APPROPRIATE AREAS OF STATE ECONOMIC REGULATION

FREDERICK G. HAMLEY*

Prefatory Remarks (by the symposium editor)

Ordinarily, when a controversial issue is discussed in the course of a symposium, this publication endeavors to obtain champions of each side to present their views in its pages. On the question, however, of how to allocate properly the regulatory functions as between the Nation and the States, it is believed that the pro-federal side has been so adequately presented in aviation literature in the past as to warrant omission of a particularized presentation of that point of view in this symposium. What has not been so adequately presented in the past is the pro-state point of view. That view is here presented by Mr. Hamley. Limitations of space have prevented fuller presentation of that view in these pages.

It may be helpful, however, to present in the following paragraphs at least a summary of the points in the pro-federal side of the argument.

Aviation regulation classifies readily into (a) safety regulation and (b) economic regulation. Over safety regulation (i.e., registration and inspection of aircraft, licensing of airmen, air traffic rules, airworthiness, equipment, etc.) there is hardly any controversy. Apparently everyone seems to agree that the federal agency is the one to do the job, with state officials taking a hand perhaps in an enforcement capacity. The remarks of the North Carolina Aeronautics Commission are perhaps indicative of the views of even state officials:

"Without exception every person questioned or appearing before this Commission was of the opinion that the present rules and regulations of the Civil Aeronautics Authority with regard to licensing of planes, pilots, safety requirements, traffic, and airport specifications are adequate and sufficient. In fact, these regulations are so strenuous that at times they become burdensome to people engaged in aeronautic activities, and have been somewhat of a deterrent to aviation. There is a movement on foot by the Civil Aeronautics Authority to simplify, and make less stringent the Civil Aeronautics Authority regulations. We do not believe that it would be wise or necessary for this state to add to the confusion already existing by attempting to supervise or enforce any regulations concerning the licensing of pilots, planes, traffic, or specifications of airports, or landing fields."*

* LL.B., 1932, University of Washington. General Solicitor, National Association of Railroad and Utilities Commissioners. Director of Washington State Department of Public Service, 1941-1943; Special Assistant Attorney General, State of Washington, 1940; Assistant District Counsel, Bureau of Reclamation, Department of the Interior, 1938-1940; Superintendent of Seattle Water Department, 1938; Member of Seattle City Council, 1935-1938. Contributor to legal periodicals.

For a forceful presentation, see Ryan, Economic Regulation of Air Commerce by the States (1945) 31 Va. L. Rev. 479; also, in this symposium, see Tipton, Legislative Program for Aviation, infra p. 564.

"N. C. AERONAUTICS COMM., REPORT (Aug. 1, 1944) 14. The Colorado Public Utilities Commission invited a discussion in 1944 of a draft of "Rules and Regulations Governing Air Carriers" which contained numerous safety provisions for operations in Colorado. See Tipton, supra note 3, at p. 571. The industry's critical reaction may perhaps be exemplified by Braniff Airways' brief, "Suggestions of Braniff Airways, Incorporated, before the Public Utilities Commission of the State of Colorado in the Matter of Rules and Regulations Governing Air Carriers, Case No. 4918." However, Chairman Sherman of that Commission has stated that the draft was meant only to sound out informed views and did not mean that the Commission had taken any position on the proposed rules. (Sept. 1, 1944) 8 American Aviation 43."
And indeed federal certification of all pilots and aircraft flying anywhere in the United States is required by the Civil Aeronautics Board’s regulations, resting upon adequate statutory language and constitutional doctrine. It is in the field of economic regulation that controversy arises. Even here there is probably no great legal controversy as to the constitutional extent of federal power. It will be a rare airline that will so operate within a single state, and without carrying mail, as not even to compete with airlines of an interstate character and thus be outside the doctrine of *Wickard v. Filburn*. So, the real controversy is not whether Congress *can* disable the states from providing economic regulation of intrastate air commerce, but whether it *should* do so. The main points in the argument favoring a hands-off policy on the part of the states can be roughly summarized as follows:

1. Unlike the utility and railroad analogy, there is here no history of state economic regulation.
2. Again, unlike the analogy from those fields, the operational development is not from something local in the beginning and then acquiring national character. Radio presents a closer analogy.
3. Local and national sets of regulations should be avoided so as not to invite legal uncertainties of conflicting jurisdiction and litigation.
4. Diverse regulation of air carriers is harmful, as witness the effect of state regulation of highway carriers. In particular, no airline should be subject to more than one regulatory commission.
5. It is unsound to vest safety regulation in one place (which will be the federal agency) and economic regulation, even partial, elsewhere; they are too interdependent.
6. Aviation transport operates characteristically with a narrow margin of profit; in contrast to early railroad history, there is not the need for local regulation of rates.
7. This narrow margin of profit is peculiarly sensitive to burdensome restrictions, of which multiple regulation is one. With this narrow margin of profit, costs must be kept down, especially in this early stage for the proper development of the industry.
8. Multiple regulation is less flexible in adapting itself to the yet-unknown but sure-to-come new developments, technical and economic. For one commission to adapt itself to fast moving changes is one thing, for 49 it is quite another.
9. At least at present, trunk line operations are the more essential and more profitable and frequently have to “carry” local operating losses; local regulations fostering local operations may impose burdens on the most essential phase of air transport.
10. Federal, and only federal, control over certificates of convenience and necessity can achieve, through encouraging or restricting local operation, particularly in conjunction with mail rate policy, and frequently without actual rate fixing, an integrated plan of relationship between costs, rates, service quality and development. State certification lends itself to fostering a different pattern of interstate air service, varying in seriousness as it affects (1) intrastate operations of interstate lines or (2) intrastate feeders of interstate lines or (3) intrastate lines paralleling or competing with interstate lines. Only as to operations so local as to have none of the above three aspects is state certification appropriate.
11. The above is also true of state exercise of power to prevent service abandonment, to compel extension of service, to require additional local stops, etc.
12. The above is also true of state exercise of power to prevent service abandonment, to compel extension of service, to require additional local stops, etc.
13. State rate regulation of local service of a carrier operating in several states is not feasible; there is the difficulty of marshaling cost facts, for one thing.
14. State regulation of rates of even lines operating wholly within the state but “engaged” in interstate commerce or carrying mails too readily lends itself to burdening that commerce and the mails. At least federal power should be ready to step in at any time.
15. The above is also true as to a purely intrastate line paralleling or competing with an interstate line.
16. Complications arise from multiple prescription of systems of accounts and reports.
17. The trial examiner technique of the federal agency avoids the need of the presence of the parties in Washington. With trial examiners and reports the federal agency has no difficulty in familiarizing itself with local service needs.

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\[14. \text{Code Fed. Regs. (Cum. Supp.) §§60.30, 60.31. Presumably, any flight even "off-the-airways" can "endanger safety in" interstate commerce and thus fall within the statutory definition of "air commerce"; and for any person to operate aircraft "in air commerce" in violation of CAB rules is expressly declared unlawful in the Federal Act.} \]
\[317 U. S. 111 (1942). \]
18. Particularly to be avoided, in state control, is control by existing public service and railroad commissions; they tend to soften the competition and retard development of this new transport competitor.

19. Although adoption of uniform state laws would meet some of the points above made, history shows that uniform proposals are not uniformly adopted nor uniformly interpreted; neither would they be uniformly administered.

INTRODUCTION

Congress, in enacting the Civil Aeronautics Act of 1938, preserved the right of the states to provide economic regulation of intrastate air commerce. But the transcontinental airlines and federal aviation authorities are today urging that this right be withdrawn from the states, and that all regulatory power, both as to local and interstate commerce, be centralized under the Civil Aeronautics Board.

This proposal involves more than a departure from the pattern of aviation legislation which Congress laid down in 1938. It contemplates a complete reversal of the policy which Congress has followed with respect to all other forms of public utility and common carrier regulation. In providing for the regulation of motor carriers, water carriers, freight forwarders, telephone and telegraph companies, electric companies and natural gas companies, Congress has followed a constant and unchanging policy of preserving and strengthening state jurisdiction over matters of local concern. Even with respect to railroad regulation, where federal regulatory authority reaches the farthest, the state commissions exercise primary jurisdiction with respect to intrastate rates, and have exclusive intrastate authority with regard to such matters as service complaints, reparations, schedules, abandonment of service, and railroad grade crossing supervision.

Once it is understood that the plan to disable the states from providing economic regulation of local air commerce involves a fundamental departure from the policy followed by Congress over a long period of time, the full impact and significance of

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2 Hearings before Committee on Interstate and Foreign Commerce on H. R. 1012, 78th Cong., 1st Sess. (1943) Vol. I, pp. 45, 145, 401; Ryan, Economic Regulation of Air Commerce by the States (1945) 31 Va. L. Rev. 479. Mr. Ryan is a member of the Civil Aeronautics Board.

3 All of the federal Acts providing regulation of such carriers and utilities contain explicit provisions guarding the rights of the states. As examples, see the following: Motor carriers: (Motor Carrier Act) 49 Stat. 543 (1935) as amended, 49 U. S. C. (1941) §§302(b), 303(b) (8), 304(a) (4a), 305(f), 306(a) and 316(e); telephone and telegraph companies: (Communications Act of 1934) 48 Stat. 1063 as amended, 47 U. S. C. (1941) §§152(b), 153(c), 222(b) and 410(a) and (b); electric utility companies: (Federal Power Act) 49 Stat. 847, 16 U. S. C. (1941) §§824(a) and (b), 824(f), 824h and 825(a).

4 In the Transportation Act of 1920, 41 Stat. 474, 49 U. S. C. (1941) §117, amending the Interstate Commerce Act, Congress gave the Interstate Commerce Commission authority to remove burdens upon interstate commerce by ordering a change in intrastate railroad rates. §13(4) of Interstate Commerce Act, 49 U. S. C. (1941) §13(4). The federal agency was also given exclusive jurisdiction over the issuance of securities by §203(b), over line extensions and abandonments by §5(2), and over consolidations by §5. The prime purpose which Congress had in view in giving the federal agency these powers, was the rehabilitation of the railroads, following a period of federal operation. Railroad Commission of Wisconsin v. Chicago, B. & Q. R. R., 257 U. S. 563, 584 (1921). (Obviously no parallel situation confronts the airlines.) Even then, the authority given to the Interstate Commerce Commission to order changes in intrastate railroad rates was strictly limited. North Carolina v. United States, 325 U. S. —, 65 S. Ct. 1260 (June 11, 1945).
the proposal is revealed. Prudence dictates that there should not be an abandonment of the historic division of regulatory jurisdiction between federal and state governments, except for most compelling reasons. Those who sponsor such a reversal in the trend of government surely carry the burden of proof. What are the great reasons which compel such a course?

**Coming Importance of Intrastate Air Commerce**

Up to this time air commerce in the United States has been predominantly interstate. Influenced by this fact, there are many who believe that local air commerce will be inconsequential in the future.

Such a conception is singularly short-sighted. The whole experience of the nation in the field of aviation, as in such other expanding industries as automobiles, moving pictures, and communications, argues against adopting arbitrary assumptions as to the ultimate extent and form which this new medium of transportation may take.

The plain fact is that, while railroads and motor carriers began as short-haul carriers and expanded into the long-haul field, air carriers are reversing the process. In the early days of aviation the operating costs, and necessarily the rates, of the pioneering airlines were very high. As a consequence they could compete with surface carriers only on long hauls, where air speed brought a saving in travel time which attracted traffic regardless of rates. But today, with improvements in equipment and operating practices, costs of operation are coming down and with them, air commerce rates. As a result, air carriers are now able to compete with surface carriers on shorter routes even though the time saving on such routes is not as pronounced as on the longer routes. There is every reason to believe that this trend will continue, especially in view of the projected nationwide airport program, the return from the service of thousands of trained pilots and mechanics, and the ever-increasing interest and enthusiasm of the general public.

The community of interest existing between cities within the borders of a single state will afford a fertile field for the expansion of air commerce in the future, just as it has given rise to extensive intrastate operations by surface carriers. Such intrastate air commerce will not be limited to passenger transportation, as the day is fast approaching when the airlines will be carrying a great volume of express and high-grade freight.6

Another great field for the development of intrastate air commerce is the handling of passenger traffic to and from suburban areas to the populous city centers. With the advancements that are being made in all branches of aeronautics, particularly with respect to helicopters, the possibilities and opportunities of developing sub-

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6 See testimony of Colonel Gorrell, late President of Air Transport Association, given before House Committee during consideration of H. R. 1012. *Hearings, supra* note 2, at 116. Chairman L. Welch Pogue of the Civil Aeronautics Board, in his address before the Academy of Political Science in New York City on November 15, 1944, pointed out that today the average per-ton mile rate for air express service is about 71.5 cents. He further stated that he expected to see these rates come down to around 15 cents a ton mile in the decade after the war, and then to press "slowly downward from that point."
urban air transport on an important scale cannot be discounted. The great number of applications which have been already filed for authority to render service of this character, some by well-established bus lines and taxicab companies, lends concrete support to this view.

Viewing all of these potentialities, it is conservative to say that the field of intrastate air commerce can become an immensely important part of a well-rounded national air transportation system. This is not to say that a great network of local air routes will spring up within a period of months. Nor is it likely that air carrier service will, within the next few years, prove practicable for distances of less than 100 or 150 miles. But the fact remains that there is a vast potential, undeveloped field for local air commerce, and that conditions are constantly becoming more favorable for the development of that commerce.

THE PHYSICAL CHARACTERISTICS OF AVIATION DO NOT DEMAND EXCLUSIVE CENTRALIZED REGULATION

Air transportation differs from other forms of transportation in two important particulars—the use of air space and the employment of super-speed. Pointing to these obvious facts, the advocates of exclusive federal regulation assert that, whatever may be the justification for dual federal-state regulation of other forms of transportation, surely here is one form that is not adaptable to such a regulatory system. It is urged that we must have a streamlined, centralized regulatory system, attuned to this new mode of transportation, and unfettered by artificial barriers.

There can be no doubt that the physical aspects of aviation differ so radically from other modes of transportation that regulatory processes relating to the physical operation of airplanes must be adjusted accordingly. Thus, while it may be possible for individual states to prescribe safety standards governing trucks and buses, this would be wholly impracticable in the case of aviation. But what we are here considering is economic regulation—not safety regulation. We are not considering what the regulatory patterns should be with respect to navigation, airworthiness of aircraft, or competency of pilots and mechanics—but what that pattern should be with respect to commercial operating authority, rates, and service.

In an address by Chairman Pogue, entitled, "Scouting Our Air Future," delivered on March 21, 1944, before the Southern Commercial Secretaries Convention in Birmingham, Alabama, he said: "The helicopter is far enough along in its development now to make anyone, who has confidence in our aeronautical engineers (and I certainly have that confidence in abundance) believe that it will be a practical flying machine in a few years. . . ."

Of course it is also contended that there is a direct relationship between economic regulation and safety regulation. To some extent this is true, but it does not follow from this that safety regulation cannot be effective without exclusive power, as well, over economic regulation. Such a contention was made during the hearings on H. R. 1012, supra note 2, and was repeated in the majority report of the committee, but it has never been documented by any tangible proof. In other fields of regulation, exclusive power to regulate rates and service has not been found essential in order to provide adequate safety regulation. For example, the Interstate Commerce Commission provides vigorous safety regulation of interstate buses and trucks, including safety regulation of such dangerous operations as the transportation of explosives, and this has proved wholly adequate and effective although the states have exclusive authority to provide intrastate economic regulation of the same carriers. There is no basis for assuming that the result would be different in the case of air commerce.
Hence all talk of avoiding the asserted burdens imposed upon interstate motor carriers by reason of state length, width, weight, tail light, and similar regulations, is entirely beside the point. These are safety regulations, not economic regulations, and no one is contending that the states should establish individual safety standards for aviation. Whatever the experience with these motor carrier safety regulations may be, it affords no basis for stating that state rate and service regulation of intrastate commerce performed by interstate motor carriers has been unduly burdensome or, that like regulation of interstate air carriers would be unduly burdensome.

Moreover, once it is fully understood that we are considering only state economic regulation, the oft-repeated truism that planes travel fast and may pass over a state in a few minutes or hours, has no significance. If they pass over a state there would be no economic regulation by that state. There would be no state economic regulation unless the same plane stopped at two different places within the same state on the same flight, and performed some purely local transportation between those points. Then state economic regulation would apply to that local transportation and to no other. The fact that such local transportation was performed two, three, or six times as fast as truck or railroad transportation, would be wholly immaterial.

Similarly, while flight through the air involves no natural barriers or boundaries, when the airplane alights, it comes to rest in some particular state. If it stops twice in the same state, during the course of a single flight, and performs some commerce between these two points, there is no more difficulty in identifying that commerce as intrastate than in the case of motor carriers or railroads.

**STATE REGULATION OF INTRASTATE AIR COMMERCE WOULD NOT JEOPARDIZE THE DEVELOPMENT OF A NATIONAL AIR TRANSPORTATION SYSTEM**

Most interstate airlines perform some intrastate air commerce. Relying upon this fact, those who oppose dual federal-state air commerce regulation assert that the federal regulatory agency must therefore necessarily have exclusive power to allocate intrastate operating rights as between carriers. Without such jurisdiction, it is asserted, there would be no assurance that interstate air carriers would be able to obtain local operating rights to complement their interstate operations, and no assurance that destructive competition from other local air carriers would be avoided. Similarly, it is contended that the federal agency must have sole authority to fix intrastate rates and fares and to stipulate the conditions of service in performing intrastate commerce, if undue burdens upon the interstate carriers are to be avoided. Only with such over-all federal control, it is argued, can the stability and growth of the national air transportation system be assured.

No one would question that interstate carriers should be able to obtain such intrastate operating rights as may be necessary to assure the stability of long-haul operations. As a corollary, such intrastate operating rights held by interstate carriers must necessarily be protected from destructive competition and must be so
regulated, as to rates and service, that the enjoyment thereof will not turn out to be a burden. But it can be seriously questioned whether it is necessary completely to overturn established principles of regulation in order to accomplish these objectives.

At the outset, it may be doubted that intrastate business now is, or ever will become, as vital to the economic welfare of the long-haul air lines as this argument for exclusive federal regulation implies. With relatively little intrastate business of their own up to the present, the airlines seem to have prospered. In an address at Oklahoma City in 1943, Commissioner Harllee Branch said: "The majority of our domestic carriers are doing so well financially on their commercial services that they no longer have any need for a mail pay rate which includes any subsidy." If the interstate airlines are today doing so well with almost no intrastate business, one may legitimately wonder why heaven and earth must be turned to secure that business for them in the future.

As a matter of fact, studies made by the Civil Aeronautics Board indicate that on the little intrastate business now performed by the large airlines, costs per passenger mile are more than the average revenue per passenger mile on most intrastate traffic. From this study, the Board concluded that: "In general, route segments which must rely chiefly on local, intrastate traffic require financial support from those route segments carrying a substantial proportion of long-distance or interstate traffic." Intrastate business becomes an advantage to the interstate carrier only when space on regularly scheduled interstate planes cannot be sold to interstate passengers. Then some additional revenue, without substantially increasing operating expenses, can be obtained by selling this space to intrastate passengers. In cases where such revenue is vital, the long-haul operator should certainly be able to obtain the necessary intrastate operating rights. But it is perfectly plain that such intrastate service, performed incidental to an interstate flight and consisting only of unsold interstate space, would in many cases inadequately meet the legitimate public need for local air service. It would not at all meet the probably far greater demand for local service on routes not paralleling the interstate route. It is thus clear that intrastate air commerce will remain primarily a local problem, with only incidental effects upon long-haul carriers. Being fundamentally a local problem, it should remain in the regulatory hands of the local commissions.

* In 1940, less than 16 per cent of the air carriers' passengers moved in intrastate commerce, and they accounted for only 8 per cent of the passenger miles reported by the airlines for that year. Ryan, op. cit. supra note 2, at 509.
* Securities and Exchange Commission records show that in 1943, 13 airlines reporting to that Commission, made a net profit before income taxes, of $29,224,000, or a net of 14.8% as per cent of sales. Net profit after income tax was shown as $15,322,000, or 7.8% net profit as a per cent of sales. As a per cent of net worth, the 1943 net profit for these 13 carriers, after income taxes, was 14.5%. (June 1, 1945) 9 AMERICAN AVIATION 58.
* A study of United Air Lines' Route 11, from Seattle, Washington to San Diego, California, selected for study because it seemed to promise the best opportunity for the intrastate traffic to make a favorable showing, disclosed that the only intrastate segment which did not register an operating deficit was the San Francisco-Los Angeles through service. Ryan, op. cit. supra note 2, at 513-516.
To the extent that the vital requirements of long-haul carriers require that they have intrastate operating rights, state regulatory agencies would be perfectly aware of that need and just as anxious and capable of meeting that need as would the federal agency. It has been so with interstate bus and truck lines. Those lines have grown and prospered under dual regulation even though they are a great deal more dependent upon short-haul, intrastate traffic than the interstate air lines are ever likely to be.\(^{11}\)

What is said above applies to local regulation of intrastate rates and service as well as local regulation of operating rights. Unless we are to assume that state regulatory authorities are wholly incompetent or that they would be completely oblivious to the real needs of the long-haul carriers, there is no basis for contending that state regulation of intrastate rates and service will place undue burdens upon the interstate carriers. Where the only intrastate service is performed by an interstate line the local rate per mile would normally be the same as the interstate rate per mile, just as it is in the case of interstate bus operations. Some of the large interstate bus lines operate through many states and are subject to state regulation in each. Yet instances of burdensome state regulation are extremely rare, if any can be found, and the interstate bus lines are today in excellent financial condition.

This is also true respecting service regulation. If state authorities were disposed to impose unreasonable schedule and accommodation requirements this would surely show up in connection with dual federal-state regulation of interstate bus lines. If, in actual experience hereafter, any problem of this kind shall arise, it will be an easy matter for Congress to enact remedial legislation when need for it is shown. But certainly it is not necessary, in advance of any showing, to guard against this remote possibility in that fraction of the local air commerce field which may be important to the long haul lines, by an outright prohibition of all state regulation.

**The Work and Cost of Complying with State Regulation Would Not Unduly Burden Interstate Carriers**

The large interstate airlines pass through many states. In most of these states some intrastate business is handled. It is said that state regulation in these states would almost certainly lack uniformity as between the states and be conflicting with federal interstate regulation. It is also argued that, if required to conform to varying and conflicting state regulations, or even uniform state regulations, regarding certificate rights, tariff filings, schedules, security issues, reports, forms of accounts, acquisitions, mergers and consolidations, a tremendous burden of work and expense would be placed upon such airlines.

\(^{11}\)In the recent hearings in *Investigation of Nonscheduled Air Services*, CAB Docket No. 1501, the Air Transport Association, according to the Examiner's Report issued on August 22, 1945, p. 6, contended “that motor carrier operations are basically similar in certain respects to air transportation services, and that therefore the experience in the development and regulation of motor carriers should be of value as a guide to the future development and regulation of air transportation service.” In (June 15, 1945) *American Aviation* 22, the following statement appears: “Air transport finds its closest analogy in intercity bus transport . . . according to Dr. L. C. Sorrell, director of research of the Air Transport Association.”
The charge that state regulation of local air commerce would result in widespread conflicts and confusion, finds no support in the experience of other forms of transportation and public utilities which are subject to dual federal-state regulation. In these other fields there has been surprisingly little difficulty of this kind, simply because state regulatory agencies have recognized the problem and have taken effective steps to meet it. As independent agencies and as members of the National Association of Railroad and Utilities Commissioners they have developed uniform regulations and uniform methods of administration. An outstanding example of this is the development of uniform systems of accounts for various types of utilities. Another example is the liaison which state commissions have established with federal regulatory commissions, by means of Cooperative Agreements, as a result of which federal and state regulatory activity is closely and successfully correlated.

In the case of air commerce this problem can be met in the same way, and it is not necessary to avoid the problem by invalidating all state regulation. The enactment of uniform state legislation relating to the regulation of local air commerce is altogether feasible. State regulatory commissions are desirous of accomplishing this and they have already developed a Uniform State Air Commerce Bill designed to attain a maximum of uniformity and cooperation as between the states, and as between the federal government and the states. General enactment of this Uniform Bill by the states would automatically produce uniformity between the states as to the basic regulatory law. The Bill contains provisions which would hold to a minimum, conflict and duplication between the federal and state regulatory agencies.

It is possible to argue that the drafting of uniform state legislation is no guaranty of uniformity of regulation—there must first be general enactment of the bill and

1 Uniform systems of accounts are in effect as to electric utilities, gas utilities and water utilities. NAT'L ASS'N RR. UTIL. COMMISSIONERS (hereafter cited NARUC), 1936 PROCEEDINGS at 104; 1937 PROCEEDINGS at 492, 494; 1938 PROCEEDINGS at 239. There is no regularly adopted uniform system of accounts for motor carriers. However, in I. C. C. ANNUAL REPORT (1938) 841, the Commission had this to say respecting dual accounting control of interstate motor carriers: "It is gratifying to report that splendid cooperation with State authorities has been received in respect to these (federal) accounting regulations. In many States forms of accounts and of reports covering the intrastate operations of such carriers are required by State authorities. Since most large carriers are engaged both in interstate and intrastate operations, it was feared that a heavy burden might be placed upon them by the requirement that different forms of accounts be kept and different forms of reports be required. To meet this situation, informal correspondence was inaugurated with the State authorities with the result that in the case of all states, save one, in which forms of accounts are prescribed for intrastate motor carriers, the carrier will be required to keep but one set of accounts and that is to be in conformity with our requirements."

2 Such agreements are in effect between the National Association of Railroad and Utilities Commissioners and the Interstate Commerce Commission, the Federal Power Commission, and the Federal Communications Commission, NARUC, 1925 PROCEEDINGS 43; 1937 id. 62; 1936 id. 268; 1938 id. 211, 228.

3 The Uniform State Air Commerce Bill was prepared, in 1944, by the Committee on Legislation of NARUC, and is set forth in full in the 1944 PROCEEDINGS 161 to 178. A resolution approving the Bill was unanimously adopted at the 1944 Annual Conference of NARUC, held at Omaha, Nebraska, in November, 1944. Id. at 178-179. The Committee on Legislation is continuing its study of this matter for the purpose of making any revisions which may be shown to be desirable.

4 These provisions are summarized in the 1944 Special Report of the NARUC Committee on Legislation. Id. at 158-159.
then there must be uniform interpretation. Of course this is true, but the same attitude which has resulted in the drafting of legislation of this kind almost assures that the necessary additional steps will also be taken. The way to make sure of this is to drive forward and complete the job—not to junk everything we have on the remote chance that the complete objective might not be achieved.

It is also said that even if state regulation is reasonably uniform, the work and cost of complying with state regulation in each state where intrastate business is handled, would place an unendurable burden upon the long-haul airlines.

At the outset it should be remembered that such state regulation would pertain only to the airline's intrastate operations, which are always likely to be a minor part of the business of interstate carriers. Moreover state authorities are disposed to go to unusual lengths to reduce and simplify the work of complying with state regulation, as indicated by the provisions of the Uniform Bill, designed to reduce the regulatory burdens upon interstate carriers. In the matter of filing tariffs, annual reports and systems of accounts, for example, the Uniform Bill provides that the form thereof shall conform as nearly as may be practicable, to the forms prescribed by the Civil Aeronautics Board. Similar provisions, now contained in other state regulatory statutes, particularly those relating to railroads and motor carriers, have proved effective in eliminating work and cost to the regulated companies.16

The Uniform Bill contains no provisions calling for state regulation of security issues, and no provisions for state surveillance of air carrier acquisitions, consolidations and mergers. The objective has been to hold state regulation, at least in the case of air carriers engaged in both interstate and intrastate commerce, to the bare essentials necessary effectively to regulate local rates and service in the public interest. In other fields of common carrier and public utility regulation, where far less effort has been made to simplify state regulation, there has been no substantial complaint from multi-state carriers or utilities regarding the burden of compliance with state economic regulation.

No one can deny that it would be easier and less expensive for the transcontinental airlines to make all their filings and reports at one place—Washington, D. C. But this would also be true respecting the large railroads, bus lines, truck companies and telephony companies which operate in many states. In these other cases the saving in work and cost to the company has not been considered a suffi-

16 It is practically certain that state accounting requirements, particularly those respecting segregation of interstate and intrastate business, would not add any burdens to the interstate air carriers additional to those provided in H. R. 3446, 79th Cong., 1st Sess., now pending before Congress. That bill was introduced, on June 12, 1945, by Congressman Bulwinkle of North Carolina and has for its purpose the avoidance of multiple taxation of air commerce. It incorporates the recommendations made to Congress in a report, dated April 3, 1945, filed by the Civil Aeronautics Board, following an investigation of multiple taxation authorized by Public Law No. 416, approved July 3, 1944, 58 Stat. 723. The bill would require each air carrier to keep records and file reports showing (1) the sum of its passenger, freight, and express tonnage originating and terminating in each state, (2) the sum of its passenger, freight, and express revenues originating in each state, (3) scheduled aircraft arrivals in and departures from each state, equating according to the size of the plane, and (4) wage and salary payments to persons employed by it within each state.
cient reason for centralizing all regulatory jurisdiction in the federal government. The minor inconveniences and expenses incident to state regulation are part of the responsibilities which airlines must be prepared to shoulder if they are to take their place, as transportation agencies of full stature, under our dual system of government. The airlines must assume that responsibility, and in return they are entitled to the sincere cooperation and assistance of state officials in seeing that those added inconveniences and expenses are held to a minimum.

THE FULL DEVELOPMENT OF LOCAL AIR COMMERCE AND ITS EFFECTIVE SUPERVISION IN THE PUBLIC INTEREST REQUIRES STATE ECONOMIC REGULATION

Those who favor exclusive federal economic regulation of air commerce do so not because they believe that this is necessary in order to have a full development of local air commerce. Rather, their contention is that, regardless of what is best for local air commerce, state economic regulation would prove so detrimental to the stability and growth of the long-haul airlines that a dual system of regulation cannot be tolerated. In the foregoing section of this paper the principal arguments which are advanced in support of this view have been examined.

In devoting so much of this discussion to the problems of the large interstate lines, however, the fact must not be lost sight of that probably the great bulk of intrastate air commerce will be performed by small lines operating in a single state, or in two or three states at most. Therefore no one is privileged to view this legislative problem entirely from the standpoint of the long-haul lines. We must give due consideration to the advantages which the small lines will gain by local regulation—advantages which will result in promoting the development of an extensive local air transport system. We must also give due weight to the fact that local economic regulation of local air commerce will be a great deal more effective, in protecting the public interest, than centralized federal regulation of such local commerce could ever be.

The desirability of developing local air commerce as fully and rapidly as public convenience and necessity requires is not open to argument. Congress itself has said that there should be encouragement and development of an air transportation system properly adapted to the present and future needs of the nation's commerce, of the Postal Service, and of the national defense.17 Certainly the future needs of the nation's commerce and of the Postal Service, and perhaps also of the national defense, cannot be met except by an air-transportation system which serves every community in America which needs and can support air service.

There are special and urgent reasons existing today, not present when Congress established this policy, why local air commerce should be encouraged. Today we have thousands of trained airplane pilots and mechanics returning to civilian life from the nation's armed services. At the same time the country is faced with a

most perplexing problem in finding employment for the millions of servicemen and war workers who must now return to peacetime pursuits. Proposals to launch a large-scale nationwide airport construction program are now before Congress. It seems obvious that, in these three special factors, there lies the basis and need for a sound and speedy development of local air commerce.

As stated above, although the long-haul airlines may substantially increase their intrastate business in the years to come, most of that local business must be developed and served by local and feeder lines. The large interstate airlines will always, and almost necessarily, give precedence to their long-haul business. Space for a short ride between two intermediate points along the trunk-line will be sold only when it cannot be sold to a passenger who is taking a long ride. Hence intermediate points cannot ordinarily expect to obtain adequate local service from the trunk lines which pass through.

If the development of local air commerce is important, and if the long-haul airlines cannot be depended upon to supply the need for such service, then we must look to the small operators. But the development of a network of local operators cannot come about under centralized federal regulation any more than the development of our nationwide system of motor truck and bus lines could have come about under exclusive Interstate Commerce Commission regulation. Under exclusive federal regulation, no local carrier could begin operations until it had obtained a certificate from the Civil Aeronautics Board in Washington, D.C. The expense and delay which this would entail, and the opposition which would undoubtedly be encountered in many cases from a battery of experts and attorneys, representing the large airlines, would be bound to retard and discourage adequate local development.

A few months ago a comparatively small company which has been rendering some irregular-route service in Oklahoma, applied to the Oklahoma Corporation Commission for a certificate authorizing scheduled and non-scheduled intrastate air service as a common carrier of passengers and property operating over 11 proposed routes and serving 39 towns in that state. The Commission found, after a hearing, that public convenience and necessity required such service and that the applicant is fit, willing, and able to perform the service. Hence it granted the application.

Commenting upon the protests filed by two large airlines, the Commission said:

Congressman P. W. Griffiths of Ohio graphically portrayed this situation in an address on the House floor, in support of H. Con. Res. 64, 79th Cong., 1st Sess., 91 Cong. Rec., July 10, 1945, at A-3625. H. Con. Res. 64, introduced on June 22, 1945, by Congressman Jennings Randolph of West Virginia, would express Congressional approval of the expansion of the air transportation system “so that it will include not only the larger cities but also, through feeder line service, the greatest practicable number of smaller cities and towns.” Passage of this resolution has also been urged, on the floor of the House, by Congressmen Schwabe and Randolph. 91 Cong. Rec., July 2, 1945, at A-3493; id., July 9, 1945, at A-3619. A similar resolution, S. Con. Res. 25, 79th Cong., 1st Sess., introduced by Senator Warren Magnuson of Washington, has been favorably reported, without amendment, by the Senate Committee on Interstate Commerce (Report No. 558, dated September 12, 1945). This Committee Report and the speeches referred to above indicate that some members of Congress are dissatisfied with the progress being made in extending air service to the smaller population centers.

In re Application of Central Airlines, Inc., cause No. 18717, decided May 1, 1945. Incidentally, the Oklahoma Commission evidenced its disposition to work cooperatively with the Civil Aeronautics
“Braniff Airways, Incorporated, and American Airlines, Incorporated, protestants herein, have been serving the State of Oklahoma with air service for many years, and have never seen fit to furnish scheduled service to any towns in Oklahoma except Tulsa and Oklahoma City, and for a brief period Ponca City.”

Why should this small company have been required to come to Washington, D. C., for authority to serve these 39 Oklahoma towns? Why should Waterman Airline, Inc., which was recently granted intrastate air carrier rights by the Alabama Public Service Commission to serve 10 cities in that state, be forced to the expense, delays and hazards of filing its application with the Civil Aeronautics Board? What is the likelihood that these and similar applicants would have applied to the federal agency, if that course were necessary, and what prospect would there have been for favorable, speedy action on the application? Merely to pose some of these questions is to show that local air commerce cannot fully and expeditiously develop under centralized control.

It is asserted that any applicant to a state agency for an intrastate air carrier certificate, would also be required to apply to the Civil Aeronautics Board for a certificate if the applicant also desired to carry interstate traffic. It is argued from this that state regulation will not decrease the burden upon an applicant for intrastate rights, but will actually increase the burden by requiring it to apply to two agencies instead of one.

This is true in the case of applicants which operate in more than one state and which must therefore have an interstate certificate before beginning any service. But we are here primarily concerned with the applicant who plans to perform air service within a single state. Except for the construction placed upon the Act by the Civil Aeronautics Board in the Canadian Colonial Airways case, the only single-state air carriers which would require interstate certificates are those which have arrangements with other carriers for a continuous carriage under joint through rates to or from a point without such state. But, in any event, any single-state applicant which will need an interstate certificate, under any construction of the Act, would undoubtedly apply first to the state authorities for its local operating rights. These rights would constitute the major portion of the business and the applicant would make its initial and most comprehensive showing before the state agency.

If the application for intrastate rights is granted, and the inauguration of local service uncovered a need to render incidental interstate service over the same routes, the applicant would then file a second application with the federal agency, except...

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* Board, by inserting the following provision in its order: “... said Central Airlines, Incorporated, be, and it is hereby, authorized to transport inter-state passengers and property over said routes when and if such authority is granted from the proper federal agency; and that this order is no way derogatory to the Civil Aeronautics Board’s jurisdiction over inter-state airline service, but in consonance therewith.”

* Waterman Airline, Inc., applicant, Docket 8937, decided August 30, 1945. This application was not protested by anyone, although representatives of some of the large airlines were present at the hearing.


* The burden of filing dual applications could be entirely eliminated in this class of cases if Congress would amend the Civil Aeronautics Act to overcome the Civil Aeronautics Board’s position in the Canadian Colonial Airways case. This suggestion is further discussed in the final section of this paper.
to the extent that the need of obtaining such interstate authority is dispensed with by amendments to the Act, as hereinafter suggested. At the time of applying for such interstate certificate the applicant would already be in business. The interstate rights would be purely incidental and the granting or denying of the application would not, in most cases, substantially affect the stability of the business. But if the applicant, prior to inaugurating any service, had to file the original application, for both intrastate and interstate rights, with the Civil Aeronautics Board, and had to make its initial case before that Commission in Washington, D. C., or before Board examiners at some regional hearing, it would face, at the outset, a most serious financial and time-wasting burden.

Up to this point the discussion under this section has been confined to the matter of certificate regulation, and has reviewed the reasons why exclusive federal control of operating rights would stifle the growth of intrastate air commerce. But economic regulation involves a great deal more than the granting or denying of original operating rights. There will be applications for extensions; for the transfer of rights; for discontinuance of service, abandonment of lines and cancellation of certificate authority. Then there are the innumerable regulatory matters relating to fares and rates, tariff filings, schedules, connections, service complaints and enforcement.

Once we grant that local air commerce will become substantial, it is manifest that detailed regulation thereof by a central bureau in Washington, D. C., would be both impracticable and ineffective. It would be impracticable because long-distance regulation from the nation's capital would entail unendurable expense and delay for small local operators; because the governmental machinery necessary to administer all local regulation from a central bureau would be unwieldy beyond description; and because top officials of the federal agency could not give proper attention to the manifold problems entailed in regulating all the local carriers of the nation, without undue distraction from their more important function of regulating the trunk-line carriers. Centralized regulation of local air carriers from an office in Washington, D. C., would be ineffective, because the central bureau could not possibly have thorough and current knowledge of local problems and conditions, and because centralized control would deny to the patrons of local air lines and to the general public directly affected by local air service, a readily accessible means of obtaining relief from inadequate service, undue discriminations and unreasonable rates.

The only alternative, under exclusive federal regulation, would be for the central agency to set up a network of regional and district offices throughout the country. The defects and inadequacies inherent in such a system are fully as objectionable as if all federal regulation were centered in Washington. Experience with other federal administrative systems of this kind teaches that regional and district offices would operate under limited authority, without power to make final decisions, and hence actually would add to the delay and expense of federalized control. As to any matters concerning which the regional and district officers were authorized to make decisions and act, local carriers and the public would have to be content with
the judgment and rulings of minor federal officials having no responsibility to the people directly affected, but only to federal commissioners in a far off city. At best, such a system would be a poor substitute for regulation of local affairs by local officials responsible to the people they serve; officials having the authority to make prompt and final decisions, unfettered by inadaptable rules and procedures manufactured a long ways off.

The purpose of the foregoing discussion, as indicated by the heading of this section, has been to show that the full development and effective regulation of local air commerce requires the retention of state regulatory jurisdiction. But there is also good reason to believe that the retention of state regulatory authority will also, in the long run, prove of great benefit to the long-haul airlines. Chairman Pogue of the Civil Aeronautics Board, has expressed the view that while air carriers will affect profoundly the passenger business of surface transport, they will also produce opportunities for wider and more frequent business contacts which will result in increased bulk cargo for surface carriers.22

By analogous reasoning, it can be said that the development of a comprehensive network of local airlines, achievable only under the fostering influence of state regulation, will stir up business for the trunk-line carriers. Local airlines will play an important part in educating the public to the advantages of air travel, and in this way will develop potential customers for the transcontinental lines. A man who becomes accustomed to traveling by air, or sending package freight by air, over a 200 mile intrastate route, is much more likely to use the long-haul air lines for his 2,000-mile journeys than would otherwise be the case.

In what has been said above, no mention has been made of "states rights" or "state sovereignty," as a reason for advocating state economic regulation of intrastate air commerce. There has been presented, instead, the substantive reasons why federal regulation of such intrastate commerce would be inimical to the public interest. Any attempt to criticise the proposal for exclusive federal economic regulation as a challenge to our dual form of government is usually met by the rejoinder that, in this day and age, and with respect to anything as important and different as aviation, resort should not be had to "formalistic" or "legalistic" arguments of this character.

It is not here intended to discuss this proposed encroachment upon state powers from the standpoint of what is legally possible as a matter of constitutional law. Rather, the purpose is to point out the underlying governmental principles which are involved, and to suggest that they be given due weight in the consideration of the whole question. Regardless of legal technicalities, there are many who feel that the concept of a dual form of government springs from a deep conviction that local problems are best dealt with by local government, and that legislation which ignores or undermines that concept is not good for our people.

When a new field of administrative action opens up, it is often easier and simpler to provide for exclusive federal administration. But the liberties and welfare of the

22 Address before the Academy of Political Science, New York City, November 15, 1944.
people cannot always be safeguarded by choosing the easy or simple way. The responsibility rests primarily upon the legislative branch of government, Congress and the state legislatures, to find a way, easy or not, which will preserve to the greatest practicable extent the dual form of government conceived by the founding fathers. Legislators cannot, in good conscience, pass over these basic considerations on the theory that the courts will adequately preserve and apply any constitutional concepts which may be involved. As Mr. Justice Holmes said: "Legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts."

Congressman Hatton W. Sumners of Texas, Chairman of the House Judiciary Committee, has put it well:

"Our whole political system is based on the principle of local self-government. . . . In weakening the states we weaken the whole fabric of free government. The inescapable price of free government is that we exercise it. The most destructive force in the world is nonuse. If we do not use our powers of self-government in the states we will awaken one day to find that self-government has passed irrevocably out of our hands."

Not alone from the standpoint of the states, but also from the standpoint of the federal government, it is necessary to call a halt to the process of creating and pyramid ing federal bureaus and agencies. Congress, and Congressmen, are already overwhelmed with the task of legislating with respect to our present massive federal governmental machinery, and with the task of assisting constituents at home who are understandably incapable of finding their way around in the labyrinth of Washington bureaucracy. Congress has before it, at the present time, a number of resolutions which have for their purpose the decentralization of the federal government.

If it is desirable to decentralize the federal machinery which has already been built up in Washington, it is doubly desirable to reject proposals for the expansion of existing federal agencies beyond the point absolutely necessary to meet the national needs.

A NEW APPROACH TO THE PROBLEM

The determination of appropriate areas of federal and state jurisdiction to regulate air commerce is a problem demanding prompt solution. Aviation is today poised for tremendous expansion, but uncertainty as to the future regulatory pattern constitutes a retarding element. It is becoming increasingly clear that no solution involving the complete disablement of the states can be promptly, if ever, achieved. Such a proposal has already been before Congress for two and a half years and no

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perceptible progress has been made.\(^{25}\) The recent action of the Senate in incorporating the Council of State Governments’ amendments into the McCarran Federal Airport bill,\(^{26}\) indicates rather clearly that the proposal for exclusive federal regulation will not have easy going in the present Congress.\(^{26}\) Plainly the time has come for a new approach to this whole problem.

As the basis for a new approach, it must be recognized that, under our system of government, the states have primary jurisdiction in the field of local action but the federal government has an over-riding power which may be exercised where necessary to attain national objectives. There cannot be insistance upon the very letter of state jurisdiction, where such a course imperils the general welfare. Correlatively, there should be no federal interference with state jurisdiction not clearly required by the general welfare.\(^{27}\) In aviation, as in all other fields of governmental action, the designation of appropriate areas of federal and state jurisdiction involves “a delicate exercise of legislative policy in achieving a wise accommodation between the needs of central control and the lively maintenance of local institutions.\(^{28}\)

Applying these guiding principles, let us start with the premise that the traditional federal and state spheres of authority will be generally preserved, but that

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\(^{25}\) Hearings on H. R. 1012, 78th Cong., 1st Sess., the first measure proposing exclusive federal regulation, were held in February and March, 1943. A serious division of opinion developed in the House Committee on Interstate and Foreign Commerce, which held these hearings, especially on this question of exclusive federal control. A Committee Report (No. 784) was finally issued on October 20, 1943, in which the Committee majority recommended enactment of a new bill, H. R. 3420, 78th Cong., 1st Sess., which bill also provided for exclusive federal jurisdiction. Nine members of the Committee signed a minority report severely criticizing H. R. 3420, particularly upon the jurisdictional question, and recommended enactment of H. R. 3491, 78th Cong., 1st Sess., which left substantially undisturbed present state authority over local air commerce. H. R. 3420 then went to the House Rules Committee and several attempts were made by its sponsors to get the bill out of that Committee so that it could come on the House floor for action. However, this proved impossible, due mainly to the controversy over federal-state jurisdiction and to the contention that further hearings should be held on the general subject. H. R. 3420 expired in the House Rules Committee when the 78th Congress adjourned sine die. In the 79th Congress, several aviation regulatory bills have been introduced, as follows: S. 1, by Senator McCarran of Nevada; S. 541, by Senator Johnston of South Carolina (a companion bill to H. R. 674); H. R. 478, by Congressman King of California (a companion bill to S. 1); H. R. 674 and H. R. 3383, by Congressman Lea of California. These bills range from measures almost wholly disabling the states to others which, with slight modifications, would fully preserve state authority. Although most of these new bills were introduced in January, 1945, no Committee hearings were held prior to the 1945 summer recess of Congress. Thus, by the fall of 1945, two years and a half had passed since the issue first came before Congress, and neither House had yet reached a decision.


\(^{27}\) The amendments so changed S. 2 as to require all federal matching funds to be channeled through a State agency. In presenting these amendments, Senator Brewster of Maine, said: “The Council of State Governments is very much concerned about this matter inasmuch as it represents, perhaps, another camel’s nose under the tent in derogation of State responsibility.” 91 Cong. Rec., Sept. 10, 1945, at 8584. At the 1944 Conference of Governors, Governor Herbert R. O’Conor of Maryland, discussing the subject, “The Sovereign States,” said: “The one factor, therefore, in state-federal relations that has stood absolutely unchanged throughout the years is their purpose. They are right when they serve best the welfare of the people; they are wrong when they interfere in any way with that welfare. Let jurists argue legal technicalities as they will, they cannot argue away the simple fact that neither state nor federal government has a right to pursue a policy detrimental to the general welfare.” (1945) 18 STATE GOVERNMENT 127.

\(^{28}\) See Palmer v. Massachusetts, 308 U. S. 79, 84 (1939).
adjustments will be made where required to meet the special problems of air commerce and to promote the general welfare. The line of demarkation between interstate and intrastate commerce thus becomes a general guide but not an inflexible boundary between the spheres of federal and state control. As Mr. Justice Holmes has said, "Some play must be allowed for the joints of the machine..."  

There are two principal factors which appear to justify adjustments which will extend federal authority beyond traditional lines. One of these is that the overwhelming preponderance of the business handled by the long-haul airlines is, and will continue to be, interstate commerce. The other is that the sizable rates of return being earned by the airlines are based upon relatively small capitalizations, and that their comparatively narrow margin of profit, when measured in dollars, makes regulatory compliance costs a more vital factor than in the case of most other types of carriers and utilities. These factors call for a limitation upon state regulation applicable to interstate carriers, to those matters which are absolutely essential in order to regulate effectively and develop local commerce.

With this objective in mind, Congress and the state legislatures might well conclude that there should be no state regulation of interstate carriers as to such matters as consolidations, mergers, acquisitions, and security issues.  

Similarly, it might be decided that the federal and state laws should provide that aircraft, while in the course of regularly scheduled interstate flights calling for landings in two or more states may, in the course of such flights, carry persons, property or express in intrastate commerce without securing permission or approval of any state or local authority. This would entirely eliminate the necessity of an interstate carrier obtaining an intrastate certificate covering points along main line interstate routes, unless and to the extent such carrier desired to operate special intrastate flights over part of such route.

Other restrictions relating to the form of tariffs, annual reports and systems of accounts, and authorizations for the extension or abandonment of service or routes, could undoubtedly be developed where desirable to relieve the long-haul carriers from unnecessary regulatory burdens. While most state legislatures would probably be willing to conform to any general policy of this character which might be decided upon, Congress has the undoubted power to make mandatory provisions for such limitations upon state regulation of interstate carriers.

The same factors which would justify some limitation upon state jurisdiction over air carriers whose business is predominantly interstate, would likewise call for some limitation upon federal jurisdiction over air carriers whose business is predominantly intrastate. For example, it would be entirely feasible and proper to exempt from federal economic regulation, air carrier service performed solely within a municipality, contiguous municipalities or commercial zone, just as a similar ex-

30 The Uniform Air Commerce Bill developed by the National Association of Railroad and Utilities Commissioners in 1944, contains no provisions for the regulation of these matters. See supra note 14.
emption now applies to motor carriers. Such an exemption would probably not have any important application for several years, until such time as common carrier helicopter service becomes practicable.

It would also be feasible and proper to exempt from federal regulation interstate commerce performed by air carriers operating in a single state, where the carrier does not perform such interstate business under a common control, management, or arrangement for a continuous carriage or shipment under joint through rates to or from a point without such state. An Amendment of the Civil Aeronautics Act, to accomplish this, would overcome the strained construction of the present Act manifested in the position the Civil Aeronautics Board took in the Canadian Colonial Airways case. In this case the Civil Aeronautics Board took the position that Canadian Colonial Airways, Inc., was an interstate carrier between Niagara Falls, New York, and New York City, because approximately 15 per cent of the company's passengers continued, via other air or surface carriers, to points beyond the State of New York. This route of Canadian Colonial Airways was confined solely to points within the State of New York; the company had no arrangement for joint through rates with any other carrier; it did not know any of its passengers were engaged in an interstate journey; and it expressly advertised that it was not authorized to transport interstate passengers.

Under such a construction of the statute there could scarcely be an air carrier in the entire country, no matter how limited its operations, which would not be an

31 Sec. 203(b) (8) of Interstate Commerce Act, 49 U. S. C. (1941) §303(b). H. R. 674, 79th Cong., 1st Sess. (1945), provides for such an exemption, but such provision appears to be circumscribed by provisos which renders the exception almost nugatory.

32 This would be analogous to the exemptions from federal motor carrier regulation, contained in sections 203(b) (8), 204(a), (4a) and 206(a) of the Interstate Commerce Act, 49 U. S. C. (1941) §§303(b) (8), 304(a) (4a), and 306(a). Such exemption from federal regulation would not mean that these minor phases of interstate commerce would go wholly unregulated. There can be no question regarding the power of the states, under the commerce clause, to regulate incidental interstate commerce performed by a local carrier engaged primarily in intrastate commerce, where Congress expressly authorizes state regulation thereof. In the recent decision of the United States Supreme Court in Southern Pacific Co. v. State of Arizona, 325 U. S. 1515, 1520 (1945), the Court said: "Congress had undoubted power to redefine the distribution of power over interstate commerce. It may either permit the states to regulate the commerce in a manner which would otherwise not be permissible (citing cases), or exclude state regulation even of matters of peculiarly local concern which nevertheless affect interstate commerce (citing cases)." Even where Congress has not expressly authorized state regulation, if Congress has failed to provide for federal regulation thereof, and if it is a matter admitting of diversity of treatment according to the special requirements of local conditions, then state regulation may be validly exercised until Congress determines to enter the field. See: Cooley v. Board of Wardens of Port of Philadelphia, 12 How. (U. S.) 298, 319 (1851); Minnesota Rate Cases, 230 U. S. 352, 399 (1913); Port Richmond Ferry v. Hudson County, 234 U. S. 317, 331 (1914); Pennsylvania Gas Co. v. Public Service Commission, 252 U. S. 23 (1920), disapproved on other grounds in East Ohio Gas Co. v. Tax Commission, 283 U. S. 465, 472 (1931); Eicholz v. Public Service Commission, 306 U. S. 268 (1939); and cases cited in Southern Pacific Co. v. State of Arizona, supra note 32, at 1472.


34 While many court decisions were cited in the briefs, there seems to be no decision directly on the point. The case in question was terminated by a consent decree and hence does not constitute a judicial precedent. It is interesting to note, however, that the Interstate Commerce Commission has reached a contrary conclusion on the same question. See: Red Star Lines, Inc. (Extension of Operations), 3 M. C. C. 313 (1937); Virginia Stage Lines, Inc. (Purchase), 15 M. C. C. 579 (1938).
interstate carrier subject to federal regulation. Moreover, this construction deprives local carriers of any freedom of choice as to whether they shall engage in interstate commerce or solely in intrastate commerce. The amendment here suggested would exempt, from the requirements of dual regulation, a host of small local air lines, whose only interstate business would be the occasional carriage of passengers or property actually in the course of an interstate journey, but not being carried on a through route or joint rates. Needless to say, there is no more necessity for federal regulation of these inconsequential fragments of interstate commerce in the field of aviation than there is in the case of motor carriers.

There is also good reason to exempt, from federal economic regulation, local air carriers operating solely between points in a single state whose aircraft happen, in the course of their flight, to pass through the air space over another state. Under the present law, such local carriers are classed as interstate carriers and made fully subject to federal regulation. If an aircraft does not land in the other state it is not actually transacting any business therein. The mere fact that safety or geographical conditions, or the location of airway facilities, make it occasionally or regularly desirable for an aircraft to enter the air space of one state while traveling between two points in another state, should not preclude the operator thereof from claiming exemption, as a local carrier, from federal economic regulation.

The above suggested adjustments in the traditional line of demarkation between federal and state jurisdiction are only intended to be indicative of the possibilities. Careful analysis by federal and state authorities, working cooperatively together, would undoubtedly disclose other and different methods of achieving "a wise accommodation between the needs of central control and the lively maintenance of local institutions." Such cooperation must not stop with the drafting of legislation, however. There should be continuous and active liaison between federal and state regulatory officials in dealing with the manifold and everchanging problems which commercial aviation of the future will present.

The new approach to the problem of regulatory jurisdiction, here suggested, is in reality a new approach only with respect to air commerce. It is a well-established and often-used approach in other fields of common carrier and public utility regulation. In these other fields, the policy of recognizing basic jurisdictional areas but developing adjustments to meet special problems, has proved uniformly successful. Had they not been tried, and had they not proven successful, there would be little left of state authority and power today—all regulation would stem from Washington, D. C. If there is to be a departure from that policy in the case of air commerce, it should come only as a last resort and after giving the long-established and heretofore successful system of federal-state regulation a fair trial.

20 The Civil Aeronautics Act of 1938, §1(20) and (21), 49 U. S. C. (1941) §401(20) and (21).