the police powers of the states. This point is again referred to in considering state safety jurisdiction *infra* where some of the legal problems raised by such assistance are discussed.

### (C) *Economic Jurisdiction*

While the constitutional power of Congress over interstate and foreign commerce is just as broad with respect to economic regulatory jurisdiction as it is to safety

<sup>37</sup> *Savage v. Jones*, 225 U. S. 501, 533 (1912); *International Shoe Co. v. Pinkus*, 278 U. S. 261, 265 (1928); *Hines v. Davidowitz*, 312 U. S. 52 (1941). See Ryan, *Economic Regulation of Air Commerce by the States* (1945) 31 VA. L. REV. 479, 490-502.

<sup>38</sup> *Supra*, note 33.

<sup>39</sup> But cf. *Kelly v. Washington*, 302 U. S. 1 (1937).

<sup>40</sup> Ryan, *op. cit. supra* note 37, at 529.

<sup>41</sup> 64 A. B. A. R. 170 (1939).

<sup>42</sup> See the comments on uniform statutes in Ryan, *op. cit. supra* note 37, at 529-530.

regulatory jurisdiction, Congress did not see fit in passing the Civil Aeronautics Act to exercise the commerce power as comprehensively with respect to Federal economic regulation as it did with respect to Federal safety regulation. As has been stated above, *all* aircraft and *all* airmen are subject to the safety requirements. No parallel provision is made in the so-called "economic" sections of the Act. Rather, the Act applies its economic sections only to carriers engaged in *air transportation*, which term, by a series of definitions in the Act,<sup>43</sup> means the carriage by aircraft of persons or property as a *common carrier*<sup>44</sup> for compensation or hire or the *carriage of mail* in interstate commerce. Consequently, the economic regulations promulgated by the Board do not extend to *private* and *contract* carriers by aircraft, regardless of whether or not such carriers engage in interstate, overseas or foreign commerce. That Congress has power to regulate *any* carrier, whether common or private, engaging in interstate commerce admits of no doubt; why Congress excluded private and contract carriers from the terms of the Act poses an interesting, if speculative, problem.<sup>45</sup>

Another section of the Act<sup>46</sup> provides in part that "no air carriers shall engage in any air transportation unless there is in force a certificate issued by the Authority (Board) authorizing such air carrier to engage in such air transportation. . . ." Other sections of the Act provide that the Board shall issue a certificate of public convenience and necessity if it finds that an applicant is fit, willing, and able to perform such transportation properly and if it finds that such transportation is required by the public convenience and necessity.<sup>47</sup> Under the statute the Board was given power to classify common carriers by aircraft for purposes of economic regulation and to prescribe the character and degree of regulation and to exempt from such regulation in the public interest to avoid undue burden.<sup>48</sup> In 1938, the Board issued an exemption order which provided for the exemption of non-scheduled common

<sup>43</sup> Sec. 1(10) and (21)(a) of the Act, 49 U. S. C. (1940) §401(10) and (21)(a).

<sup>44</sup> Cases holding particular air carriers to be common carriers are: Curtiss-Wright Flying Service, Inc. v. Glose, 66 F. (2d) 710 (C. C. A. 3d, 1933), *cert. den.* 290 U. S. 696; Ziser v. Colonial Western Airways, Inc., 10 N. J. M. 1118, 162 Atl. 591 (1932); Hagymasi v. Colonial Western Airways, Inc., 1931 U. S. Av. R. 73 (N. J. Sup. Ct. 1931) affirmed 10 N. J. Misc. 1118, 162 Atl. 591 (1932). Bolle v. Colonial Western Airways, Inc., 110 N. J. L. 46, 164 Atl. 436 (1932); Smith v. O'Donnell, 215 Cal. 714, 5 P. (2d) 690, 12 Pac. (2d) 933 (1932); Turgeon v. Quebec Airways, Ltd., 1942 U. S. Av. R. 201 (Super. Ct. Quebec, 1942); Conklin v. Canadian Colonial Airways, Inc., 1934, U. S. Av. R. 21 (N. Y. Sup. Ct. N. Y. Co., 1933), as affirmed 266 N. Y. 244, 194 N. E. 692; Law v. Transcontinental Air Transportation, Inc., 1931 U. S. Av. R. 205 (U. S. E. D. Pa., 1931); McCusker v. Curtiss-Wright Flying Service, Inc., 269 Ill. App. 502 (1933). Cases holding particular air carriers not to be common carriers are: Bird v. Louer, 272 Ill. App. 552 (1933); Seaman v. Curtiss Flying Service, Inc., 1929 U. S. Av. R. 48 (N. Y. Sup. Ct. Suffolk Co., 1929), reversed on other grounds, 231 App. Div. 867, 247 N. Y. S. 251; North American Accident Insurance Co. v. Pitts, 213 Ala. 102, 104 So. 21 (1928); Brown v. Pacific Mutual Life Insurance Co., 8 F. (2d) 996 (C. C. A. 5th, 1925).

<sup>45</sup> One can speculate on the intent of Congress in inserting the proviso: "That the Authority (Board) may by order relieve air carriers who are not directly engaged in the operation of aircraft in air transportation from the provisions of this Act to the extent and for such periods as may be in the public interest." For details of this relief, see Neal, *The Status of Non-Scheduled Operations under the Civil Aeronautics Act of 1938*, *infra* this symposium, p. 508.

<sup>46</sup> Sec. 401(a) of the Act, 49 U. S. C. §481(a) (1940).

<sup>47</sup> *Id.* at (d) (1).

<sup>48</sup> Sec. 416(a) and (b) of the Act, 49 U. S. C. §496(a) and (b) (1940).

carriers from certain requirements of the economic regulations.<sup>49</sup> Consequently, only common carriers operating scheduled services in air transportation, as defined by the Act, have thus far been subject to the economic regulations of the Board, and only common carriers engaged in interstate, overseas, and foreign air transportation by aircraft are subject in any way to such economic regulations.

It has long been established that the power of Congress to regulate interstate commerce is plenary. It is equally well established that in regulating interstate commerce Congress may regulate intrastate activities which may burden or interfere with Federal control of interstate commerce. To what extent Congress, under the Civil Aeronautics Act of 1938, has exerted its power to regulate the economic activities of air carriers of an intrastate nature is as yet an unsettled question. The jurisdiction asserted by the Act over safety matters is extremely broad; it specifically includes "any operation or navigation of aircraft within the limits of any civil airway or any operation or navigation of aircraft which *directly affects*, or which may endanger safety in, interstate, overseas, or foreign air commerce."<sup>50</sup> By limiting economic jurisdiction to interstate, overseas and foreign air carriers who are "common carriers" the Congress in the Civil Aeronautics Act certainly did not write into the Act the specific ideas of broad jurisdiction which are included in the safety provisions just quoted. The jurisdiction of the Civil Aeronautics Board over intrastate economic operations would, therefore, seem to depend on the extent to which particular cases of intrastate air commerce are related to interstate air commerce.<sup>51</sup>

While intrastate air transportation in the United States in principle remains under state control, like all borderlines the line between Federal and state jurisdiction over intrastate air transportation is difficult to draw.<sup>52</sup> It is possible that intrastate airlines transporting passengers or property, which may be considered as being in the stream of interstate or foreign commerce, can be subjected to Federal jurisdiction. At least with respect to the Federal requirement of the certificate of convenience and necessity, a Federal District Court has so held, in the *Canadian Colonial Airways* case.<sup>53</sup> (The carrier voluntarily discontinued the service between New York City and Niagara Falls, New York, and a consent decree was entered permanently enjoining the carrier from operating such a service without having been certificated by the Civil Aeronautics Board.<sup>53a</sup>) This is the only instance in which the power of the Federal government to regulate a physically intrastate air operation has been before the courts. The implications of this decision are far-reaching, for it is diffi-

<sup>49</sup> 14 CODE FED. REGS. (CUM. SUPP.) §292.1.

<sup>50</sup> Sec. 1(3) of the Act, 49 U. S. C. §401(3) (1940).

<sup>51</sup> The term "air commerce" is used in its technical sense in the treatment of safety regulation, that is, with the meaning given the term by definition in Sec. 1(3) of the Act, 49 U. S. C. §401(3) (1940). But in that part of the Act dealing with economic regulations, "commerce" or "air commerce" is used in its ordinary legal sense.

<sup>52</sup> See Ryan, *op. cit. supra* note 37; Willebrandt, *Federal Control of Air Commerce* (1940) 11 J. OF AIR L. AND COMM. 204; Morris, *State Control of Aeronautics* (1940) 11 *id.* 320; Taylor, *A Practical Reconciliation of State and Federal Control* (1941) 12 *id.* 232.

<sup>53</sup> *C. A. B. v. Canadian Colonial Airways*, 41 F. Supp. 1006 (S. D. N. Y. 1940).

<sup>53a</sup> ANNUAL REPORT OF THE CIVIL AERONAUTICS BOARD (1941) 36.



cult to imagine an air service of any magnitude which would not in some way "affect" interstate commerce even though such service be operated entirely within the boundaries of a single state. Such intrastate operations may parallel, compete or connect with an interstate air carrier in such a way as to affect interstate air transportation by diverting traffic, or by "supplying" passengers and cargo to an interstate carrier (the so-called "feeder" airline operation). Since air transportation is primarily a long distance operation rather than local in scope, it is unlikely that any air service though operated within the boundaries of a single state could long survive without depending to a greater or lesser degree on an aviation market which traverses state lines.<sup>54</sup>

The jurisdiction asserted by the Federal government in the economic regulatory field seems comparatively limited not only by the narrow definition given the term "air transportation" but also due to the fact that there has been no attempt by the National Government to extend (except with respect to the Canadian Colonial operation just described) and thereby define more accurately its economic jurisdiction by means of the usual constitutional principles relating to the commerce power.

## II. STATE JURISDICTION

### (A) *Safety Regulation*

All of the states have legislation covering various phases of air safety regulation. Forty states require that all aircraft and all pilots have a Federal license. Of the eight states<sup>55</sup> which have no such requirement, six require either a state or Federal license,<sup>56</sup> and two require only a state license for both aircraft and pilots.<sup>57</sup> Virginia requires both a state and Federal license for aircraft and pilots. Eleven states have adopted air traffic rules substantially identical with the Federal Air Traffic Rules,<sup>58</sup> twenty-three<sup>59</sup> have air traffic regulations which make no reference to the Federal rules but which are usually based in part upon them, and fourteen<sup>60</sup> have no provision on this subject.

It has been held that while a state may prescribe air traffic regulations for intrastate traffic,<sup>61</sup> a statute which fixes no criterion to be adhered to by the State Aviation Commission in establishing such regulations is invalid as it violates the fundamental

<sup>54</sup> See Ryan, *op. cit. supra*, note 37, at 518-522, 506 for an economic analysis of intrastate air transportation and the articles cited *supra* note 52.

<sup>55</sup> The states which do not have this requirement are: Alabama, Connecticut, Maryland, Minnesota, New Jersey, North Dakota, Oregon, and Utah.

<sup>56</sup> Maryland, Minnesota, New Jersey, North Dakota, Oregon, and Utah.

<sup>57</sup> Alabama and Connecticut.

<sup>58</sup> Kentucky, Maine, Montana, New Jersey, New Mexico, New York, Ohio, Rhode Island, South Dakota, Washington, and Wisconsin.

<sup>59</sup> Alabama, Arizona, Arkansas, California, Connecticut, Delaware, Idaho, Illinois, Iowa, Kansas, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nevada, New Hampshire, Oregon, Pennsylvania, Tennessee, Utah, Vermont, and Virginia.

<sup>60</sup> Colorado, Florida, Georgia, Indiana, Louisiana, Mississippi, Nebraska, North Carolina, North Dakota, Oklahoma, South Carolina, Texas, West Virginia, and Wyoming.

<sup>61</sup> *People v. Katz*, 140 Misc. 46, 249 N. Y. Supp. 719 (1931); *Parker v. Granger*, 4 Cal. (2d) 668, 52 P. (2d) 226 (1935), *app. dism.* 298 U. S. 644 (1936); *Erickson v. King*, 218 Minn. 98, 15 N. W. (2d) 201 (1944).

principle of Constitutional law that an uncontrolled statutory delegation of legislative power is void.<sup>62</sup> Federal and state air traffic regulations govern when they conflict with local regulations governing the landing and take-off of airplanes at airports.<sup>63</sup>

Adoption by the states of the Federal Air Safety Regulations does create certain legal questions. One lower court has held invalid state legislation authorizing the state agency to conform to then or thereafter existing Federal regulations (Federal Traffic Rules for landing and taking off at airports);<sup>64</sup> another lower court has invalidated a state law forbidding operation of aircraft without a Federal aircraft and pilot license.<sup>65</sup> These courts viewed the legislation as an unconstitutional delegation of state legislative power to the Federal government. In the latter case, the court by dictum stated that it would not be an unwarranted delegation of the legislative authority of the state to prescribe by statute that standards of construction of airplanes and qualifications of pilots must conform to the requirements of the Federal government. Minnesota amended her statute to include such a provision.<sup>66</sup> It is noteworthy that the State Aeronautic Department Act which the National Association of State Aviation Officials approved in November, 1944, and which was proposed for adoption by the forty-four states holding legislative sessions in 1945 provides:

"All rules and regulations prescribed by the Commission under the authority of this Act shall be kept in conformity, as nearly as may be, with the then current Federal legislation governing aeronautics and the regulations duly promulgated thereunder and rules and standards issued from time to time pursuant thereto."<sup>67</sup>

A footnote to the text by the authors of this proposed Act explains that this provision has been drafted in this form to avoid constitutional objections of delegation of state legislative powers to the Federal government.<sup>68</sup> Insofar as the licensing of aircraft, airmen, and air flight instructors is concerned, this proposed Act "does no more than to require the registration of Federal licenses, permits, and certificates."<sup>69</sup>

<sup>62</sup> *State v. Larson*, 10 N. J. Misc. 384, 160 Atl. 556 (1932); cf. *Schechter Corp. v. United State*, 295 U. S. 495 (1935).

<sup>63</sup> *Rinehart v. Woodward Flying Service*, 122 W. Va. 392, 9 S. E. (2d) 521 (1940).

<sup>64</sup> *State v. Larson*, *supra* note 62.

<sup>65</sup> *Neiman v. Britton*, 235 C. C. H. §2801, 1935 U. S. Av. R. 159 (Minn. Dist. Ct. Jan. 22, 1935).

<sup>66</sup> Minn. Laws of 1935, Chap. 358, Secs. 2 and 3, 1935 U. S. Av. R. 384. See *Report of American Bar Association Committee on Aeronautical Law*, 1929 U. S. Av. R. 315, 323, 330.

<sup>67</sup> Sec. 6, subdivision 4, of the proposed Act.

<sup>68</sup> This footnote states:

"The laws of a number of states use the language 'shall be consistent with and conform to the then current federal legislation,' etc., or its equivalent. The question arises as to the constitutionality of a state statute adopting federal legislation or rules which may be enacted or prescribed in the future, thus surrendering legislative power to the congress or a federal bureau. On the other hand, if legislation and regulations existing at the time of the enactment of the state statute were adopted by reference, no opportunity would be given for keeping step with new legislation and regulations. The suggested language, therefore, seems preferable, because such a provision is valid and should be preferred to the gesture of an invalid provision."

<sup>69</sup> Quoted from the explanatory footnote to Section 9 of the proposed Act. The full text of the footnote states:

"In drafting this proposed regulatory section it has been the aim to avoid interference with proper federal regulation and at the same time, in the interest of the public, to enable the states to enforce

This Act should be taken as representing present state official thinking on the jurisdiction states want to assume in safety matters in the aeronautical field, as state officials drafted and are now sponsoring this Act.

It is readily apparent that the states want to go as far as they can legally go in adopting Federal safety regulations so as to assure the maximum amount of uniformity. Whether the proposed Act avoids the charge of infringing upon a jurisdiction already asserted by the Federal government is a question yet to be decided. The analysis of Federal safety jurisdiction in the first part of this article leaves little doubt but what the scope of activity left to the states in this field is indeed narrow. To avoid legal challenge to state regulations which cover the same field as those adopted by the Federal government, it has been suggested that the Civil Aeronautics Act be amended to specifically authorize the states to enforce the Federal safety regulations. The Attorney General of Florida has already held that his state's traffic inspectors may enforce the Federal air traffic regulations which have been adopted by Florida, but the inspectors may make arrests only in conjunction with peace officers.<sup>70</sup> Another suggestion is that persons violating the Federal safety regulations may be proceeded against in the state courts so as to prevent the flooding of the Federal courts with air traffic cases.<sup>71</sup>

The chief current question is whether Federal safety jurisdiction already excludes all state jurisdiction in the field. As already stated in discussing Federal safety jurisdiction, the cases which have considered the extent of Federal jurisdiction have not considered this problem. It may well be that Federal jurisdiction in this field is so broad as to exclude state safety jurisdiction as the *Drumm* case<sup>72</sup> certainly indicates a tendency to go that far.

### (B) *State Economic Jurisdiction*

Fifteen states have statutes containing economic regulations applicable to air transportation.<sup>73</sup> In general, these statutes require common carriers by air to obtain certificates of public convenience and necessity before operating in the state with the more recent statutes going farther and paralleling the economic regulations of the Civil Aeronautics Act of 1938. California prohibits ". . . transportation of passengers for hire . . . between fixed termini over a route entirely within this State unless such person holds a Federal certificate of authority."<sup>74</sup>

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police regulations. In so far as the licensing of aircraft, airmen, and air flight instructors is concerned, it does no more than to require the registration of federal licenses, permits, or certificates. A sentence has been added to the ordinary provision to the effect that certificates of registration shall constitute licenses in order to avoid possible constitutional objections. As to air schools, instructors in ground subjects, and airports, it is felt that these are matters entirely within the jurisdiction of the state."

<sup>70</sup> Opinion of August 17, 1934, printed in full in 1935 U. S. Av. R. 117.

<sup>71</sup> See H. R. 3383, Sec. 4, 79th Cong., 1st Sess. (1945).

<sup>72</sup> *United States v. Drumm*, *supra* note 33.

<sup>73</sup> Alabama, Arizona, Arkansas, California, Colorado, Illinois, Nevada, New Mexico, North Dakota, Pennsylvania, Rhode Island, Vermont, Virginia, West Virginia, and Wyoming.

<sup>74</sup> Cal. Laws 1943, Ch. 868, 1943 U. S. Av. R. 230. See Wolcott, *Does the Jurisdiction of the California Railroad Commission Extend to Air Transportation?* (1945) 33 CAL. L. REV. 114; McKeage, *The California Railroad Commission Has Jurisdiction Over Intrastate Rates and Charges of Airlines* (1945) *id.* at 299.

Most of this state legislation predates the Civil Aeronautics Act of 1938 and little has been done by the states having these statutes to regulate air carriers.<sup>75</sup> In 1944, Virginia<sup>76</sup> enacted legislation to provide regulation of the economic affairs of intrastate air carriers and Rhode Island amended her law.<sup>77</sup> In 1945, Alabama,<sup>78</sup> Arkansas,<sup>79</sup> and Vermont,<sup>80</sup> adopted statutes of similar effect. The latter three statutes were based upon the so-called Uniform State Air Carrier Bill drafted in 1944 and sponsored by the National Association of Railroad and Utility Commissioners. This Bill proposes state control over intrastate air carriers and over intrastate business of interstate air carriers. The three states just named, however, deleted the provisions relating to control over intrastate business of interstate air carriers.

There has been no court litigation involving the economic regulation by states of air transportation, but some decisions of state commissions in passing on economic matters have been reported. While these decisions are rather old in terms of the history of air transportation—all except one of them pre-dates the Civil Aeronautics Act of 1938—they should be recorded here as of historical importance in considering state economic jurisdiction over civil aviation. An applicant before the Arizona Commission who refused to produce statistics as to its other operations was found to have failed to meet the burden of showing that public convenience and necessity required the service for which authorization was sought.<sup>81</sup> One who contracted to dust crops with insecticide by airplane is not a "common carrier" and was held not subject to the Arizona Commission's jurisdiction.<sup>82</sup> In choosing between rival applicants for service between the cities of Grand Junction and Denver, the Colorado Commission made a factual finding as to the carrier best able to meet needs of the public for air service and analyzed the principles which it must consider in making such a decision.<sup>83</sup> In another case, the Colorado Commission in 1930 granted an interstate air carrier a certificate of public convenience and necessity without proof of need for the service in view of the Commerce clause of the Federal Constitution.<sup>84</sup> The Illinois Commerce Commission granted an intrastate air carrier a certificate of public convenience and necessity after finding facts showing that the carrier was financially and technically able to conduct the proposed service.<sup>85</sup> In Massachusetts, although no law requires certificates of public convenience before air carriers began operations, it has been held that rates charged by common carriers by aircraft are

<sup>75</sup> See Davis, *State Regulation of Aircraft Common Carriers* (1930) 1 AIR L. REV., 47; Ryan, *op. cit. supra* note 37.

<sup>76</sup> Va. Laws 1944, Ch. 267.

<sup>78</sup> Governor's Act No. 269, Ala. Acts 1945, H. B. 302.

<sup>80</sup> Vt. Laws 1945, H. B. 189.

<sup>81</sup> Application of Century Pacific Lines, P. U. R. 1932 C, 388, 1932 U. S. Av. R. 190 (1932).

<sup>82</sup> Quick Aviation Co. v. C. J. Kleinman, 60 Ariz. 430, 138 P. (2d) 897 (1943).

<sup>83</sup> Pikes Peak Air Company v. U. S. Airways, Inc., P. U. R. 1930 E, 308, 1930 U. S. Av. R. 253 (1930).

<sup>84</sup> Application of U. S. Airways, Inc., P. U. R. 1928 E, 518, 1932 U. S. Av. R. 187 (1928).

<sup>85</sup> Application of Century Air Lines, *et al.*, 1932 U. S. Av. R. 197 (1931). See also Matter of Northwest Airways, Inc., 3 AIR L. REV. 384 (Ill. Comm. Comm. May 4, 1932). See Opinion of Attorney General of Illinois, 1944 U. S. Av. R. 46 (1944) holding that intrastate air carriers who are common carriers must obtain such a certificate before beginning operations within that state.

<sup>77</sup> R. I. Laws 1944, H. B. No. 851.

<sup>79</sup> Ark. Laws 1945, Act No. 252.

subject to regulation by the Department of Public Utilities.<sup>86</sup> In Nevada, the State Commission, in issuing certificates of public convenience and necessity to three air transport companies for service on call, provided that each should have, at its home airport, a preference or priority of two hours over the others.<sup>87</sup> In Pennsylvania, the State Public Service Commission in an early decision,<sup>88</sup> has outlined the general principles it would follow in granting certificates of public convenience and necessity to common carriers by air.

This review of all the reported decisions by the states on economic regulation of air carriers reveals how little attention the states have given to this subject. Undoubtedly, the adoption of the Civil Aeronautics Act of 1938 virtually eliminated most of the need for state legislation of this character. Since air transportation is primarily long distance or interstate in character, there appears to be little of value which state economic control can add to Federal economic regulation. Economic regulation by forty-eight states could well be such a burden as to stifle civil aviation by the multitude of varied regulations which these different regulating agencies would almost certainly promulgate.<sup>89</sup>

A further complication for state economic regulation of air carriers arises from the fact that in most states the economic regulation is exercised by the State Utility or Railroad Commission rather than the State Aeronautics Commission. Where separate Commissions exist, an undercover fight usually goes on between these two state agencies almost constantly over their respective jurisdictions and duties. It is to be noted that the present Model State Aeronautics Department Act covering state safety jurisdiction is sponsored by the State Aeronautics Commissions (National Association of State Aviation Officials), and that those Commissions are opposed, either openly or in fact, to the state economic jurisdiction provided in the Uniform State Air Carrier Bill sponsored by the National Association of Railroad and Utility Commissioners. Some contend that if state commissions charged with jurisdiction over surface carrier utilities are now given jurisdiction over air carriers they will favor surface carriers over air carriers and thereby retard the development of air transportation.

At the present time, the Federal government clearly has economic regulatory jurisdiction over all "common carriers" engaged in interstate, overseas and foreign air transportation. It is doubtful, however, that the power is conferred by the Civil Aeronautics Act on the Board to exert economic regulatory jurisdiction over all intrastate air transportation. To the extent that the Federal authority may not extend to the interstate economic aspect of intrastate transportation, it may not cover

<sup>86</sup> Opinion of Attorney General of Massachusetts, 1944 U. S. Av. R. 51 (1944).

<sup>87</sup> Application of Francis A. Riordan, *et al.*, P. U. R. 1928 D, 854, 1932 U. S. Av. R. 185 (1928).

<sup>88</sup> Application of Gettysburg Flying Service, Inc., 8 Pa. P. S. C. R. 787, P. U. R. 1928 B, 287, 1932 U. S. Av. R. 181 (1927). In Application of Battlefield Airways, Inc., 17 Pa. P. S. C. R. 410 (1928) an application for incorporation of an air transport corporation was denied on the ground that since one company already operated in the proposed area of service the creation of a second company would result in destructive competition.

<sup>89</sup> See Boren, *National and State Regulation of Civil Aeronautics* (1943) 89. CONG. REC. A 1840, and citations *infra*, note 103.

all operations of the interstate airlines. It is not certain that the services such airlines supply and the rates they charge for carriage between points within the boundaries of a single state are subject to Federal jurisdiction. The *Canadian Colonial Airways* proceeding, already referred to herein in discussing Federal economic jurisdiction, suggests, however, the possibility that the Federal government may have jurisdiction over the intrastate services and charges of an interstate airline.

In all other fields of public transportation where both the Federal and state governments have attempted regulation thereof, the courts have been called upon to determine the respective and relative areas of jurisdiction of the Federal and state governments.<sup>90</sup> Air transportation will be no exception.

In determining the validity of state statutes or regulations which may affect interstate commerce, the Supreme Court of the United States has evolved two tests involving separate sets of criteria for two types of situations. In the first situation the general rule is well stated in the leading case of *Cooley v. Board of Port Wardens*.<sup>91</sup> There the court first formulated its theory that where the inherent nature of the subject matter requires uniformity of treatment within all the states, the power of Congress to legislate with respect thereto is exclusive. This doctrine, known as the "Uniformity of Regulation" theory, has been affirmed repeatedly by the court.<sup>92</sup> So, if the subject matter is one requiring uniform regulation throughout the states, the power of Congress to regulate is exclusive; perhaps it would take a positive manifestation of Congressional intent permitting the states to regulate before state regulation would be upheld.<sup>93</sup> Whether aviation is classifiable as such a subject matter has never been decided by the court. It is, however, entirely conceivable that it might be so considered by analogy to the power asserted by Congress over navigable waters.<sup>94</sup> No clear formula has been evolved by the courts whereby it is ascertainable in advance of a decision whether or not a given subject matter admits of only uniform and therefore national legislation.

In the second type of situation, that is, where the inherent nature of the subject matter does not require uniformity, but rather admits of diversity of regulation, each state may legislate respecting such matters and regulation by the states will be valid until the Federal Government, through Congressional action, manifests an intent either expressly or by implication to occupy the entire field.<sup>95</sup> After Congress acts, the courts are then called upon to decide whether Federal and state laws respecting the same subject conflict because of repugnancy or inconsistency.<sup>96</sup> In *Oregon-*

<sup>90</sup> See Tarney, *Methods of Differentiating Interstate Transportation from Intrastate Transportation* (1938) 6 GEO. WASH. L. REV. 553.

<sup>91</sup> 12 How. (U. S.) 299 (1851).

<sup>92</sup> *Mobile County v. Kimball*, 102 U. S. 691 (1881); *Missouri ex rel. Bartlett v. Kansas Natural Gas Co.*, 265 U. S. 298 (1931); *Ashwander v. T. V. A.*, 297 U. S. 288 (1936); *Houston R. C. v. United States*, 234 U. S. 342 (1941).

<sup>93</sup> Cf. cases in foregoing footnote.

<sup>94</sup> *Ashwander v. T. V. A.*, 297 U. S. 288, 328 (1936); *United States v. Appalachian Power Co.*, 311 U. S. 377 (1940).

<sup>95</sup> *Clark Distillery Co. v. Western Maryland R. Co.*, 242 U. S. 311 (1917); *Minnesota Rate Cases*, 230 U. S. 352 (1913).

<sup>96</sup> *The Shreveport Rate Cases*, 234 U. S. 342 (1914); *Mapier v. Atlantic Coast Line R. R. Co.*, 272 U. S. 605 (1926).

*Washington R. & N. Co. v. Washington* the court stated “. . . there is a field in which the local interests of states touch so closely upon interstate commerce, that in the silence of Congress on the subject, the states may exercise their police powers. But when Congress has acted and occupied the field, the power of the states to act is prevented.”<sup>97</sup>

It will be recalled that in a large measure the Federal government has occupied the safety field insofar as the Federal Civil Air Regulations are applicable to all aircraft and all airmen. Whether or not such occupation of the field excludes the states from imposing supplementary safety rules is not clear.<sup>98</sup> With respect to the economic regulatory field, however, it seems patent that Congress did not intend the Federal government to exercise the broad jurisdiction asserted in the safety field. The economic regulatory jurisdiction intended to be assumed by the Federal government is limited by the Act itself. In this situation, the extent to which the Civil Aeronautics Board can assert jurisdiction over the economic aspects of intrastate air transportation depends in large measure on the language of the Act as interpreted in legal precedents construing such language when used under the Commerce Clause of the Constitution. In this language and in these precedents will be found the answer as to where to draw the line between the jurisdiction which the Congress has asserted and the field of economic regulation left to the states.

It is well established that the commerce power extends to all activities which may “affect” interstate commerce.<sup>99</sup> To the extent that the effective regulation of interstate commerce involves the regulation of intrastate commerce—a field ordinarily reserved to the respective states—Congress may legislate<sup>100</sup> concerning such intrastate commerce, and may legislate to the exclusion of the states where it manifests a clear intention to occupy the field exclusively.<sup>101</sup> In the light of such interpretations of the Commerce Clause, the assertion by the Civil Aeronautics Board of jurisdiction over the intrastate operations of Canadian Colonial Airways, an interstate carrier, does not seem a usurpation of state power over intrastate commerce. Whether the Civil Aeronautics Board can assert jurisdiction over intrastate air transportation of intrastate air carriers on the grounds that the regulation of such transportation is essential to the effective regulation of interstate transportation will depend upon substantial factual findings by Congress to that effect. Ample precedent can be found by looking in other public utility fields, particularly as respects public carriers, both by railroad and by water vehicles.<sup>102</sup>

It is certain from this short survey that there is a most pressing need for Federal legislation to clarify Federal jurisdiction over economic phases of air transportation

<sup>97</sup> 270 U. S. 87 (1925).

<sup>98</sup> *Kelly v. Washington*, 302 U. S. 1 (1937).

<sup>99</sup> *M'Culloch v. Maryland*, 4 Wheat. (U. S.) 316 (1819); *United States v. Ferger*, 250 U. S. 199 (1918); *Consolidated Edison Co. v. National Labor Relations Board*, 305 U. S. 197 (1938); *United States v. Darby*, 312 U. S. 100 (1940); *United States v. Wrightwood Dairy Co.*, 315 U. S. 110 (1942).

<sup>100</sup> *Houston R. Co. v. United States*, 297 U. S. 288 (1936).

<sup>101</sup> *Hines v. Davidowitz*, 312 U. S. 52 (1941); *Wickard v. Filburn*, 302 U. S. 1 (1937); *Cloverleaf v. Patterson*, 315 U. S. 148 (1942).

<sup>102</sup> See *Tarney*, *supra* note 90; *Binzer*, *Civil Aviation—The Relative Scope of Jurisdiction of the State and Federal Government* (1945) 33 Ky. L. J. 276.

It is also apparent that this Federal legislation could best take the form of asserting exclusive Federal jurisdiction. It seems inconceivable that the states should be allowed to impose the unreasonable burden of varieties of economic regulations on the air transportation industry.<sup>103</sup> Years of conflict and court litigation can be prevented by such legislation if adopted now before the states begin to assert jurisdiction in this field.

### (C) Airports—Airport Zoning

All of the states have legislation authorizing their local political sub-divisions—usually cities—to acquire and operate airports.<sup>104</sup> Further and more detailed reference is made to this subject later on in discussing local jurisdiction.

Thirty-six states have legislation authorizing the promulgation of zoning regulations to control the height of structures erected in airport approach areas.<sup>105</sup> This type of legislation is also given more extended consideration in the next section herein on local jurisdiction.

### (D) Tort Liabilities

Some states have asserted jurisdiction over aviation accident liabilities. Arkansas,<sup>106</sup> Georgia,<sup>107</sup> and Pennsylvania<sup>108</sup> have adopted statutes providing that an aircraft operator's liability to his passengers is governed by the rules applicable to torts on land. California<sup>109</sup> and South Carolina<sup>110</sup> have statutes restricting the right of guest passengers in airplanes to recover for injuries suffered, and a Maryland statute exempts operators engaged in interstate or foreign commerce from liability for injuries caused by faults of navigation, dangers of the air and acts of God when the aircraft has a proper crew and is airworthy.<sup>111</sup>

Section 5 of the "Uniform State Law for Aeronautics," which was prepared by a committee of the American Bar Association in conjunction with the National Conference of Commissioners on Uniform State Laws and approved by both organizations in 1922, imposes the rule of absolute liability for damages by aircraft to persons or property on land or water, unless the injury is caused in whole or in

<sup>103</sup> See McDonald and Kuhn, *The Ocean Air—State or Federal Regulation* (1945) 31 VA. L. REV. 363, 374; Ryan, *id.* at 522.

<sup>104</sup> See STATE LAWS RELATING TO AIRPORTS, AIRPORT ZONING, AIR NAVIGATION FACILITIES: IN FORCE JULY 1, 1944 (National Aeronautic Association 1944); WATERMAN, *op. cit. supra* note 36; and RHYNE, AIRPORTS AND THE COURTS (1944).

<sup>105</sup> See RHYNE, *id.* at 171 for a list of these acts adopted before 1945. In 1945 Delaware, North Dakota, Utah, Vermont, and Washington adopted new airport zoning acts. Florida, Illinois, Iowa, Nebraska, New York, North Carolina, Oklahoma, Pennsylvania, Tennessee, and Wisconsin, clarified or expanded acts which had already been adopted in those states.

<sup>106</sup> Ark. Laws 1941, Act 457, 1941 U. S. Av. R. 341 at 348.

<sup>107</sup> Ga. Laws 1933, Act 206, 1933 U. S. Av. R. 421 at 423.

<sup>108</sup> Pa. Laws 1933, Act 224, 1933 U. S. Av. R. 476 and 485.

<sup>109</sup> See discussion and interpretation of this provision in *Whittemore v. Lockheed Corp.*, 51 Cal. App. (2d) 605, 125 P. (2d) 531 (1942) and further decisions in this case 149 P. (2d) 212, 151 P. (2d) 670 (1944).

<sup>110</sup> S. Car. Laws 1935, Act 42, 1935 U. S. Av. R. 421.

<sup>111</sup> Md. Laws 1931, Ch. 403, 1931 U. S. Av. R. 365.



part by the person injured.<sup>112</sup> This statute, where it is in effect, does import into the law of the particular state a different legal rule for injuries of this kind as compared with injuries caused by mid-air collisions, injuries aboard aircraft, and injuries to aircraft by other instrumentalities.

In four<sup>113</sup> of the twenty-three states<sup>114</sup> which have adopted this Uniform Statute on surface injuries, this section has been amended to remove the absolute liability provision and to base liability on the rules of torts on land. Two states make proof of injury to persons and property on the ground *prima facie* evidence of negligence.<sup>115</sup> In Missouri, this section was entirely eliminated when the Uniform Law was adopted,<sup>116</sup> and in Colorado<sup>117</sup> and Georgia<sup>118</sup> this section was not adopted when certain other provisions of the Uniform Law were enacted. The fourteen states,<sup>119</sup> and Hawaii, which have the absolute liability provision incorporated in their law should recognize the present status of aviation as an ordinary mode of travel by deleting this provision from their statutes.

Section 6 of the Uniform State Law for Aeronautics of 1922 provides: "The liability of the driver of one aircraft to the owner of another aircraft, or to aeronauts or passengers on either aircraft, for damage caused by collision on land or in the air, shall be determined by the rules of law applicable to torts on land."<sup>120</sup> Twenty states have adopted this section.<sup>121</sup> In cases involving collisions of airplanes on the ground, the courts of states which have not adopted this provision have held that the general common law rules governing liability for accidents on land will be applied in aviation cases.

Seventeen states<sup>122</sup> and Hawaii now have in force the provisions of Section 4

<sup>112</sup> 11 UNIF. LAWS ANN. (1938) §5, pp. 161-162; text is also found in 1928 U. S. Av. R. 472-476.

<sup>113</sup> Arizona (uses the word "Negligence" to reach this legal effect) Laws 1929, Ch. 38, 1929 U. S. Av. R. 403 at 406; Ark. Laws 1941, Act 457, 1941 U. S. Av. R. 341, 347; Idaho Laws 1931, Ch. 100, 1931 U. S. Av. R. 335; and Pa. Laws 1933, Act 224, 1933 U. S. Av. R. 476 at 484. See Kadylak v. O'Brien, 1941 U. S. Av. R. 9 (U. S. D. C. W. D. Pa. 1941)—not officially reported, applying the Pennsylvania statute.

<sup>114</sup> Arizona, Delaware, Idaho, Indiana, Maryland, Michigan, Minnesota, Missouri, Montana, Nevada, New Jersey, North Carolina, North Dakota, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont and Wisconsin—citations to all of these statutes are given in the table on page 129 of 1944 U. S. Av. R.

<sup>115</sup> GA. CODE (1935) §N-105, 1933 U. S. Av. R. 422; MD. CODE ANN. (1939) Art. 1A, §5, Laws 1937, Ch. 528, 1937 U. S. Av. R. 631. See Birkhead v. Simmon, 171 Md. 178, 189 A. 265 (1936) holding the Maryland statute inapplicable to airports.

<sup>116</sup> P. L. 122, Laws 1929, Mo. REV. STATS. 1929, §13905-13915 (Aug. 27, 1929).

<sup>117</sup> Colo. Laws 1937, Ch. 81.

<sup>118</sup> P. L. 99, Laws 1933, GA. CODE 1933, §11-101-11-110 (1933).

<sup>119</sup> Delaware, Indiana, Michigan, Minnesota, Nevada, New Jersey, North Carolina, North Dakota, Rhode Island, South Carolina, South Dakota, Tennessee, Vermont, and Wisconsin. See 1944 U. S. Av. R. 129 for table giving citations to all statutes.

<sup>120</sup> 11 UNIF. LAWS ANN. (1938) §6, p. 163; 1928 U. S. Av. R. 472-476.

<sup>121</sup> Arizona, Arkansas, Delaware, Georgia, Idaho, Indiana, Maryland, Michigan, Minnesota, Missouri, Nevada, New Jersey, North Carolina, North Dakota, Rhode Island, South Carolina, South Dakota, Tennessee, Vermont and Wisconsin. Full citations to each state statute are given in the table on page 129 of 1944 U. S. Av. R.

<sup>122</sup> Colorado, Delaware, Indiana, Michigan, Minnesota, Montana, Nevada, New Jersey, North Carolina, North Dakota, Rhode Island, South Carolina, South Dakota, Tennessee, Vermont, Wisconsin, Wyoming. See 1944 U. S. Av. R. 129 for tables giving citations to all statutes.

of the Uniform State Law for Aeronautics of 1922. This provides that the landing of an aircraft on the lands of another, without his consent, is unlawful unless it is a "forced landing"; and in the case of a "forced landing," the owner of the aircraft is absolutely liable. Six states make unauthorized landing of an aircraft on the land of another unlawful except in case of a "forced landing."<sup>123</sup> Of these six states, Arizona, Idaho and Pennsylvania provide that liability for the damage caused by such landings shall be determined by the rules of torts on land, Maryland makes the aircraft owner *prima facie* liable unless he proves the injury was not caused by his negligence or by the negligence of someone acting for him, and Arizona and Missouri do not specify what legal rules are applicable.

Other provisions of this Uniform Law have already proved to be unsound,<sup>124</sup> and a general rewriting of this Uniform Law to bring it up to date was undertaken by the American Bar Association, the Conference of Commissioners on Uniform State Laws, and the American Law Institute through a joint committee.<sup>125</sup> A series of hearings and meetings were held in 1937 and a tentative draft of a "Uniform Aeronautical Code" was completed.<sup>126</sup> In July, 1938, the National Conference of Commissioners on Uniform State Laws approved "The Uniform Aviation Liability Act," but gave its Executive Committee authority to withhold promulgation of the Act if anything came to its attention which warranted such action. The American Bar Association and the American Law Institute had previously withdrawn from the participation in the work of the joint committee.<sup>127</sup> This new proposed Uniform Act imposes a rule of absolute liability "regardless of negligence" for damage by aircraft to persons and limits the amount which can be recovered. After the adoption of the Civil Aeronautics Act of 1938, the Executive Committee of the Commissioners voted to withhold the promulgation of their new Act, acting under authority conferred by the Conference, until the newly created Civil Aeronautics Authority could study the Act and submit recommendations on its provisions.<sup>128</sup>

The Civil Aeronautics Authority assigned a member of its legal staff to make a study of proposed aviation liability legislation. When the Reorganization Order reorganized the Civil Aeronautics Authority, the study went along with the functions of the new Civil Aeronautics Board. This study was completed in 1941,<sup>129</sup> but the war and its attendant emergencies have caused the Civil Aeronautics Board to delay action upon the recommendations made therein. These recommendations call for a Federal act to cover most aviation tort liabilities. Completion of this

<sup>123</sup> Arizona, Arkansas, Idaho, Maryland and Pennsylvania.

<sup>124</sup> See RHYNE, *op. cit. supra* note 104, at 109-113, 154-157.

<sup>125</sup> See *Report of the Standing Committee on Aeronautical Law* (1937) 66 A. B. A. R. 221.

<sup>126</sup> For the full texts of the three acts comprising this code: i.e., "Uniform Aviation Liability Act," "Uniform Law of Airflight," and "Uniform Air Jurisdiction Act," see HOTCHKISS, *TREATISE ON AVIATION LAW* (1938) pp. 459-499.

<sup>127</sup> See *Report of the Standing Committee on Aeronautical Law* (1942) 67 A. B. A. R. 186.

<sup>128</sup> *Ibid.*

<sup>129</sup> See SWEENEY, *REPORT TO THE CIVIL AERONAUTICS BOARD OF A STUDY OF PROPOSED AVIATION LIABILITY LEGISLATION* (1941).

study and recommendations on legislation for aviation accident liabilities is high on the C. A. B.'s post-war agenda.

The above brief review certainly indicates that the Uniform Act of 1922 has not brought uniformity into the aircraft liability field, and it further demonstrates the weakness in any plan calling for state action. All the states will not adopt any "uniform" act which is proposed to replace the 1922 Act, so Federal legislation is essential if real uniformity is to be achieved.

A Federal Bill was introduced in 1943 to be known as the "Air Carriers Liability Act of 1943" which would have brought partial uniformity into the aviation tort liability field by providing Federal jurisdiction over all claims for bodily injuries or death in interstate, overseas, or foreign air commerce.<sup>130</sup> A similar Bill is now pending in Congress.<sup>131</sup>

### (E) *Workmen's Compensation*

The liability of companies engaged in the aviation business, whether in the manufacturing of planes or the operation thereof, for damages for injury or death of employees has been subject only to legislation by the states. The Federal Government has no statute defining the liabilities of air carriers engaged in interstate commerce for the injury or death of their employees. In most of the states at the present time, there is in effect various workmen's compensation laws, most of which while containing no specific reference to aviation, are broadly enough drafted so that they have been held applicable to pilots, mechanics and others engaged in aviation.<sup>132</sup>

It has occasionally been urged that aviation is so inherently dangerous that it is without the scope of the Workmen's Compensation Statutes. This argument has been rejected, however, and it has been held that such a statute is applicable where death results from an airplane accident.<sup>133</sup>

The question of whether the injury was sustained while the employee was acting in the usual course of his employment is not, of course, peculiar to aviation business. It has been decided that a mechanic whose duty it was to taxi planes in and out of the hangar was killed "in the course of his employment" where the accident was due to an impromptu flight.<sup>134</sup> So also was a theater manager held to be engaged "in the course of his employment" where he made the flight in question for advertising purposes and with the consent of his employer.<sup>135</sup> However, where a

<sup>130</sup> H. R. 1012, 78th Cong., 1st Sess., Sec. 58. See discussion of this legislation in *Hearings Before the Committee on Interstate and Foreign Commerce on H. R. 1012*, 78th Cong., 1st Sess. (1943) 249-271.

<sup>131</sup> H. R. 532, 79th Cong., 1st Sess. (1945).

<sup>132</sup> See cases cited *infra* notes 133-139; Ross, *The Problem of Workmen's Compensation in Air Transportation* (1935) 6 J. OF AIR L. 1, and 48-69 where the author collects all workmen's compensation laws affecting aviation; Zollman, *Workmen's Compensation Acts and Aircraft Accidents* (1935), *id.* at 70.

<sup>133</sup> *Stites v. Universal Film Mfg. Co.*, 1928 U. S. Av. R. 312, 2 Cal. Acc. Comm. 653 (1915). See also *Standard Accident Insurance Co. v. Arnold*, 1 S. W. (2d) 434 (Tex. Civ. App. 1927).

<sup>134</sup> *Smith v. Indemnity Commission*, 1937 U. S. Av. R. 129 (Ohio App. 1937).

<sup>135</sup> *Constitution Indemnity Co. v. Skydles*, 47 F. (2d) 441 (C. C. A. 5th 1931).

pilot was flying in violation of regulations at the time of the accident, he was held to have acted outside the scope of his employment and compensation was denied.<sup>136</sup>

That Workmen's Compensation Acts of the various states encompass aviation as a business admits of little doubt so long as the "employment" is restricted within the boundaries of the particular state. That air transportation is primarily long-distance, interstate transportation is a fact reiterated many times in this article. Consequently, it is of the utmost importance to determine whether a particular state's Workmen's Compensation Act applies to injuries which occur without the state. In some states the compensation act expressly provides for such a situation. Other states, such as New York, have compensation statutes expressly prohibiting recovery under New York law when the employee is permanently employed outside of the state.<sup>137</sup> However, an aerial photographer who traveled all over the United States but who was hired in New York, from which state he received his instructions, supplies, and pay was held by the New York court to have been "employed in New York" and the New York Workmen's Compensation Act was held applicable, although the accident in which he was killed occurred in California.<sup>138</sup> Similarly, in an action for damages for the wrongful death of plaintiff's intestate whose contract of employment was entered into under the laws of the State of Michigan and who, in the course of his employment, was killed in the crash of an airplane in Illinois, full faith and credit was extended to the laws of Michigan under which plaintiff, by her election to accept an award of compensation under the Workmen's Compensation Act of that state, divested herself of the right to maintain an action for wrongful death in Illinois.<sup>139</sup> While the number of cases in which the extra-territorial effect of Workmen's Compensation statutes has been in issue has been few, enough have been decided to indicate that the tendency is to apply such statutes extra-territorially.

There is no reason, however, why the Federal government could not assert jurisdiction to eliminate the jurisdictional questions which constantly arise in this field.<sup>139a</sup>

#### (F) *Ownership of Air Space*

Some states have assumed jurisdiction by legislation over ownership of air space and lawfulness of flight. Twenty-three states<sup>140</sup> have adopted the provisions of the Uniform Aeronautics Act of 1921<sup>141</sup> which states:

<sup>136</sup> *Re Insurance Corp.*, 63 F. (2d) 36 (C. C. A. 5th 1933). See also *Datin v. Valc*, 1931 U. S. Av. R. 175 (Pa., not officially reported).

<sup>137</sup> *Baum v. New York Air Terminals*, 230 App. Div. 531, 245 N. Y. S. 357 (1930).

<sup>138</sup> *Alexander v. Movieto-News, Inc.*, 273 N. Y. 511, 6 N. E. (2d) 604 (1937).

<sup>139</sup> *Biddy, Admx. v. Blue Bird Air Service*, 374 Ill. 506, 30 N. E. (2d) 14 (1940).

<sup>139a</sup> See *Hearings, supra* note 130, at 240-249, discussing a proposed amendment to the Civil Aeronautics Act of 1938 which would authorize the Civil Aeronautics Board to take appropriate action to end present conflicts over which state law applies to air carrier employee injuries. See Pillsbury, *Application of Federal Compensation Acts to Aviation* (1933) 4 *AIR L. REV.* 38.

<sup>140</sup> Arizona, Arkansas, Delaware, Georgia, Idaho, Indiana, Maryland, Michigan, Minnesota, Missouri, Montana, Nebraska, New Jersey, North Carolina, North Dakota, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, and Wisconsin; Hawaii has also adopted the Uniform Act.

<sup>141</sup> 11 UNIF. LAWS ANN. 160 (1938).

"Sec. 3. *Ownership of Space.* The ownership of the space above the lands and waters of this state is declared to be vested in the several owners of the surface beneath, subject to the right of flight described in Section 4.

"Sec. 4. *Lawfulness of Flight.* Flight in aircraft over the lands and waters of this state is lawful unless at such a low altitude as to interfere with the then existing use to which the land or water or the space over the land or water is put by the owner, or unless so conducted as to be eminently dangerous to persons or property lawfully on the land or water beneath."

In Massachusetts<sup>142</sup> and Wyoming<sup>143</sup> statutory provisions substantially like the 1921 Uniform Act, but in different language, have been adopted, but in the other states no legislation on ownership of air space exists.

This Uniform Law was approved in 1921 with the endorsement of the American Bar Association being given in 1922.<sup>145</sup> The American Bar Association's Committee on Aeronautical Law soon found fault with the "ownership theory contained in the above provisions of the 1921 Uniform Law, and in 1930 the Association authorized the committee to draft a new Uniform State Code. In 1931, the committee submitted a draft of a proposed Uniform Regulatory Act, but because of an intense conflict of opinion over the ownership of air space problem, the Association's approval of this proposed act was not requested.<sup>146</sup>

The Bar Association Committee's draft was submitted to the National Conference of Commissioners on Uniform State Laws for study. The Commissioners on Uniform State Laws had proposed that a Uniform Aeronautical Code for adoption by the states should be promulgated to cover a "Uniform Aviation Liability Act," "Uniform Law of Air Flight," and a "Uniform Air Jurisdiction Act." Of this proposed new legislation, the section on air space ownership came in for the most vigorous criticism<sup>147</sup> because it was leaving out the "ownership" idea as to air space which had been carried forward from the *ad coelum* maxim of the common law into the 1921 Uniform Law which it was intended to replace.

While this conflict was raging, the American Law Institute in 1934 adopted a final draft of its *Restatement of the Law of Torts*, which in Section 194 carries forward the ancient and discredited absolute ownership of air space concept which originated in the *ad coelum* maxim.<sup>148</sup>

In 1935, the American Bar Association and the National Conference of Commissioners of Uniform State Laws each at its annual meeting, approved a "Uniform State Regulatory Act" containing proposed new language to replace the 1921 Uniform Act and to eliminate the air space ownership idea.<sup>149</sup> This "Uniform State

<sup>142</sup> Mass. Laws 1939, Ch. 393, Sec. 3. A commission to fix minimum altitudes for flight is provided for.

<sup>143</sup> WYO. REV. STAT. (1931) §4-105.

<sup>145</sup> 49 A. B. A. R. 97, 413 (1922).

<sup>146</sup> 56 A. B. A. R. 69, 317 (1931).

<sup>147</sup> See Hayden, *Objections to New Uniform Aeronautical Code* (1932) 18 A. B. A. J. 121; Hayden, *Airspace Property Rights Under the New Aeronautical Code* (1933) 4 AIR L. REV. 31.

<sup>148</sup> See Wherry and Condon, *Aerial Trespass Under the Restatement of Torts* (1935) 6 AIR L. REV. 113.

<sup>149</sup> 60 A. B. A. R. 119 (1935); see Hayden, *New Deal in Airspace Rights* (1939) 10 J. OF AIR L. & C. 158; Godehn, Brophy, Butler and Hale, *Proposed Law of Airflight* (1937-38) 8 J. OF AIR L. 505, 9 *id.* at 154 *et seq.*

Regulatory Act" and the "Uniform Law of Air Flight" of the proposed new "Uniform Aeronautical Code" are identical. The American Bar Association, in 1941, however, voted to suspend further recommendation of enactment into law of this "Uniform State Regulatory Act," with the idea that uniformity in the aviation field might best be obtained through Federal legislation.<sup>150</sup>

The Joint Legislative Drafting Committee of the Council of State Governments and the United States Department of Justice are now working on a proposed "Harmless Flight of Aircraft Act" which provides "Flight in aircraft over lands and waters of this state shall not give rise to a cause of action at law or in equity based upon a trespass, unless damage other than nominal damage is alleged and proved." This proposed Act if approved and sponsored for adoption by state legislatures will do much to further the cause of civil aviation by eliminating much of the trouble arising out of the antiquated provisions of the 1921 Uniform State Law for Aeronautics.

### (G) *Taxation*

State and local taxes on commercial air lines are almost exclusively of the following types:<sup>151</sup> (1) Real property taxes; (2) personal property taxes; (3) net income taxes; (4) capital stock taxes; (5) gross earning taxes; (6) payroll taxes; (7) gasoline taxes; (8) aircraft registration fees; (9) pilot license fees.

The air lines are subject to real property taxes in all states where they own such property.<sup>152</sup> However, they generally lease rather than own their hangars and traffic solicitation offices and operate from municipally owned fields, with the result that their direct payments of this type of tax are small in volume.

Personal property taxes are payable on at least the tangible personalty, such as planes, office equipment, spare motors and fuel, in all states except: (1) Delaware, New York and Pennsylvania, where all personal property is tax free, and (2) Idaho, Maryland, Massachusetts, Michigan, and New Hampshire, where planes are exempt but some or most other tangible personalty is taxable. However, tangible personal property, like other property, is taxable only where it is held to have its tax situs, and few local assessors have asserted jurisdiction over the planes of the commercial carriers.<sup>153</sup>

The tax situs of planes is subject to considerable question. There are at least three conflicting theories on this subject. Some believe that planes operating in more than one state are taxable only at the corporation's domicile; since most of the airlines are domiciled in one of the states which exempts planes, this is about the equivalent of holding that the planes of the interstate carriers are not taxable. Others believe that planes are taxable only at the head office of the airline, the "commercial

<sup>150</sup> 66 A. B. A. R. 148, 221 (1941). For an extensive consideration of this subject and a collection of all the court decisions see RHYNE, *op. cit. supra* note 104, at 82-163.

<sup>151</sup> See C. A. B., MULTIPLE TAXATION OF AIR COMMERCE (a report to Congress), H. Doc. No. 141, 79th Cong., 1st Sess. (1945) 14 *et seq.*; Thompson, *State and Local Taxation Affecting Air Transportation* (1933) 4 J. OF AIR L. 497.

<sup>152</sup> MULTIPLE TAXATION OF AIR COMMERCE, *supra* note 150, at 17 *et seq.*

<sup>153</sup> See *Northwest Airlines v. Minnesota*, *infra* note 155.

domicile." This theory exempts the planes of several large companies whose head offices are in New York and Pennsylvania, two of the states which tax no personal property. A third theory holds that a state may tax as property a fractional part of the fleet of any airline using a port within the state, the fraction being computed as the ratio of route miles in the state to total route miles or in some other fashion reasonably designed to divide the fleet fairly among the states of operation.

The last theory of tax situs is the one which is likely to result in the most complete taxation of air line property. It is the theory now used in taxing railroad property. Thus far, only eight states have laws providing for this type of taxation of air line property. These states are: Kentucky, Nevada, North Dakota, Oregon, Utah, Washington, West Virginia and Wyoming. In these eight states, the property, both real and personal, is assessed by the state tax department rather than by local assessors, although most of the taxes collected on the assessment go to local governments.

Corporations operating airlines are subject to net income tax in thirty states and the District of Columbia. Most of the remaining eighteen states do not have corporation net income taxes on any corporation; however, three states—New York, Oregon, and West Virginia—tax some corporations on this base but not airlines. There has been some question, however, whether a state could tax the net income of an airline which engaged in no intrastate commerce, with the result that there has been less taxation on this base than might be expected from the above figures. Furthermore, several of the most important air fields in the country are in states which have no corporation net income taxes, such as Florida, Illinois, Michigan, New Jersey, Ohio, Texas, and Washington.

Capital stock taxes are just about as widespread as corporation net income taxes. There is also the same constitutional question concerning an airline which engages in no intrastate commerce. For this reason, and for the further reason that capital stock taxes are usually moderate in rate, the states derive very little from this levy on airlines.

Gross earnings taxes are applicable to airlines in only eight states—Arizona, Indiana, New Mexico, New York, Pennsylvania, Tennessee, Washington, and West Virginia. It has been assumed by all of these states that they could not tax receipts from interstate commerce, and only a few of them, notably New York and Pennsylvania, have enough intrastate commerce to derive appreciable revenues from this source.

The airlines are subject to state unemployment compensation taxes on the same basis as other employers of the requisite number of persons. Aside from the fact that this tax accounts for the largest segment of the airlines' state and local tax bills, there is nothing peculiar about its application to these carriers.

Twenty-one states impose some tax on gasoline used in aircraft.<sup>154</sup> In just over

<sup>154</sup> See MOTOR FUEL TAXES AS APPLIED TO GASOLINE CONSUMED BY AIRPLANES—JANUARY 1, 1945—EXEMPTIONS—REFUNDS—DISPOSITION (Air Transport Association 1945).

half of these, the tax is the regular state motor fuel tax that is applicable to gasoline used on the highways; in the others, the tax is imposed at a lower rate. Kentucky, while taxing aviation fuel used by planes operating locally, exempts fuel used in scheduled flights by planes operating in interstate commerce. Virginia refunds the tax on fuel which is purchased in the state, but is still in the tank when the plane leaves the state. In the other nineteen states, the tax is collected on all fuel purchased or withdrawn from storage in the state, whether used in the state or beyond its boundaries. There is adequate support for this practice in Supreme Court decisions.<sup>154\*</sup>

Aircraft registration fees are generally purely nominal fees, from which planes licensed by the Civil Aeronautics Administration, or used in interstate commerce, or owned by non-residents are often exempt. Connecticut, Idaho, and Michigan are the only states with levies higher than \$10 a plane (in the latter two states, the registration charge is in lieu of property taxes), and apparently none of the airlines under the jurisdiction of the Civil Aeronautics Board pays fees in any of these three states.

The pilot license fees are usually collectible only from persons not licensed by the Civil Aeronautics Administration and therefore produce little revenue in the aggregate and virtually none from the interstate carriers.

In the only aviation tax case of national import, the Supreme Court of the United States held that Minnesota could tax all of the planes of Northwest Airlines where that airline used this state as its "home port."<sup>155</sup> Northwest is a corporation chartered in Minnesota with its principal offices and overhauling base located in St. Paul. It operates interstate airlines, carrying persons, property and mail over scheduled routes fixed by the Civil Aeronautics Board extending from Chicago to the west coast. Fourteen per cent of the air miles and sixteen per cent of the plane miles were flown within the borders of Minnesota. The planes are registered with the Administrator and St. Paul is listed as their "home port." Except when being overhauled, they were used continuously and interchangeably over the entire route. For the year 1939, Minnesota assessed and taxed all planes of Northwest at their full value.

The opinion of Mr. Justice Frankfurter, in which three other Justices concurred, based the decision upon the rule that the domicile of the owner of tangible personal property has jurisdiction to tax the property so long as it has not acquired a permanent situs in another state. Mr. Justice Jackson's concurring opinion rests upon the analogy between airplanes and vessels and selected as the most practical rule that formerly applied to vessels, making them taxable only at their home port. Mr. Chief Justice Stone, who wrote the dissenting opinion, in which three other Justices joined, was of the opinion that on the facts a proportion of the planes had acquired a situs beyond the jurisdiction for tax purposes, being permanently within the jurisdiction of the other states through which the routes passed, and thus a tax

<sup>154\*</sup> *Eastern Air Transport, Inc. v. South Carolina Tax Com.*, 285 U. S. 147 (1932). And cf. *American Airways v. Grosjean*, 3 F. Supp. 995 (E. D. La. 1933).

<sup>155</sup> *Northwest Airlines v. Minnesota*, 322 U. S. 292 (1944).



on this proportion would be an undue burden on interstate commerce inasmuch as it would subject that portion to multiple taxation merely because it was used in interstate commerce.<sup>156</sup>

(H) *Other State Jurisdiction*

In addition to aviation subjects already considered above, the states have asserted jurisdiction in a number of other aviation fields. The twenty-three states adopting the Uniform State Law for Aeronautics have also enacted the sections of that law giving the state jurisdiction over crimes committed<sup>158</sup> or contracts made<sup>159</sup> while in flight over the state. This Act as adopted by these states also makes dangerous flying<sup>160</sup> and hunting<sup>161</sup> from aircraft a misdemeanor. Some states have special insurance laws for aviation,<sup>162</sup> and miscellaneous laws on various crimes committed in or by those operating aircraft, aviation education in public schools, transportation of liquor and a wide variety of other laws which are specifically enacted for or are made specifically applicable to civil aviation.<sup>163</sup>

III. LOCAL JURISDICTION

(A) *Airport Acquisition*

While the Federal government has exercised the predominant role, the part played by municipalities in the development of civil aviation certainly ranks next in importance. It is the cities who have worked with the Federal government in the development of airports.<sup>164</sup> Without airports, there could be no aviation so the part played by cities is indeed an important one. The state governments, as such, have expended only 2 per cent of the money spent on the airports which have been developed up to the present time, as states have been content to adopt legislation authorizing their cities to finance airports out of city funds.<sup>165</sup>

Nearly all cities have been authorized by state statutes or charter provisions to acquire and operate airports.<sup>166</sup> Cities have in many instances also been given the jurisdiction to acquire airports outside their corporate limits,<sup>167</sup> to operate airports

<sup>156</sup> The decision is discussed elsewhere in this symposium. Welch, *The Taxation of Air Carriers*, *infra*, p. 584.

<sup>158</sup> Sec. 7 of the Uniform Act, 11 UNIF. LAWS ANN. (1938) 164.

<sup>159</sup> Sec. 8, *ibid.*

<sup>160</sup> Sec. 9, *ibid.*

<sup>161</sup> Sec. 10, *id.* at 165.

<sup>162</sup> These insurance laws are all cited in the comprehensive digest of state aviation legislation in 1944 U. S. Av. R., pp. 131-174.

<sup>163</sup> For reference to all of these state statutes, see 1944 U. S. Av. R.

<sup>164</sup> NAT'L AERONAUTIC ASS'N, JOINT AIRPORT USERS CONFERENCE PROCEEDINGS (1944) 136.

<sup>165</sup> *Hearings Before Subcommittee of the Committee on Commerce (Senate) on S. 2 and S. 34*, 79th Cong., 1st Sess. (March 13-23, 1945) 153.

<sup>166</sup> RHYNE, *op. cit. supra* note 104, at 17-45.

<sup>167</sup> *State ex rel. Walla Walla v. Clausen*, 157 Wash. 457, 289 Pac. 61 (1930); *City of Spokane v. Williams*, 157 Wash. 120, 288 Pac. 258 (1930); *McLaughlin v. City of Chattanooga*, 177 S. W. (2d) 823 (Tenn. 1944), where the land which Chattanooga acquired was located in the State of Georgia; *Fishel v. City and County of Denver*, 106 Colo. 576, 108 P. (2d) 236 (1940); *Howard v. City of Atlanta*, 190 Ga. 730, 10 S. E. (2d) 193 (1940); *In the Matter of Petition of City of Detroit*, 14 N. W. (2d) 140 (Mich. 1944).

jointly with other cities,<sup>168</sup> and to create special airport authorities to serve entire metropolitan areas.<sup>169</sup>

### (B) *Regulations Governing Use of Airports*

Having acquired airports, cities must adopt local safety regulations to supplement the Federal Air Traffic Rules,<sup>170</sup> and any state air traffic regulations which may exist, if local conditions make this desirable. There can be little doubt of the jurisdiction of a county or city which owns an airport to prescribe necessary local safety regulations governing landing, taking off, taxiing, parking, flight restrictions, lighting, fire prevention, starting of engines of aircraft, and fees for use of airport facilities.<sup>171</sup> Such local regulations are valid if they do not conflict with Federal or state regulations on the same subject,<sup>172</sup> and the Federal and state governments have issued only general rather than local rules up to the present time.

A city may deny use of its publicly owned airport to a pilot who has violated local regulations for use of the airport<sup>173</sup> and a concession operator on the airport may refuse to sell gasoline to this pilot if he lands on the airport in spite of the city's order prohibiting him the use of the field.<sup>174</sup> A city may regulate solicitation of passengers by taxicabs at its airport and may require the payment of a fee for the privilege of making such solicitation.<sup>175</sup> A city may regulate the conduct of those using an airport owned by it even though the airport is located outside of its corporate limits.<sup>176</sup>

### (C) *Low Flights Over Cities*

Many cities have ordinances prohibiting low flights over their corporate limits.<sup>177</sup> These ordinances have not yet been tested in the courts on conflict with Federal and state regulations, but the courts may well consider these regulations as

<sup>168</sup> *Ragsdale v. Hargraves*, 198 Ark. 614, 129 S. W. (2d) 967 (1939); see Jarz, *Intermunicipal Cooperation in Establishing, Maintaining and Operating Airports* (1941) 12 J. OF AIR L. & COMM. 301.

<sup>169</sup> *Erickson v. King*, 218 Minn. 98, 15 N. W. (2d) 201 (1944); *Miles v. Lee*, 284 Ky. 39, 143 S. W. (2d) 843 (1940); *People v. Bartholf*, 388 Ill. 445, 58 N. E. (2d) 172 (1944) and the case of *People ex rel. Curren v. Wood*, — Ill. —, 62 N. E. (2d) 809, 10 M. L. J. 86 (Sept. 19, 1945), which upholds a later Illinois statute; *Monterey Peninsula Airport District v. Mason*, 19 Cal. (2d) 446, 121 P. (2d) 727 (1942).

<sup>170</sup> See Federal Air Traffic Rules, 235 C. C. H. ¶9060.0-9060.94, 14 CODE FED. REGS. (CUM. SUPP.) §60.

<sup>171</sup> In *City of Spokane v. Williams*, 157 Wash. 120, 288 P. 258 (1930) the Court said:

"Patrons of the field, whether they be owners of property abutting upon it or not, have no right in making use of the field to enter it with their ships except at places and in the manner provided by the rules and regulations of the City and its managers and agents in control of the field, which regulations may be changed from time to time as necessity and safety may require."

<sup>172</sup> *Rinehart v. Woodward Flying Service*, 122 W. Va. 392, 9 S. E. (2d) 521 (1940).

<sup>173</sup> *Green v. Messer*, 243 Ala. 405, 10 S. (2d) 157 (1942).

<sup>174</sup> *Messer v. Southern Airways Sales Co.*, 17 So. (2d) 679 (Ala. 1944). Here the Court said in part: "Patrons of a municipal airport have no right to make use of the field except in accordance with reasonable rules and regulations adopted by the City for its operation."

<sup>175</sup> *Weinstein v. McKenzie*, 106 N. Y. L. J. 1458 (N. Y. Sup. Ct., N. Y. Co. Nov. 12, 1941).

<sup>176</sup> *Silverman v. City of Chattanooga*, 165 Tenn. 642, 57 S. W. (2d) 552 (1933). See *Elbrite v. Crawford*, 215 Cal. 724, 12 P. (2d) 937 (1932).

<sup>177</sup> *McIntire and Rhyne, Airports and Airplanes and the Legal Problems They Create for Cities* (1939) (NIMLO Report No. 42).

valid under city police power and supplementary to rather than in conflict with Federal and state regulations.<sup>178</sup> A New York statute fixing heights below which aircraft cannot fly over congested areas has been upheld as a proper exercise of the state's police power and held not to be an interference with interstate commerce.<sup>179</sup> These ordinances generally fix height limits below which it is unlawful to fly aircraft and prohibit the following: acrobatic, dangerous, and unusual flying, landings at other than regularly established airports, operation without lights at night, noise and loudspeaking devices, flights over the central part of the city, flights by student pilots over the city, the dropping of objects from airplanes, and the carrying of explosives.<sup>180</sup>

Some of these city ordinances provide that, if a permit is first obtained, exhibition flights may be made over the city, banners can be carried, and circulars dropped from airplanes.<sup>181</sup> In the only case which has arisen on this type of ordinance, the court held that a city police commissioner could temporarily suspend all permits for the operation over the city of aircraft towing banners.<sup>182</sup> The suspension was made after a plane towing a banner made a forced landing near a congested beach endangering the safety of thousands of people.

#### (D) Zoning to Protect Airport Approaches

Another jurisdiction exercised by municipalities in the aviation field is the adoption of zoning regulations to prevent obstructions in the approaches of public airports.<sup>183</sup> While there has been a Bill introduced in the Congress which gave the Federal government jurisdiction over this subject<sup>184</sup> and the Civil Aeronautics Administration once announced a decision that states should do the zoning,<sup>185</sup> it is now apparently conceded by the Federal and state governments that this is a matter of peculiar local application and local governments should do the zoning. Local industrial, residential, and other districts vary from city to city, as do the physical surroundings of each airport, so each airport is a peculiar problem making state and national zoning impractical without regard to legal considerations. The Federal Bill was rewritten and reintroduced without the zoning provision,<sup>186</sup> and both the Federal government and state governments now sponsor a Model Airport Zoning Act for adoption by state legislatures which authorizes cities to adopt zoning regula-

<sup>178</sup> See *Opinion of Attorney General of Minnesota*, 1941 U. S. Av. R. 191 (Nov. 8, 1944); *Smith v. New England Aircraft Co.*, 269 Mass. 639, 170 N. E. 385 (1930).

<sup>179</sup> *People v. Katz*, 140 Misc. 46, 249 N. Y. S. 719 (N. Y. Sup. Ct. 1931).

<sup>180</sup> See *McINTIRE AND RHYNE*, *op. cit. supra* note 177, at 21-22. In *Silverman v. City of Chattanooga*, *supra* note 176, an ordinance prohibiting low flights was held to be a valid exercise of the City police power.

<sup>181</sup> *McINTIRE AND RHYNE*, *op. cit. supra* note 177, at 22-23.

<sup>182</sup> *S. S. Pike, Inc. v. City of New York*, 169 Misc. 109, 6 N. Y. S. (2d) 957 (1938).

<sup>183</sup> See generally *RHYNE*, *op. cit. supra* note 104, at 164-190.

<sup>184</sup> H. R. 1012, 78th Cong., 1st Sess. (1943); Smylie, *Constitutionality of Federal Airport Zoning Bill* (1943) 12 GEO. WASH. L. REV. 1.

<sup>185</sup> *MacChesney, Model Airport Zoning Act* (1941) 12 J. OF AIR L. & COM. 172, and Letter in same issue at p. 182.

<sup>186</sup> H. R. 3420, 78th Cong., 2d Sess. (1944).

tions to protect airport approaches.<sup>187</sup> Thirty-six states now have adopted the Model Act or some similar legislation on this subject.<sup>188</sup> It has been held that an ordinance zoning the area around a city airport is invalid in the absence of an enabling statute on this specific subject,<sup>189</sup> so adoption of such a statute is highly desirable in most states. In some states cities have such a broad grant of powers that they can zone around airports without such a statute but even in these states the statute will remove all argument as to the existence of this authority.

Airport zoning ordinances generally provide that no structures above specified heights may be erected within specific distances of a specific airport.<sup>190</sup> The heights of permitted structures are allowed to increase on a graduated scale with distance from the field.<sup>191</sup>

In two cases airport zoning ordinances have been approved by dictum where courts were passing on other questions.<sup>192</sup> In the first case an airport zoning ordinance was held invalid because there was no state statute authorizing such a regulation,<sup>193</sup> and in the second case an ordinance prohibiting erection of buildings higher than 5 feet within 100 feet of an airport's boundaries was held to be confiscatory and invalid.<sup>194</sup> It is submitted that the courts should uphold zoning regulations to protect airport approaches as a reasonable exercise of the police power of state and local governments.<sup>195</sup> Such regulations certainly promote and protect the safety, convenience and general welfare of the whole community in which a public airport is located.<sup>196</sup> If the community is without air transportation, it will certainly become a "ghost" town in the near future as such transportation is now essential to commercial progress.<sup>197</sup> Justice Cardozo in 1928, in the infancy of aviation as we know it today, stated in one of his most famous court opinions that:<sup>198</sup>

<sup>187</sup> See SUGGESTED STATE WAR LEGISLATION (1944-1945), prepared by a joint legislative drafting committee of the Council of State Governments and the United States Department of Justice which contains this Model Airport Zoning Act as one of the Acts recommended by Federal and State governments for adoption by state legislatures.

<sup>188</sup> See *supra* note 105.

<sup>189</sup> *Yara Engineering Corp. v. City of Newark*, 40 A. (2d) 559 (N. J. Sup. Ct. 1945); *Rice v. City of Newark*, 40 A. (2d) 561 (N. J. Sup. Ct. 1945).

<sup>190</sup> See RHYNE, *op. cit. supra* note 104, at 174-175.

<sup>191</sup> *Ibid.*

<sup>192</sup> *United States v. 357.25 Acres of Land*, 235 C. C. H. §1883 (U. S. W. D. La. 1944) holding that a verdict of "no dollars" as the value of certain air space rights, sought by the Federal government in condemnation proceedings, was correct since an airport zoning ordinance prohibited erection of structures within the air space in question; *Burnham v. Beverly Airways, Inc.*, 311 Mass. 628, 42 N. E. (2d) 575 (1942) wherein the Court, in holding that adjacent landowners were entitled to an injunction against a private airport's operator, inferred that the Massachusetts Airport Zoning Act should be used to protect airport approaches it said: "It should be remembered, however, that the statute, in 40-A-401 now contains adequate provisions for securing and regulating the approach to public airports."

<sup>193</sup> *United States v. 357.25 Acres of Land*, *supra* note 192.

<sup>194</sup> *Burnham v. Beverly Airways, Inc.*, *ibid.*

<sup>195</sup> The legal authorities which support this idea are collected in RHYNE, *op. cit. supra* note 104, at 164-190.

<sup>196</sup> Hunter, *The Relation of Airport Zoning to Community Planning and Zoning* (1940) C. A. A. Airports Service Release.

<sup>197</sup> Grant, *Constitutionality of Zoning Law Enacted to Protect Airport Approaches* (1942) 13 J. OF AIR L. & COMM. 272.

<sup>198</sup> *Hesse v. Rath*, 249 N. Y. 436, 164 N. E. 342 (1928).

"Aviation is today an established method of transportation. The future, even the near future will make it still more general. The city that is without the foresight to build the ports for the new traffic may soon be left behind in the race of competition. Chalcedon was called the city of the blind because its founders rejected the nobler site of Byzantium lying at their feet. The need for vision of the future in the governance of cities has not lessened with the years. The dweller within the gates, even more than the stranger from afar, will pay the price of blindness."

Where a city expends a large sum of money on a public airport for the benefit of the community as a whole, that public investment can be lost if high structures in the airport's approaches make it unsafe to use the field. The entire community would suffer from the loss of air transportation. Surely the principles of law which the courts have developed to sustain general zoning and planning of cities, to the effect that the individual property owner can be restricted in the use of his land if the restriction is for the benefit of the community as a whole,<sup>199</sup> applies with great force to the zoning of approaches to public airports. If certain areas of a city can be set aside for industrial uses, others for residential uses and still others for other specific uses in the interest of community benefit by making the best available use of a city's area, it certainly seems that the setting aside of an area for airport use is of the same general type of community planning. The community needs full use of its airport so the individuals in the airport approaches give up some uses of their property for the benefit of the community as a whole. The Supreme Court of the United States in the famous *Euclid* case upheld zoning as a police power regulation rather than a taking of property on the community benefit theory, thereby once again recognizing that property rights are relative rather than absolute.<sup>200</sup> These legal principles lead one to conclude that the courts will uphold regulations zoning airport approaches if the specific regulations are reasonable.

<sup>199</sup> Village of Euclid v. Ambler Realty Co., 272 U. S. 365 (1926); 3 McQUILLIN, MUNICIPAL CORPORATIONS (2d ed. 1943) §1027 *et seq.*; BASSETT, ZONING (1940); SMITH, ZONING LAW AND PRACTICE (1937).

<sup>200</sup> Village of Euclid v. Ambler Realty Co., *supra* note 199.