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# THE STATE OF DRONES: WHAT ROOM IS LEFT FOR STATES TO ESTABLISH AN UNCREWED AIRCRAFT REGULATORY SCHEME?

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## I. INTRODUCTION

### A. Snapshot of Uncrewed Aircraft Industry

Between the rise of the Drone Racing League<sup>1</sup> and the utilization of small unmanned or uncrewed aircraft (alternately referred to herein as UAS) in the global fight against the spread of the coronavirus,<sup>2</sup> uncrewed aircraft have created many benefits for society. Similarly, multiple private sector industries have benefited from the utilization of uncrewed aircraft, including aerial photography,<sup>3</sup> aerial journalism<sup>4</sup> and agriculture<sup>5</sup> to name a few. In the public sector, the utilization of uncrewed aircraft has seen mixed results with

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<sup>1</sup> Dan Weil, *The Next Big Thing in Sports?*, WALL ST. J. (Mar. 11, 2020), <https://www.wsj.com/articles/the-next-big-thing-in-sports-11583171352?mod=searchresults&page=1&pos=8>.

<sup>2</sup> Timothy W. Martin & Liza Lin, *Fever-Detecting Goggles and Disinfectant Drones: Countries Turn to Tech to Fight Coronavirus*, WALL ST. J. (Mar. 10, 2020), <https://www.wsj.com/articles/fever-detecting-goggles-and-disinfectant-drones-countries-turn-to-tech-to-fight-coronavirus-11583832616?mod=searchresults&page=1&pos=15>.

<sup>3</sup> David A. Fischer, *Dron't Stop Me Now: Prioritizing Drone Journalism in Commercial Drone Regulation*, 43 COLUM. J.L. & ARTS 107, 109 (2019).

<sup>4</sup> Chuck Tobin et. al., *Will Federal Preemption Push Drone Journalism to New Heights? State, Municipal Regulations Suspect Following Singer v. City of Newton*, COMM'N. LAW., 40 (Spring 2019).

<sup>5</sup> Allison I. Fultz, *Flying Ahead of the Pack: Drones in the Agriculture Industry*, 35 COMPUT. & INTERNET L., 4 (2018).

disaster relief efforts,<sup>6</sup> policing<sup>7</sup> and firefighting<sup>8</sup> but reports of rogue uncrewed aircraft interrupting first responders have increased.<sup>9</sup> Sectors that have significant potential for uncrewed aircraft include package delivery,<sup>10</sup> and inspection services for insurance companies.<sup>11</sup>

Some key distinctions about uncrewed aircraft and crewed aircraft are: the number of uncrewed aircraft that will need to be registered in 2035 are projected to surpass the number of airplanes that will need to be registered by 2035;<sup>12</sup> and uncrewed aircraft pilots are limited by the Federal Aviation Administration (FAA) to fly up to four hundred (400) feet,<sup>13</sup> compared to the sixty-thousand (60,000) foot ceiling that crewed aircraft are allowed to reach. These stark differences lead to a greater likelihood of tortious or criminal activity occurring with the use of uncrewed aircraft. Issues such as aerial trespass,<sup>14</sup> damage to uncrewed aircraft,<sup>15</sup> law enforcement's duty to public safety and United States (US) Constitutional protections against unreasonable search and seizure are of great concern

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<sup>6</sup> Nanci K. Carr, *Look! It's A Bird! It's A Plane! No, It's A Trespassing Drone*, 23 J. TECH. L. & POL'Y 147, 152 (2019).

<sup>7</sup> Jennifer M. Bentley, *Policing the Police: Balancing the Right to Privacy Against the Beneficial Use of Drone Technology*, 70 HASTINGS L.J. 249, 289 (2018).

<sup>8</sup> Brook C. Kolarich, *Playing with Fire: Drone Incursions into Wildfire Suppression Operations and the Regulatory Challenges to Reducing Their Risks*, 19 TEX. TECH. ADMIN. L.J. 301, 304 (2018).

<sup>9</sup> Colleen Shalby, *Illegal Drones Ground Water-dropping Helicopters at Critical Moment in Maria Fire Battle*, L.A. TIMES (Nov. 2, 2019), <https://www.latimes.com/california/story/2019-11-01/maria-fire-drone-hinders-firefighting-efforts-as-blaze-doubles-in-size-overnight>; Brittany Shammass, *Drones Are Swarming over Colorado and Nebraska at Night: Authorities Say They Have No Idea Why*, WASH. POST (Jan. 2, 2020), <https://www.washingtonpost.com/transportation/2020/01/02/drones-are-swarming-over-colorado-nebraska-night-authorities-say-they-have-no-idea-why/>.

<sup>10</sup> Carr, *supra* note 6.

<sup>11</sup> William Goodwin & Tyler Finn, *The Local Future of the Low-Altitude Airspace*, 31 AIR & SPACE L. 18, 21 (2018).

<sup>12</sup> Jonathan Vanian, *More Drones Are Now Registered With the Government Than Airplanes*, FORTUNE (Feb. 8, 2016) <https://fortune.com/2016/02/08/more-registered-drones-than-airplanes/>.

<sup>13</sup> 14 C.F.R. § 107.58(b). See Fed. Aviation Admin., *Fact Sheet – Small Unmanned Aircraft Systems (UAS) Regulations (Part 107)* (July 23, 2018), [https://www.faa.gov/news/fact\\_sheets/news\\_story.cfm?newsId=22615](https://www.faa.gov/news/fact_sheets/news_story.cfm?newsId=22615).

<sup>14</sup> Kyle Joseph Farris, *Flying Inside America's Drone Dome and Landing in Aerial Trespass Limbo*, 53 VAL. U. L. REV. 247, 249 (2018).

<sup>15</sup> 5 B. E. Witkin, *Damage to Unmanned Aircraft or Unmanned Aircraft System* § 104 (11th ed. 2020).

to scholars addressing the integration of uncrewed aircraft into the national airspace.<sup>16</sup> To address these concerns, the FAA must keep the following needs in consideration when developing a regulatory scheme for uncrewed aircraft: identification of “see and avoid” technology to avoid unnecessary regulations, development of an uncrewed aircraft operation training scheme, and stipulation of appropriate procedures for when an uncrewed aircraft loses contact or is hacked from the operator.<sup>17</sup> Despite concerns of scholars and considerations of the FAA, states are in a great position to fill the gaps that exist in the regulatory scheme of uncrewed aircraft.

### B. Uncrewed Aircraft in Mississippi

Mississippi in particular is uniquely positioned to be at the forefront of innovation in the uncrewed aircraft industry. The leading research university for the Alliance for System Safety of UAS through Research Excellence (ASSURE) is Mississippi State University, which provides the FAA with research to integrate uncrewed aircraft into domestic airspace and helps the industry transition into its billion-dollar potential by critiquing operations of uncrewed aircraft alongside crewed aircraft nationwide.<sup>18</sup> There are three companies (Aurora Flight Sciences, Northrop Grumman Unmanned Systems and Stark Aerospace) that manufacture uncrewed aircraft in the state.<sup>19</sup> There are also a number of community colleges across Mississippi that offer Associate degrees of Applied Science which prepare students for the FAA Part 107 Certification Exam and educate students on how to deconstruct and build their own uncrewed aircraft for a variety of industries.<sup>20</sup> The program

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<sup>16</sup> See generally Jamie Busby, *Drone Delivery: The Danger of Opening the Air As A Commercial Highway*, 18 LOY. MAR. L.J. 287, 301-303 (2019).

<sup>17</sup> Benjamin Kapnik, *Unmanned but Accelerating: Navigating the Regulatory and Privacy Challenges of Introducing Unmanned Aircraft into the National Airspace System*, 84 J. AIR L. & COM. 439, 448 (2019).

<sup>18</sup> *About Us*, ASSUREUAS.ORG <http://www.assureuas.org/about.php> (last visited Dec. 21, 2020).

<sup>19</sup> *Industries-Aerospace*, MISSISSIPPI.ORG, <https://mississippi.org/industries/aerospace/> (last visited Dec. 21, 2020).

<sup>20</sup> *Mississippi: Business is Blossoming in the Magnolia State*, BUS. FACILITIES (Nov. 9, 2019), <https://businessfacilities.com/2019/11/mississippi-business-is-blossoming-in-the-magnolia-state/>; The programs can be found at <https://www.hindscc.edu/programs-of-study/career-technical/unmanned-aerial-systems/> and <http://www.prcc.edu/academics/plans/technology/uas>

offered by community colleges will be introduced in high school vocational programs on the Mississippi Gulf Coast.<sup>21</sup>

Keeping in mind the influence that the uncrewed aircraft industry has on Mississippi, it is important to highlight legislation introduced in the Mississippi Legislature, by Senator Brice Wiggins of Pascagoula, during the 2020 legislative session.<sup>22</sup> The innovative legislative characteristics of Senator Wiggins' bill include the following: establishing uncrewed aircraft as an instrumentality of torts and crimes, establishing that continuous operation of an uncrewed aircraft over a landowner's real property does not create a prescriptive right in their airspace, establishing the fact that county and municipal governments are preempted from enacting ordinances regulating uncrewed aircraft, and creating a commission that serves as an advisory body for the advancement of uncrewed aircraft in the state of Mississippi.<sup>23</sup> Senator Wiggins' bill is a good starting point to safely and efficiently integrate uncrewed aircraft into the state's airspace. Creating a state registry of UAS would be able to provide additional benefits, as has been seen in other states.<sup>24</sup>

As will be demonstrated using the laws of several states as models, it is important to note that legislatively, when states establish an uncrewed aircraft registry, they must concurrently preempt counties and municipalities from being able to pass ordinances regulating uncrewed aircraft so that there is a uniform state operated and maintained registry. In addition, states must create a comprehensive uncrewed aircraft registry that can be operated in conjunction with the FAA's uncrewed aircraft registry.

As one commenter points out, "[w]ithout some agreement between legislatures, researchers and private companies, drone regulations will be extremely slow to develop, which could increase

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<sup>21</sup> Lindsay Mott, *Gautier High School First in State to Pilot New CTE Curriculum*, OURMSHOME.COM (Dec. 24, 2018), <https://www.ourmshome.com/gautier-high-school-first-in-state-to-pilot-new-cte-curriculum/>.

<sup>22</sup> S.B. 2282, 135<sup>th</sup> Leg. Sess., Reg. Sess. (Miss. 2020)

<sup>23</sup> *Id.*

<sup>24</sup> Arthur Holland Michel, *Drones AT Home Local and State Drone Laws*, CTR. FOR THE STUD. OF THE DRONE AT BARD COLLEGE (March 2017), <https://dronecenter.bard.edu/files/2017/03/CSD-Local-and-State-Drone-Laws-1.pdf>.

public fears around safety, privacy and surveillance.”<sup>25</sup> The current state of affairs provides Mississippi an opportunity to be the leader in the mitigation of public fears of uncrewed aircraft by passing common-sense legislation that addresses the integration of uncrewed aircraft into intrastate airspace.

### C. *What to Expect*

Echoing the sentiment of a Heritage Foundation legal fellow, Jonathan Zalewski, “the time is ripe to begin thinking about a new framework that incorporates state regulation of the NAS [national air space].”<sup>26</sup> That sentiment, coupled with statements from the Secretary of Transportation<sup>27</sup> and FAA Administrator,<sup>28</sup> give weight to the argument that states are in a position to create efficient uncrewed aircraft registries. In order to create the registry, state legislatures must pass legislation that does the following: preempts counties and municipalities from enacting ordinances regulating uncrewed aircraft, establishes a state operated and maintained uncrewed aircraft registry and distinguishes a state government’s right to control navigable intrastate airspace from the FAA’s right to control navigable interstate airspace.

Building on the background that was set out in Part I, Part II will introduce the concept of preemption under the Federal Aviation Act, Airline Deregulation Act and judicial decisions specific to

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<sup>25</sup> Zoe Manzanetti, *Legislators Face Tech-Heavy Agenda as They Confront the Future: Digital Issues to Watch*, GOVERNING.COM (Feb. 27, 2020), <https://www.governing.com/next/Digital-Issues-to-Watch-in-2020.html>.

<sup>26</sup> Jonathan M. Zalewski, *Sharing the Sky: Regulating Unmanned Aircraft in American Airspace Via Cooperative Federalism*, 42 U. DAYTON L. REV. 333, 348 (2017).

<sup>27</sup> Elaine L. Chao, *UAS Integration Pilot Program Selection Announcement*, U.S. DEP’T TRANSP. (May 9, 2018), <https://www.transportation.gov/briefing-room/uas-integration-pilot-Program-selection-announcement> (“Instead of a dictate from Washington, this program takes another approach. It allows interested communities to test drones in ways they are comfortable with.”).

<sup>28</sup> Jeremiah Karpowicz, *Drone Integration and Regulatory Acceleration—An Interview with FAA Acting Administrator Dan Elwell*, COM. UAV NEWS (Sept. 4, 2018), <https://www.expouav.com/news/latest/drone-integration-regulatory-acceleration-faa-dan-elwell/> (“Ultimately, what we want is some sort of standard or overarching rule(s) with broad applicability that can be tailored by the local community. To illustrate this further, let’s look at other aviation contexts. Medivac helicopters operate under certain rules and regulations set forth by the FAA. However, the local jurisdictional authority provides additional guidance on where they can take off or land for routine operations. We envision the same dynamic for drone operations.”).

uncrewed aircraft. Part III will highlight the necessity for states to act, in line with a proposal from the Real Estate Section of the American Bar Association (ABA). Part III will also demonstrate the legislative actions other states have taken so far on uncrewed aircraft. Finally, Part IV will demonstrate how cities and counties have contributed to the patchwork effect of uncrewed aircraft legislation. Further, Part IV will make the case as to why Senator Brice Wiggins' bill and the proposed legislation will provide a great foundation for states to follow. Part V will highlight on-going cases regarding the operation of uncrewed aircraft and offer concluding thoughts.

## II. ZONE OF FEDERAL AUTHORITY IN AVIATION

### A. *Introduction to Preemption Generally*

The 10th Amendment to the US Constitution states that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”<sup>29</sup> In contrast, Article VI of the Constitution, colloquially referred to as the Supremacy Clause, declares that

[t]his Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.<sup>30</sup>

Where questions arose as to whether federal law or state law controls a given situation, courts have engaged in an analysis as to whether the Supremacy clause requires that federal law preempts state law, or whether the 10th Amendment limits of the delegation to the federal government and preserves powers reserved to the states.

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<sup>29</sup> U.S. CONST. amend. X.

<sup>30</sup> U.S. CONST. art. VI cl. 2.

There are two types of preemption generally: express and implied.<sup>31</sup> Of implied preemption, there are two types: implied conflict preemption and implied field preemption.<sup>32</sup> Where a court is faced with express preemption, Congress' intent is often clearly demonstrated in the text of the preemption provision. However, when faced with the challenge of determining whether state law is impliedly preempted by an act of the US Congress or by federal regulations that flow therefrom, and in keeping with the 10th Amendment, Courts tend to begin a preemption analysis by invoking a presumption against preemption and looking for Congress' intent. For example, in *Rice v. Santa Fe Elevator Corp.*, a case that presents the roots of preemption jurisprudence and succinctly describes the various types of implied preemption, the US Supreme Court held that:

Congress legislated here in [a] field which the States have traditionally occupied....So we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress....Such a purpose may be evidenced in several ways. The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it....Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject....Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose....Or the state policy may produce a result inconsistent with the objective of the federal statute.....It is often a perplexing question whether Congress has precluded state action or by the choice of selective regulatory measures has left the police power of the States undisturbed except as the state and federal regulations collide.<sup>33</sup>

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<sup>31</sup> Justin W. Aimonetti & Christian Talley, *Game Changer: Why and How Congress Should Preempt State Student-Athlete Compensation Regimes*, 72 STAN. L. REV. ONLINE 28, 39 (2019), <https://www.stanfordlawreview.org/online/game-changer/>.

<sup>32</sup> *Id.*

<sup>33</sup> *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230-31 (1947).

Courts would subsequently identify the “assumption” described above as a “presumption against preemption.”<sup>34</sup> As we consider the role of states in the regulation of drones and the types of preemption identified above, it is important to keep the presumption against preemption in mind, for the bedrock of the federalist system is subsidiarity, a concept embraced by the European Union where the federal government acts only when a state, county or municipal government is unable to.<sup>35</sup>

### i. Express Preemption

Express preemption occurs where “Congress unambiguously states that preemption is to occur, there is no need to look beyond the specific language at issue because the results of the preemptive language are clear and unambiguous.”<sup>36</sup> Express preemption analysis often takes place when a preemption provision provided in legislation is core to the question that a Court must answer.<sup>37</sup> In 1992, Justices Scalia and Thomas’ concurrence in part in *Cipollone v. Liggett Group, Inc.*<sup>38</sup> pointed out that “[t]he existence of an express preemption provision tends to contradict any inference that Congress intended to occupy a field broader than the statute’s express language defines.”<sup>39</sup> Justices Scalia and Thomas are saying in *Cipollone* that where there is express preemption, Congress’ intent is to preempt only that area described in the express language of the statute, and inferences that Congress intended to occupy a field broader than the express language are contradicted by the express language. So, if there is express preemption, there is no inference

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<sup>34</sup> See, e.g., *Sikkelee v. Precision Airmotive Corp.*, 822 F.3d 680, 683 (3d Cir. 2016) (Holding that federal law does not preempt state law product liability claims, because, “In light of principles of federalism and the presumption against preemption, Congress must express its clear and manifest intent to preempt an entire field of state law. Here none of the relevant statutes or regulations signals such an intent.”)

<sup>35</sup> Johan Meeusen, *Comparing Interstate and European Conflict of Laws from A Constitutional Perspective: Can the United States Inspire the European Union?*, 67 AM. J. COMP. L. 637, 648 (2019).

<sup>36</sup> Laura K. Jortberg, *Who Should Bear the Burden of Experimental Medical Device Testing: The Preemptive Scope of the Medical Device Amendments Under Slater v. Optical Radiation Corp.*, 43 DEPAUL L. REV. 963, 990 (1994).

<sup>37</sup> Susan J. Stabile, *Preemption of State Law by Federal Law: A Task for Congress or the Courts?*, 40 VILL. L. REV. 1, 6 (1995).

<sup>38</sup> *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 547 (1992).

<sup>39</sup> *Id.* at 547.

of a broader preemption, at least under that statute. Thus, where Congress has provided an express preemption clause, inferences of congressional intent to preempt a field broader than the express terms of the statute should not be entertained by courts.

## ii. Implied Conflict Preemption

Implied conflict preemption “occurs when federal and state provisions directly conflict, preventing a party from complying with both regulations simultaneously.”<sup>40</sup> One way this arises is when a state action conflicts with an issue of foreign relations. As Justice Souter wrote in *American Ins. Ass’n v. Garamendi*,<sup>41</sup> “an exercise of state power that touches on foreign relations must yield to the National Government’s policy.”<sup>42</sup>

A case of potential conflict preemption that arose just three years after *Garamendi*<sup>43</sup> was *Gonzales v. Oregon*<sup>44</sup> where the Supreme Court had to decide whether or not Congress, through the enactment of the Controlled Substances Act (CSA), preempted Oregon’s Death with Dignity Act (DDA), which allowed physicians to practice physician-assisted suicide with controlled drugs for terminally ill patients.<sup>45</sup> For analysis later in this Article, it is important to point out that the Court stated that although “[s]tates traditionally have had great latitude under their police powers to legislate as to ‘the protection of the lives, limbs, health, comfort, and quiet of all persons’ . . . ,<sup>46</sup> there is “no question that the federal government can set uniform national standards in these areas.”<sup>47</sup> The Court ultimately decided that the CSA did not preempt the DDA by holding that “[t]he text and structure of the CSA show that Congress did not have this far-reaching intent to alter the federal-state balance and the congressional role in maintaining it.”<sup>48</sup>

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<sup>40</sup> Jonathan V. O’Steen & Van O’Steen, *The FDA Defense: Vioxx(r) and the Argument Against Federal Preemption of State Claims for Injuries Resulting from Defective Drugs*, 48 ARIZ. L. REV. 67, 70 (2006).

<sup>41</sup> *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396 (2003).

<sup>42</sup> *Id.* at 413.

<sup>43</sup> *Id.*

<sup>44</sup> *See generally Gonzales v. Oregon*, 546 U.S. 243 (2006).

<sup>45</sup> *Id.* at 250.

<sup>46</sup> *Id.* at 270 (quoting *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985)).

<sup>47</sup> *Gonzales v. Oregon*, 546 U.S. 243, 271 (2006).

<sup>48</sup> *Id.* at 275.

Just over a decade later, in *Arizona v. Inter Tribal Council of Arizona*<sup>49</sup> an issue came before the Supreme Court about whether an Arizona law requiring voters to provide a proof of citizenship to vote in federal elections was preempted by a federal regulation stating that citizens simply had to assert their citizenship under oath to vote in federal elections.<sup>50</sup> The majority in *Arizona* wrote that “when Congress legislates with respect to the ‘Times, Places and Manner’ of holding congressional elections, it necessarily displaces some element of a pre-existing legal regime erected by the States.”<sup>51</sup> The displacement in this case was the “manner” of which the elections were held and the majority in *Arizona* held that the National Voter Registration Act

precludes Arizona from requiring a Federal Form applicant to submit information beyond that required by the form itself. Arizona may, however, request anew that the EAC include such a requirement among the Federal Form’s state-specific instructions, and may seek judicial review of the EAC’s decision under the Administrative Procedure Act.<sup>52</sup>

The holding in *Arizona* led the states of Arizona and Kansas to create a two-tier voter registration system, requiring proof of citizenship in state elections but not federal elections.<sup>53</sup>

In 2016, Kansas’ Secretary of State, Kris Kobach faced a series of court cases that contested the two-tier voter registration system. The first was *Fish v. Kobach*<sup>54</sup> where the court’s majority ruled that “Secretary of State [Kobach] is directed to register for federal elections all otherwise eligible motor voter registration applicants that have been canceled or are in suspense due solely to their failure to provide [Documentary Proof of Citizenship].”<sup>55</sup> The second resulting case was *League of Women Voters of United States v. Newby*.<sup>56</sup> Like *Fish v. Kobach*, at question here was the right of states to

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<sup>49</sup> *Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1 (2013).

<sup>50</sup> *Id.* at 4-7.

<sup>51</sup> *Id.* at 14.

<sup>52</sup> *Id.* at 20.

<sup>53</sup> Amanda Crawford, *Not All Voters Equal as States Move to Two-Tier Ballots*, BLOOMBERG (Oct. 9, 2013), <https://www.bloomberg.com/news/articles/2013-10-10/not-all-voters-equal-as-states-move-to-two-tier-ballots>.

<sup>54</sup> *Fish v. Kobach*, 189 F. Supp. 3d 1107 (D. Kan. 2016).

<sup>55</sup> *Id.* at 1152.

<sup>56</sup> *League of Women Voters v. Newby*, 838 F.3d 1 (D.C. Cir. 2016).

require “anybody who wishes to register to vote . . . provide documentary proof of United States citizenship.” This requirement was appended to the “federally prescribed national mail voter registration form, often called ‘the Federal Form.’”<sup>57</sup> The effect of this action was that the Federal Form led “registrants . . . to believe that they cannot be registered for federal elections unless they provide proof of citizenship.”<sup>58</sup> The court found that though Congress has the power to preempt state regulation, states have “exclusive authority to decide the eligibility for voters in federal elections,”<sup>59</sup> Nevertheless, here the court reasoned that the federal law as encapsulated in the Federal Form did not preclude a state from requiring additional information, but simply had to show that such information was “necessary.”<sup>60</sup> The majority in *Newby* ultimately struck down the “state-specific instructions.”<sup>61</sup>

Conflict preemption can occur across a variety of policy issues but its impact on the uncrewed aircraft industry is quite significant. The voter cases are persuasive for the argument that just because a federal regulation is in place, the regulation does not leave states unable to create a supplementary regulation for their residents to follow. Later in this Article, discussion will address a number of cases regarding how the integration of uncrewed aircraft into the national airspace has led to disputes between government entities and uncrewed aircraft operators who question the authority of the government entities passing regulations on the operation of uncrewed aircraft.

### iii. Implied Field Preemption

According to Mr. Durst and Mrs. Shultz, an analysis of implied field preemption would be entertained by a Court when “authority intended to be wielded by,” the federal government, is excluded from being exercised by the states.<sup>62</sup> In 1984, the Supreme Court in

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<sup>57</sup> *Id.* at 5.

<sup>58</sup> *Id.* at 4 (citations omitted).

<sup>59</sup> *Id.* at 11 (citations omitted).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 15.

<sup>62</sup> Daniel A. Durst & Karla M. Shultz, *Wielding and Yielding: Pennsylvania Judicial Procedural Rulemaking Authority and the Preemption Doctrine*, 26 WIDENER L.J. 45, 60 (2017).

*Silkwood v. Kerr-McGee Corp.*<sup>63</sup> determined that “[i]f Congress evidences an intent to occupy a given field, any state law falling within that field is preempted.”<sup>64</sup> This principle is at work within a variety of fields, including alien registration and nuclear energy safety regulations.

The preempted field of alien registration is fairly straightforward. Whereas in 1941, the *Hines v. Davidowitz*<sup>65</sup> Court found that “[w]here the federal government has enacted a complete scheme for the regulation of aliens, and has therein provided a standard for their registration, a state cannot, inconsistently with the purpose of Congress, interfere with, curtail, or complement the federal law, or enforce additional or auxiliary regulations.”<sup>66</sup> In 2012, the majority in *Arizona v. United States* stated that the “[g]overnment of United States has broad, undoubted power over the subject of immigration and status of aliens, resting, in part, on its constitutional power to ‘establish a uniform Rule of Naturalization,’ and its inherent power as sovereign to control and conduct relations with foreign nations.”<sup>67</sup> Both holdings show the broad power that Congress possesses over states in matters of foreign affairs.

In nuclear energy, the line of precedent is not as straightforward. The Atomic Energy Act of 1954 (AEA) established a regulatory regime headed by the Atomic Energy Commission<sup>68</sup> that preempted the field of nuclear safety regulation. In 1983, a distinction was made in the holding of *Pacific Gas and Electric Company v. State Energy*<sup>69</sup> where the Court found that while “the Federal Government has occupied the entire field of nuclear safety concerns”<sup>70</sup> the “legal reality remains that Congress has left sufficient authority in the states to allow the development of nuclear power to be slowed or even stopped for economic reasons,”<sup>71</sup> which showed that state laws and regulations that were related to nuclear non-

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<sup>63</sup> *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984).

<sup>64</sup> *Id.* at 248.

<sup>65</sup> *Hines v. Davidowitz*, 312 U.S. 52 (1941).

<sup>66</sup> *Id.* at 66.

<sup>67</sup> *Arizona v. United States*, 567 U.S. 387 (2012).

<sup>68</sup> 42 U.S.C. § 2011.

<sup>69</sup> *Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 223 (1983).

<sup>70</sup> *Id.* at 212.

<sup>71</sup> *Id.* at 223.

safety measures fell outside of the preempted field of the AEA. Furthermore, the holdings in *English v. General Electric*<sup>72</sup> and *Virginia Uranium, Inc. v. Warren*<sup>73</sup> showed that state law regulating nuclear safety would be preempted if it had “some direct and substantial effect on the decisions made by those who build or operate nuclear facilities concerning radiological safety levels”<sup>74</sup> and “comes close to trenching on core federal powers.”<sup>75</sup>

#### iv. Conclusions on Preemption, Generally

The zones of federal authority and state authority regulating the aviation industry vary based upon the regulations that are the subject of discussion. The essence of express preemption lies in the provisions drafted by Congress. Consideration of the presence of implied conflict preemption is critical in a preemption analysis because courts must be careful to find whether or not a state provision directly contradicts a federal provision. Implied field preemption is important to a preemption discussion because states must be careful not to pass legislation that intervenes with the intent of the federal government.

In matters of aviation, the Federal Aviation Act often involves an analysis of implied field preemption as that Act carries no express preemption provision, whereas the Airline Deregulation Act requires an analysis of express preemption under 49 U.S.C. § 41713. These are addressed in the next section.

### B. Aviation Preemption Challenges

#### i. Federal Aviation Act

The Federal Aviation Act of 1958,<sup>76</sup> which established “the FAA, was passed by Congress for the purpose of centralizing in a single authority the power to frame rules for the safe and efficient use of the nation's air space.”<sup>77</sup> For the sake of this discussion, it is

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<sup>72</sup> *English v. Gen. Elec. Co.*, 496 U.S. 72 (1990).

<sup>73</sup> *Virginia Uranium, Inc. v. Warren*, 139 S. Ct. 1894 (2019).

<sup>74</sup> *English v. Gen. Elec. Co.*, 496 U.S. at 85.

<sup>75</sup> *Virginia Uranium, Inc. v. Warren*, 139 S. Ct. at 1903.

<sup>76</sup> Fed. Aviation Act of 1958, § 601(A)(5, 6), (B); 49 U.S.C.A. § 1421(A)(5, 6), (B).

<sup>77</sup> Charles F. Krause & Kent C. Krause, *Preemption under the Federal Aviation Act*, 1 AVIATION TORT AND REGULATORY LAW § 5:3 (2020).

important to showcase the codified result of this Act, as it pertains to air safety, where the powers delegated to the FAA Administrator were to promote and oversee the safety of American airspace.<sup>78</sup> As Adam Miller pointed out, “49 U.S.C. 44701(a)(5) allows the FAA to prescribe regulations and minimum standards necessary for safety in air commerce and national security,”<sup>79</sup> and this allowance leaves “some room for state and local UAS laws, albeit recommending that state authorities first consult federal aviation authorities in such matters.”<sup>80</sup>

Jurisprudence on the Federal Aviation Act shows that where there are pervasive regulations in an area, the Federal Aviation Act preempts all state claims in that area, particularly air safety.<sup>81</sup> In 1973, the US Supreme Court held in *City of Burbank v. Lockheed Air Terminal* that “[t]he Federal Aviation Act requires a delicate balance between safety and efficiency. . . . and the protection of persons on the ground . . . [t]he interdependence of these factors requires a uniform and exclusive system of federal regulation if the congressional objectives underlying the Federal Aviation Act are to be fulfilled.”<sup>82</sup> In 1989, the 1st Circuit followed the guidance in *City of Burbank*<sup>83</sup> by holding that there was “an unmistakably clear intent to occupy the field of pilot regulation related to air safety, to the exclusion of state law.”<sup>84</sup> A decade later, in *Abdullah v. American Airlines*, the 3rd Circuit found “Congress’s intent to regulate interstate and international air safety to be unambiguous”<sup>85</sup> and held “state and territorial standards of care in aviation safety are federally preempted.”<sup>86</sup> In 2004, the 5th Circuit held in *Witty v. Delta Airlines* that “federal regulatory requirements for passenger safety warnings and instructions are exclusive and preempt all state standards and requirements.”<sup>87</sup> In 2005 and 2007, the 6th

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<sup>78</sup> 49 U.S.C.A. § 44701.

<sup>79</sup> Adam N. Miller, *Up in the Air: The Status & Future of Drone Regulation in Hawaii*, 40 U. HAW. L. REV. 307, 331 (2017).

<sup>80</sup> Timothy M. Ravich, *Airports, Droneports, and the New Urban Airspace*, 44 FORDHAM URB. L.J. 587 (2017).

<sup>81</sup> *Allen v. Spirit Airlines, Inc.*, 981 F. Supp. 2d 688, 692 (E.D. Mich. 2013).

<sup>82</sup> *City of Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. 624, 638–39 (1973).

<sup>83</sup> *Id.*

<sup>84</sup> *French v. Pan Am Exp., Inc.*, 869 F.2d 1, 6 (1st Cir. 1989).

<sup>85</sup> *Abdullah v. Am. Airlines, Inc.*, 181 F.3d 363, 376 (3d Cir. 1999).

<sup>86</sup> *Id.*

<sup>87</sup> *Witty v. Delta Air Lines, Inc.*, 366 F.3d 380, 385 (5th Cir. 2004).

Circuit and 9th Circuit agreed with the 3rd Circuit's reasoning by holding respectively that "federal law establishes the standards of care in the field of aviation safety and thus preempts the field from state regulation"<sup>88</sup> and "federal law occupies the entire field of aviation safety."<sup>89</sup> On the basis of the Act's purpose to centralize air safety regulation and the resulting regulatory scheme, the 10th Circuit held in 2010 that "federal regulation occupies the field of aviation safety to the exclusion of state regulations."<sup>90</sup> Just a year later, the 2nd Circuit concluded that "Congress intended to occupy the field of air safety,"<sup>91</sup> but their discussion of the scope of Congress' intention to preempt the field of air safety is core to the essence of this paper. The 2nd Circuit highlights that "[i]n occupying the field of air safety, Congress did not intend to preempt the operation of state statutes and regulations like the ones at issue here"<sup>92</sup> and ultimately held that

[a]lthough....Congress has indicated its intent to occupy the entire field of aviation safety, the generally applicable state laws and regulations imposing permit requirements on land use challenged here do not, on the facts before us, invade that preempted field.<sup>93</sup>

The holding in *Goodspeed Airport v. East Haddam Inland Wetlands and Watercourses Commission* shows that permit requirements on land use do not necessarily deal with aviation safety, and therefore might fall outside of the field of congressional preemption.<sup>94</sup> *Goodspeed* is important because it provides states with persuasive authority to make a case that there are powers available to them to oversee the regulations of uncrewed aircraft, notwithstanding implied preemption under the Federal Aviation Act.<sup>95</sup>

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<sup>88</sup> *Greene v. B.F. Goodrich Avionics Sys., Inc.*, 409 F.3d 784, 795 (6th Cir. 2005).

<sup>89</sup> *Montalvo v. Spirit Airlines*, 508 F.3d 464, 473 (9th Cir. 2007).

<sup>90</sup> *US Airways, Inc. v. O'Donnell*, 627 F.3d 1318, 1326 (10th Cir. 2010).

<sup>91</sup> *Goodspeed Airport LLC v. E. Haddam Inland Wetlands & Watercourses Comm'n*, 634 F.3d 206, 210 (2d Cir. 2011).

<sup>92</sup> *Id.* at 212.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

## ii. Airline Deregulation Act

In 1978, when Congress passed the Airline Deregulation Act (ADA), they “sought to ensure that its repeal of much of the federal regulatory program would not be undercut by new and invasive state regulation”<sup>96</sup> by including an express preemption provision.

When the ADA passed, the provision originally stated that

no State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of *any air carrier having authority under [title IV of this Act] to provide air transportation.*<sup>97</sup>

Following a recodification of title 49 of the U.S. Code in 1994,<sup>98</sup> the provision now states

a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of *an air carrier that may provide air transportation under this subpart* [(subpart II of part A of sub-title VII of title 49)].<sup>99</sup>

The linguistic difference of the provision was highlighted by two attorneys from the US Department of Transportation (DOT) who recently published an article stating that

[i]nstead of slavishly abiding by the current text, courts must familiarize themselves with the pre-recodification law so as to correctly find the ADA applicable to intrastate operators, with

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<sup>96</sup> Jol A. Silversmith, *Federal Preemption over Air Carrier Prices, Routes, and Services: Recent Developments*, 24 No. 3 AIR & SPACE L. 4, 4 (2012); see Airline Deregulation Act of 1978, 49 U.S.C. § 41713.

<sup>97</sup> 49 U.S.C.A. § 1305(a)(1) (West 2020) (*emphasis added*).

<sup>98</sup> Revision of Title 49, U.S.C. Annotated, “Transp.,” Pl 103–272, July 5, 1994, 108 Stat. 745.

<sup>99</sup> 49 U.S.C.A. § 41713 (West 2020) (*emphasis added*).

economic authority constituting the appropriate predicate for such a finding.<sup>100</sup>

Scholars have also highlighted a number of Courts who have ruled on the effect of the ADA preemption provision that have established binding precedent for courts in the future.<sup>101</sup> Despite the Supreme Court's finding in *Northwest, Inc. v. Ginsberg*,<sup>102</sup> advising courts to rely upon pre-recodification language sets a dangerous precedent and backtracks the progress that has been made in the field over the past twenty years.

In 1992, utilizing precedent set by a previous holding on the effect of the preemption provision of the Employee Retirement Income Security Act of 1974,<sup>103</sup> the US Supreme Court held in *Morales v. Trans World Airlines* that “[s]tate enforcement actions having a connection with or reference to airline ‘rates, routes, or services’ are pre-empted under 49 U.S.C.App. § 1305(a)(1).”<sup>104</sup> The *Morales*<sup>105</sup> holding, authored by Justice Scalia, was at the core of the discussion of *American Airlines v. Wolens* just three years later.<sup>106</sup> In *Wolens*, the majority held that “[t]he ADA’s preemption clause. . . stops States from imposing their own substantive standards with respect to rates, routes, or services, but not from affording relief to a party who claims and proves that an airline dishonored a term the airline itself stipulated.”<sup>107</sup> The majority is right in asserting that the application of express preemption upon state laws should be uniform. Those decisions should not be left to the mercy of the Supreme Court Justice authoring the opinion. As long as the

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<sup>100</sup> Alexander Simpson & Claire McKenna, *No Good Deed Goes Unpunished: The Recodification of the Airline Deregulation Act’s Preemption Provision*, 31 AIR & SPACE L. 8, 11 (2018).

<sup>101</sup> See generally, Paul Stephen Dempsey, *Federal Preemption of State Regulation of Airline Pricing, Routes, and Services: The Airline Deregulation Act*, 10 FIU L. REV. 435 (2015).

<sup>102</sup> *Northwest, Inc. v. Ginsberg*, 572 U.S. 273, 282 (2014) (“While ‘rule[s]’ and ‘standard[s]’ are not mentioned in the current version of the statute, this omission is the result of a recodification that was not meant to affect the provision’s meaning. Those additional terms were deleted as part of a wholesale recodification of Title 49 in 1994, but Congress made it clear that this recodification did not effect any ‘substantive change.’”).

<sup>103</sup> See *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 85 (1983).

<sup>104</sup> *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992).

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 232–33 (1995).

landscape of the nation has not drastically changed between opinions, precedent should remain binding for purposes of delineating powers between states and the federal government.

The immediate response to *Wolens* and *Morales* took place in 1997,<sup>108</sup> when the 2nd Circuit held in *Abdu-Brisson v. Delta Airlines* that there was not an applicable bright line test to ADA express preemption provision challenges and that the provision should be approached by courts on a case-by-case basis.<sup>109</sup> Despite the court stating that there was not a definite bright line test, the 2nd Circuit acknowledged that

[i]f state laws....are preempted merely because they can be said to broadly and generally “relate to prices or services” only in some tenuous, remote or peripheral way and thus preempted, then it is federal law which is unnecessarily interfering with legitimate state laws and policies. We do not believe that congressional intent should be so broadly interpreted without clear justification.<sup>110</sup>

In 2007, the 9th Circuit balanced three elements in *Montalvo v. Spirit Airlines* to determine whether the ADA’s preemption provision expressly preempted Montalvo’s claim.<sup>111</sup> First, the Court had to “ascertain and give effect to the plain meaning of the language used.”<sup>112</sup> Then, the Court “look[ed] to the provisions of the whole law and to its object and policy.”<sup>113</sup> Finally, the Court kept in mind that “Congress’ intent is the ultimate touchstone of every preemption case.”<sup>114</sup> Using *Witty*<sup>115</sup> as a basis for deciding this case, the 9th Circuit held that “[w]ithout more factual development, we cannot determine whether the preemptive reach of *Morales* extends as far as the seating configuration issue presented in this case” which resulted in the case being remanded to the District Court.<sup>116</sup>

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<sup>108</sup> *Id.*; *Morales v. Trans World Airlines, Inc.*, 504 U.S. at 384.

<sup>109</sup> *Abdu-Brisson v. Delta Airlines, Inc.*, 128 F.3d 77, 85–86 (2d Cir. 1997).

<sup>110</sup> *Id.*

<sup>111</sup> *Montalvo v. Spirit Airlines*, 508 F.3d 464, 474 (9th Cir. 2007).

<sup>112</sup> *Id.* (quoting *Hughes Air Corp. v. Public Util. Comm’n*, 644 F.2d 1334, 1337 (9th Cir. 1981)).

<sup>113</sup> *Id.* (quoting *Kelly v. Robinson*, 479 U.S. 36, 43 (1986)).

<sup>114</sup> *Id.*

<sup>115</sup> *Witty v. Delta Air Lines, Inc.*, 366 F.3d at 85.

<sup>116</sup> *Montalvo v. Spirit Airlines*, 508 F.3d at 475.

Around the same time the 9th Circuit reached a decision in *Montalvo*,<sup>117</sup> a series of lengthy delays occurred on New York runways where passengers were not provided water or food.<sup>118</sup> This led the New York Legislature to pass measures ensuring passengers received fresh air, waste removal services and adequate food and water. The Air Transport Association contended this was preempted by the ADA.<sup>119</sup> The 2nd Circuit ultimately highlighted in 2008 that the “[p]urpose of the express preemption provision of the . . . ADA[] was to ensure that the states would not undo the federal deregulation with regulation of their own.”<sup>120</sup> It held that the

express preemption provision of ADA stated that a state law was preempted if it related to a price, route, or service of an air carrier, and the PBR requirements clearly related to services of an air carrier, as it substituted its requirements for competitive market forces, by mandating specific services”<sup>121</sup>

so it was therefore expressly preempted by the ADA.

Contrary to previous cases where actions by state legislatures and government agencies were core to the preemption discussion, in 2014, the Supreme Court encountered a case where it had to decide “whether the Airline Deregulation Act pre-empts a state-law claim for breach of the implied covenant of good faith and fair dealing.”<sup>122</sup> In 2008, Northwest Airlines terminated Ginsberg’s status with their frequent flyer program, WorldPerks Airline Partners Program, citing that he had “abused” their program; Ginsberg contended that Northwest terminated his status as a “cost-cutting measure.”<sup>123</sup> The Supreme Court concluded that “the phrase ‘other provision having the force and effect of law’ includes common-law claims”<sup>124</sup> and held that “[b]ecause respondent’s implied covenant of good faith and fair dealing claim seeks to enlarge his contractual agreement with petitioners. . . .49 U.S.C. § 41713(b)(1) pre-empts

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<sup>117</sup> *Id.*

<sup>118</sup> *Air Transp. Ass’n of Am., Inc. v. Cuomo*, 520 F.3d 218, 218 (2d Cir. 2008).

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 222.

<sup>121</sup> *Id.*

<sup>122</sup> *Northwest, Inc. v. Ginsberg*, 572 U.S. at 276.

<sup>123</sup> *Id.* at 276, 277.

<sup>124</sup> *Id.* at 284.

the claim.”<sup>125</sup> The portion of this decision that was particularly interesting was when the Court stated that “[w]hat is important, therefore, is the effect of a state law, regulation, or provision, not its form, and the ADA’s deregulatory aim can be undermined just as surely by a state common-law rule as it can by a state statute or regulation.”<sup>126</sup> The emphasis on the effect, not form, of a state statute is particularly interesting and a great way to approach the relationship that statutes share with preemption challenges. The emphasis also echoes Justices Scalia and Thomas’ concurrence in *Cipollone*,<sup>127</sup> where the takeaway was that if there is express preemption, there is not field preemption based upon the same statute, which means that the preemptive effect is narrowed to mean only those things expressly stated by Congress are preempted.<sup>128</sup> The concurrence in *Cipollone*, as well as the jurisprudence described above indicates limitations on the preemptive effect of the ADA.

### C. Uncrewed Aircraft and Preemption

#### i. The FAA’s Power Grab

US Supreme Court jurisprudence shows that the FAA’s authority is very broad, so the ultimate question is whether there are areas that would fall out of federal authority and within state authority. The FAA Modernization and Reform Act of 2012,<sup>129</sup> resulting FAA regulations,<sup>130</sup> *Taylor v. Huerta*<sup>131</sup> and *Singer v. City of Newton*<sup>132</sup> provide guidance on this question.

The origins of the FAA’s registration rule for uncrewed aircraft began in 2012 when the FAA Modernization and Reform Act was passed and signed into law by President Obama. This act included the Special Rule for Model Aircraft<sup>133</sup> which stated that the FAA

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<sup>125</sup> *Id.* at 289.

<sup>126</sup> *Id.* at 283.

<sup>127</sup> *Cipollone v. Liggett Grp., Inc.*, 505 U.S. at 2633.

<sup>128</sup> *Id.*

<sup>129</sup> FAA Modernization and Reform Act Of 2012, PI 112-95, Feb. 14, 2012, 126 Stat 11.

<sup>130</sup> 14 C.F.R. § 107.

<sup>131</sup> *Taylor v. Huerta*, 856 F.3d 1089 (D.C. Cir. 2017)

<sup>132</sup> *Singer v. City of Newton*, 284 F. Supp. 3d 125 (D. Mass. 2017).

<sup>133</sup> FAA Modernization and Reform Act Of 2012, PI 112-95, Feb. 14, 2012, 126 Stat 11.

“may not promulgate any rule or regulation regarding a model aircraft.”<sup>134</sup> During the Obama Administration, a directive was released stating

[n]ot later than November 10, 2012, the Secretary of Transportation, in consultation with . . . the aviation industry, Federal agencies . . . , and the unmanned aircraft systems industry, shall develop a comprehensive plan to . . . (iii) establish standards and requirements for the operator and pilot of a civil unmanned aircraft system, including standards and requirements for registration and licensing.<sup>135</sup>

From this directive came a series of actions from the DOT and the FAA to create a regulatory framework addressing the registration of uncrewed aircraft.

In 2014, an administrative law judge with the National Transportation Safety Board (NTSB) upheld an FAA order designating uncrewed aircraft as definitionally the same as crewed aircraft, stating that “[w]e must look no further than the clear, unambiguous plain language of 49 U.S.C. § 40102(a)(6) and 14 C.F.R. § 1.1: an ‘aircraft’ is any ‘device’ ‘used for flight in the air.’ This definition includes any aircraft, crewed or uncrewed, large or small.”<sup>136</sup> Two years later, the FAA published 14 C.F.R. Part 107, which introduced regulations including general provisions, operating rules, remote pilot certification requirements and waivers available to uncrewed aircraft pilots.<sup>137</sup> The NTSB administrative law judge’s finding and 14 C.F.R. Part 107 were paramount to two cases that were decided three years later. *Taylor v Huerta*<sup>138</sup> and *Singer v City of Newton*,<sup>139</sup> addressed the FAA’s authority over uncrewed aircraft and how state laws and local ordinances are affected by preemption of federal law.

In 2015, John Taylor was a model aircraft hobbyist in Washington DC who challenged an Advisory Circular which provided that model aircraft could not fly within Flight Restricted Zones, and a FAA-issued rule requiring owners of all small uncrewed aircraft

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<sup>134</sup> 49 U.S.C. § 40101.

<sup>135</sup> 49 U.S.C. § 44802.

<sup>136</sup> *Huerta v. Pirker*, 2014 WL 8095629, at 5.

<sup>137</sup> 14 C.F.R. § 107.

<sup>138</sup> *Taylor v. Huerta*, 856 F.3d 1089.

<sup>139</sup> *Singer v. City of Newton*, 284 F. Supp. 3d at 125.

to register with the FAA.<sup>140</sup> The language of the Advisory Circular required that a person challenging the order must do so within 60 days of the order's issuance and although Taylor missed the deadline, he was still afforded the opportunity to file a late petition on "reasonable grounds."<sup>141</sup> Taylor listed two reasonable grounds in his petition: that the FAA did not provide adequate notice of the order's issuance and that the circular was "so confusing that it did not provide notice about the conduct it prohibited."<sup>142</sup> In May of 2017, the court held that "Taylor must point 'to more than simply ignorance of the order' as reasonable grounds for his delay. . . [h]is petition for review of Advisory Circular 91-57A is therefore untimely."<sup>143</sup>

In regards to the registration rule, the FAA argued that the rule was "authorized by pre-existing statutory provisions that are unaffected by the FAA Modernization and Reform Act"<sup>144</sup> and "consistent with one of the general directives of the FAA Modernization and Reform Act: to "improve aviation safety."<sup>145</sup> The *Taylor* Court held that the FAA

lacked statutory authority to issue [a] rule requiring owners of small unmanned aircraft operated for recreational purposes to register with FAA, despite FAA's contention that rule was authorized by pre-existing statutory provisions that were unaffected by FAA Modernization and Reform Act's bar on rules and regulations regarding model aircraft, where [the] rule created new regulatory regime for model aircraft that included new registration process for online registration of model aircraft, imposed new requirements on people who previously had no obligation to engage with FAA, and imposed new penalties on model aircraft owners who did not comply.<sup>146</sup>

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<sup>140</sup> *Taylor v. Huerta*, 856 F.3d at 1090.

<sup>141</sup> *Id.* at 1094.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* (citations omitted).

<sup>144</sup> *Id.* at 1092.

<sup>145</sup> *Id.* at 1093.

<sup>146</sup> *Taylor v. Huerta*, 856 F.3d at 137; PL 115-254; FAA Reauthorization Act Of 2018, PL 115-254 (Oct. 5, 2018), 132 Stat 3186. See *FAA Reauthorization*, FED. AVIATION ADMIN. (June 21, 2019), <https://www.faa.gov/about/reauthorization/>.

In the same year as the holding of *Taylor*, the District Court of Massachusetts ruled on *Singer v. City of Newton*,<sup>147</sup> which also serves as an influential case in the realm of uncrewed aircraft law. In December of 2016, the city council of Newton, Massachusetts approved an ordinance regulating uncrewed aircraft “for the principal purpose of protecting the privacy interests of Newton’s residents.”<sup>148</sup> Michael Singer was a FAA-certified small uncrewed aircraft pilot who resided in Newton and did not operate or register his uncrewed aircraft as a hobbyist.

Singer brought suit against the city to challenge Ordinance sections<sup>149</sup> which “require[d] all owners of pilotless aircraft [to] register their pilotless aircraft with Newton, and also prohibit operation of pilotless aircraft out of the operator’s line of sight or in certain areas without permit or express permission.”<sup>150</sup> In the court’s discussion of Newton Ordinances § 20–64(b),<sup>151</sup> it points out that the FAA

indicated its intent to be the exclusive regulatory authority for registration of pilotless aircraft...[citing an FAA fact sheet that states] no state or local government may impose an additional registration requirement on the operation of UAS in navigable

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<sup>147</sup> *City of Newton*, 284 F. Supp. 3d 125.

<sup>148</sup> *Id.* at 127.

The Ordinance states in part: “Purpose: The use of pilotless aircraft is an increasingly popular pastime as well as learning tool. It is important to allow beneficial uses of these devices while also protecting the privacy of residents throughout the City. In order to prevent nuisances and other disturbances of the enjoyment of both public and private space, regulation of pilotless aircraft is required. The following section is intended to promote the public safety and welfare of the City and its residents. In furtherance of its stated purpose, this section is intended to be read and interpreted in harmony with all relevant rules and regulations of the Federal Aviation Administration, and any other federal, state and local laws and regulations.

*Id.*

<sup>149</sup> *City of Newton*, 284 F. Supp. 3d at 131; (“The sections addressed in this case include NEWTON REV. ORDINANCES ch. 20, § 64(B), § 64(C)(1)(A), § 64(C)(1)(B) AND § 64(C)(1)(E).”).

<sup>150</sup> *Singer v. City of Newton*, 284 F. Supp. 3d at 127.

<sup>151</sup> NEWTON, MASS., REV. ORDINANCES ch. 20, § 64(B) (“Section (b) states: “Owners of all pilotless aircraft shall register their pilotless aircraft with the City Clerk’s Office, either individually or as a member of a club . . .”).

airspace without first obtaining Federal Aviation Administration approval.<sup>152</sup>

It is important to note that the record reflects in this case that the city of Newton did not seek the approval of the FAA. The city of Newton argued that, because the FAA implemented mandatory registration for certain uncrewed aircraft, “this space creates a void in which the city may regulate drones.”<sup>153</sup> The Court did not agree with the city’s argument, holding that the

[c]ity ordinance’s registration requirements for pilotless aircraft conflicted with FAA’s exclusive registration requirements and, thus, were subject to preemption; FAA explicitly indicated its intent to be exclusive regulatory authority for registration of pilotless aircraft, and city sought to register all pilotless aircraft without limit as to which altitude they operated, in clear derogation of FAA’s intended authority.<sup>154</sup>

Although the Newton City Council passed the sections of this ordinance with the public safety and privacy of Newton residents in mind, Singer argued that “subsections (c)(1)(a) and (c)(1)(e) conflict with FAA-permitted flight.”<sup>155</sup> The court’s discussion of Newton Ordinances § 20–64(c)(1)(a)<sup>156</sup> and § 20–64(c)(1)(e)<sup>157</sup> highlighted that “Newton’s choice to restrict any drone use below this altitude . . . thwarts not only the FAA’s objectives, but also those of Congress for the FAA to integrate drones into the national airspace.”<sup>158</sup> By establishing regulations in the city that regulate the use of uncrewed aircraft below the FAA-prescribed height of 400 feet, the court found that the city of Newton neglected to see how the FAA’s consideration of co-regulation would “hardly permit an interpretation that essentially constitutes a wholesale ban on drone use in Newton.”<sup>159</sup> Because of this, the court held that subsections (c)(1)(a) and (c)(1)(e) were preempted.

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<sup>152</sup> *City of Newton*, 284 F. Supp. 3d at 131.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 125

<sup>155</sup> *City of Newton*, 284 F. Supp. 3d at 131.

<sup>156</sup> NEWTON, MASS., REV. ORDINANCES ch. 20 § 64(C)(1)(A).

<sup>157</sup> *Id.* § 20–64(c)(1)(e).

<sup>158</sup> *City of Newton*, 284 F. Supp. 3d at 132.

<sup>159</sup> *Id.*

The final discussion in this case was regarding Newton Ordinance § 20–64(c)(1)(b),<sup>160</sup> where Singer argued that “subsection (c)(1)(b) conflicts with the FAA’s visual observer rule and related waiver process, which only the FAA can modify.”<sup>161</sup> The court highlighted the delegation of power from Congress to the FAA in their discussion of this subsection when the Court stated that “Congress [gave] the FAA the responsibility of regulating the use of airspace for aircraft navigation and to protect individuals and property on the ground . . . and specifically directed the FAA to integrate drones into the national airspace system.”<sup>162</sup> The Court then explained that the FAA used this power to require that a remote pilot command the flight of the uncrewed aircraft or a visual observer see the uncrewed aircraft through the duration of the flight and “allow waiver of the visual observer rule.”<sup>163</sup> Because of this, the Court held that the subsection was preempted under the reasoning that “the Ordinance limits the methods of piloting a drone beyond which the FAA has already designated, while also reaching into navigable space . . . intervening in the FAA’s careful regulation of aircraft safety cannot stand.”<sup>164</sup>

ii. Subsequent Legislation and Congress’ Reaction to Taylor

a. *FAA Reauthorization Act Of 2018*

In October of 2018, President Trump signed the FAA Reauthorization Act of 2018 into law.<sup>165</sup> This legislation addressed aircraft noise, the integration of uncrewed aircraft into national airspace, and the financing of airport capital projects. Furthermore, this legislation directed the FAA to appoint leadership in the field of supersonic aircraft. Finally, the legislation ensured safe lithium battery transportation.<sup>166</sup> In addition, as Mark. Connot and Jason Zummo pointed out, an interesting aspect of the FAA

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<sup>160</sup> NEWTON, MASS., REV. ORDINANCES ch. 20, § 64(C)(1)(B).

<sup>161</sup> *City of Newton*, 284 F. Supp. 3d at 132.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *City of Newton*, 284 F. Supp. 3d at 133.

<sup>165</sup> FAA Reauthorization Act Of 2018, Pl 115-254 (Oct. 5, 2018), 132 Stat 3186; See *FAA Reauthorization*, FED. AVIATION ADMIN. (June 21, 2019), <https://www.faa.gov/about/reauthorization/>.

<sup>166</sup> *Id.*

Reauthorization Act of 2018 was that it codified the holdings from *Newton* and *Taylor v. Huerta*.<sup>167</sup> Inspired, although not altogether, from the 2016 version,<sup>168</sup> the FAA Reauthorization Act of 2018 provides strong evidence that Congress did not intend to preempt states entirely from regulating uncrewed aircraft in their airspace.

There are a number of things the 2016 version would have done. Part (a) states:

[n]o State or political subdivision of a State may enact or enforce any law, regulation, or other provision having the force and effect of law relating to the design, manufacture, testing, licensing, registration, certification, operation, or maintenance of an unmanned aircraft system, including airspace, altitude, flight paths, equipment or technology requirements, purpose of operations, and pilot, operator, and observer qualifications, training, and certification.<sup>169</sup>

This, in essence, is a straight forward preemption clause related to the operation of uncrewed aircraft, among other things.

Part (b) codifies the holding in *Morales* – that a federal law might not preempt state laws that are general, affecting the general public, without significant adverse impact, and with a connection to the activity that is tenuous, remote or peripheral.<sup>170</sup>

Part (c) codifies something similar to *Abdullah v. American Airlines*, except that all causes of action under state law are permitted.<sup>171</sup> However, because the 2016 version never became law, there

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<sup>167</sup> Mark J. Connot & Jason J. Zummo, *Everybody Wants to Rule the World: Federal vs. State Power to Regulate Drones*, 29 AIR & SPACE L. 13, 16 (2016).

<sup>168</sup> FED. AVIATION ADMIN. REAUTHORIZATION ACT OF 2016, S. 2658, § 2142 (116TH CONG. 2016).

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* (“Nothing in this subtitle shall be construed to limit a State or local government’s authority to enforce Federal, State, or local laws relating to nuisance, voyeurism, harassment, reckless endangerment, wrongful death, personal injury, property damage, or other illegal acts arising from the use of unmanned aircraft systems if such laws are not specifically related to the use of an unmanned aircraft system for those illegal acts.”)

<sup>171</sup> *Id.*

Nothing in this subtitle, nor any standard, rule, requirement, standard of performance, safety determination, or certification implemented pursuant to this subtitle, shall be construed to preempt, displace, or supplant any State or Federal common law rights or any State or Federal statute creating a remedy for civil relief, including those for civil damage, or a penalty for a criminal conduct. Notwithstanding any other provision of this

are only two situations in which preemption applies: when a municipal, county or state law conflicts with the ADA or the Federal Aviation Act. As noted, the ADA expressly preempts on “rates, routes and services” and the Federal Aviation Act impliedly preempts other areas, mostly for safety.

To date, two cases have addressed the FAA Reauthorization Act of 2018, as it relates to the ADA’s preemption provision, since it became effective: *Air Evac EMS, Inc. v. Cheatham*<sup>172</sup> and *Scarlett v. Air Methods Corp.*<sup>173</sup> In December of 2018, the 4th Circuit heard a case regarding an air ambulance company, Air Evac EMS, and had to decide whether or not the ADA expressly preempted West Virginia’s regulation of air ambulances.<sup>174</sup> The Court analyzed the language of the ADA’s express preemption provision while addressing West Virginia’s arguments that the air ambulance industry falls outside of the language and even if the air ambulance industry falls within the language, West Virginia’s policies do not “run afoul of the ADA.”<sup>175</sup> The 4th Circuit ultimately held that “the preemption clause reaches air ambulance companies like Air Evac” among other findings.<sup>176</sup>

Similarly, in *Scarlett*, using *Wolens* and *Ginsberg* as a foundation,<sup>177</sup> the 10th Circuit encountered a class action lawsuit where patients sued an air ambulance services provider to recover excess payments they made.<sup>178</sup> The plaintiffs argued before the court “that Defendants are not “air carriers” because they also provide

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subtitle, nothing in this subtitle, nor any amendments made by this subtitle, shall preempt or preclude any cause of action for personal injury, wrongful death, property damage, or other injury based on negligence, strict liability, products liability, failure to warn, or any other legal theory of liability under any State law, maritime law, or Federal common law or statutory theory if such laws are not specifically related to the use of an unmanned aircraft system.

*Id.*

<sup>172</sup> *Air Evac EMS, Inc. v. Cheatham*, 910 F.3d 751 (4th Cir. 2018).

<sup>173</sup> *Scarlett v. Air Methods Corp.*, 922 F.3d 1053 (10th Cir. 2019).

<sup>174</sup> *Cheatham*, 910 F.3d at 760.

<sup>175</sup> *Id.* at 762.

<sup>176</sup> *Id.* at 766.

<sup>177</sup> *Wolens*, 513 U.S. at 826; *Ginsberg*, 572 U.S. at 276.

<sup>178</sup> *Air Methods Corp.*, 922 F.3d at 1060.

intrastate flights,”<sup>179</sup> however, looking to the ADA’s preemption provision, the Court held that

[T]he definition of “air carrier” is expansive and encompasses companies that provide both intrastate and interstate flights. A company is an air carrier when it is “undertaking *by any means, directly or indirectly*, to provide air transportation.” 49 U.S.C. § 40102(a)(2) (emphasis added). To “undertake” means “[t]o take on an obligation or task.” *Undertake*, Black’s Law Dictionary (10th ed. 2014). Defendants have obtained the necessary certifications to provide interstate flights and, in fact, do provide interstate flights. Under the plain meaning of § 40102(a)(2), Defendants have undertaken to provide air transportation.<sup>180</sup>

These holdings show that the ADA applies to air ambulances, and that was, according to the courts, Congress’ intent. The question moving forward is whether or not courts will apply the same level of scrutiny to the uncrewed aircraft industry as the 4th Circuit and 10th Circuit did to the air ambulance industry in *Cheatham* and *Scarlett*.<sup>181</sup>

The contention between interstate and intrastate flight, core to the 3rd Circuit decision in *Ickes v. Federal Aviation Administration*, may provide guidance to this question.<sup>182</sup> The 3rd Circuit held that “because airplanes constitute instrumentalities of interstate commerce, any threat to them, such as the one posed by Ickes’ flights of his Challenger II, is properly subjected to regulation even if the threat comes from a purely intrastate activity.”<sup>183</sup> The fact that the Court’s conclusion relied upon the Commerce Clause,<sup>184</sup> rather than the Supremacy Clause, further complicates the issue of how Courts will treat the activities of uncrewed aircraft in future.

#### *b. FAA Registration and Remote ID Rules*

In October of 2015, US DOT Secretary Anthony Foxx and FAA Administrator Michael Huerta announced the creation of a task

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<sup>179</sup> *Id.*

<sup>180</sup> *Id.* at 1061.

<sup>181</sup> *Cheatham*, 910 F.3d at 760; *Air Methods Corp.*, 922 F.3d at 1060.

<sup>182</sup> *Ickes v. Fed. Aviation Admin.*, 299 F.3d 260 (3d Cir. 2002).

<sup>183</sup> *Id.* at 263.

<sup>184</sup> U.S. CONST. art. 1, § 8, Clause 3.

force to create registration requirements for uncrewed aircraft systems stating that “[r]egistration will help make sure that operators know the rules and remain accountable to the public for flying their unmanned aircraft responsibly.”<sup>185</sup> Two months later, in December of 2015, the DOT and FAA released a final rule which “provide[d] an alternative, streamlined and simple, web-based aircraft registration process for the registration of small unmanned aircraft, including small unmanned aircraft operated as model aircraft, to facilitate compliance with the statutory requirement that all aircraft register prior to operation.”<sup>186</sup>

In 2017, the District of Columbia Circuit held in *Taylor v. Huerta* that the “Registration Rule is unlawful as applied to model aircraft.”<sup>187</sup> However, a drone registration provision was included in the National Defense Authorization Act of 2017.<sup>188</sup> The resulting framework included 14 C.F.R. § 48.1<sup>189</sup> and 49 U.S.C.A. § 44103<sup>190</sup> which outlined the regulatory and statutory registration and marking requirements for small uncrewed aircraft in the US.<sup>191</sup> In February of 2019, the FAA and DOT released an interim final rule “requir[ing] small unmanned aircraft owners to display the unique identifier assigned by the FAA upon completion of the registration process (registration number) on an external surface of the aircraft.”<sup>192</sup> This rule is important to the registration of small uncrewed aircraft because it would allow law enforcement to easily access the identifier rather than deconstructing the uncrewed aircraft to identify the operator.

In addition to registration requirements, remote identification has dominated the conversation on Capitol Hill as increased

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<sup>185</sup> Press Release, Federal Aviation Admin., U.S. Transportation Secretary Anthony Foxx Announces Unmanned Aircraft Registration Requirement, (Oct. 19, 2015).

<sup>186</sup> Registration and Marking Requirements for Small Unmanned Aircraft, 80 Fed. Reg. 78594, 78594 (Dec. 16, 2015) (to be codified at 14 C.F.R. pt. 1, 45, 47, 48, 91, and 375).

<sup>187</sup> *Taylor v. Huerta*, 856 F.3d at 90.

<sup>188</sup> National Defense Authorization Act of 2018, Pub. L. No. 115-91, § 143, 131 Stat 1283 (2017); See also Bryan V. Norton, *Drone 101: A Survey of the Overlapping Laws, Rules and Regulations in Idaho and the National Airspace*, 61 ADVOC. 31, 32 (2018).

<sup>189</sup> 14 C.F.R. § 48.1.

<sup>190</sup> 49 U.S.C.A. § 44103 (West).

<sup>191</sup> 14 C.F.R. § 1.1.

<sup>192</sup> External Marking Requirement for Small Unmanned Aircraft, 84 Fed. Reg. 3669, 3669 (Feb. 13, 2019) (to be codified at 14 C.F.R. pt. 48)..

sightings of uncrewed aircraft have occurred, garnering the bipartisan support of Congress to implement measures sooner than later.<sup>193</sup> Remote identification is essential to the safe integration of uncrewed aircraft into national airspace and establishing guidelines for remote identification is key to creating a framework that will allow states and municipalities to have uncrewed aircraft fly with crewed aircraft in their respective airspaces.<sup>194</sup> On December 31, 2019, the FAA offered a notice of proposed rulemaking on the remote identification of uncrewed aircraft systems in the US,<sup>195</sup> which has been met with great criticism from top industry leaders such as Da Jieng Innovations<sup>196</sup> and the Experimental Aircraft Association.<sup>197</sup> Since then, the FAA has circulated a graphic simplifying their vision of remote identification in the US,<sup>198</sup> and obtained over 53,000 comments on the Federal Register regarding its proposal.<sup>199</sup> According to one legal practitioner, the proposal, if implemented as is,

would amend current registration requirements for UAS operators, create operation and production requirements for UAS producers, and prohibit operators from registering multiple drones under a single registration number. Further, the rule

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<sup>193</sup> Michael Burke, *Senators urge FAA to allow remote tracking of drones*, THE HILL (Apr. 29, 2019), <https://thehill.com/policy/transportation/441175-bipartisan-pair-of-senators-call-for-faa-to-publish-remote>.

<sup>194</sup> *UAS Remote Identification*, FED. AVIATION ADMIN. (Mar. 5, 2020), [https://www.faa.gov/uas/research\\_development/remote\\_id/](https://www.faa.gov/uas/research_development/remote_id/).

<sup>195</sup> Remote Identification of Unmanned Aircraft Systems, 84 Fed. Reg. 72438, 72439 (Dec. 31, 2019) (to be codified at 14 C.F.R. pt. 1, 47, 48, 89, 91, and 107)..

<sup>196</sup> *US drone ban puts lives at risk, says DJI*, INSIDE IMAGING (Feb. 20, 2020), <https://www.insideimaging.com.au/2020/us-drone-ban-puts-lives-at-risk-says-dji/>.

<sup>197</sup> Gordon Gilbert, *EAA to FAA: Remote ID Rule Threatens Model Flying*, AIN ONLINE (Mar. 4, 2020), <https://www.ainonline.com/aviation-news/business-aviation/2020-03-04/ea-faa-remote-id-rule-threatens-model-flying>.

<sup>198</sup> Jim Moore, *FAA Gets Early Earful on Drone ID Concerns About Privacy, Cost*, AOPA (Jan. 9, 2020), <https://www.aopa.org/news-and-media/all-news/2020/january/09/faa-gets-early-earful-on-drone-id>.

<sup>199</sup> Brian Garrett-Glacier, *UAS Service Suppliers Discuss 53,000 Comments on FAA's Remote ID Proposal*, AVIONICS INT'L (Mar. 19, 2020), <https://www.aviationtoday.com/2020/03/19/uas-service-suppliers-discuss-53000-comments-faas-remote-id-proposal/>.

would require all registered UAS to have functional end-to-end communication throughout the duration of the flight.<sup>200</sup>

Until the FAA's proposal is released as a final rule, which is not expected until at least 2021,<sup>201</sup> states should continue to pass legislation regulating uncrewed aircraft in their borders to show the federal government that states are capable of doing what they always have done – exercising their police powers to make their citizens safe.<sup>202</sup>

#### *D. Implications for State Regulation of Uncrewed Aircraft*

Federal preemption only goes so far and leaves latitude for states to regulate some aspects of drones. Based upon the *Taylor* holding and subsequent legislation, states and political subdivisions would likely be unable to pass measures related to the recreational operation of uncrewed aircraft in their jurisdiction.<sup>203</sup> Furthermore, the *Newton* holding would likely preempt legislation regarding the registration of non-recreational uncrewed aircraft, changes to altitude limits or the FAA's visual-observer rule.<sup>204</sup>

State laws would be found to be expressly preempted from the ADA or impliedly preempted from the Federal Aviation Act because the 2016 version did not become law. In the case of legislation establishing a state-operated drone registry, the legislation would likely become an issue of implied preemption under the Federal Aviation Act, as amended by the 2018 legislation and the National Defense Authorization Act of 2017. The scope of implied preemption

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<sup>200</sup> Clifford Maine & Todd Dixon, *Proposed UAS Remote Identification Requirements To Impact Drone Users*, NAT'L L. REV. (Feb. 24, 2020), <https://www.natlawreview.com/article/proposed-uas-remote-identification-requirements-to-impact-drone-users>.

<sup>201</sup> Dave Lincoln, *The FAA's Proposed Remote ID Rule: What You Need to Know*, SKYWARD (Jan. 28, 2020), <https://skyward.io/the-faas-proposed-remote-id-rule-what-you-need-to-know/>. The FAA announced, on December 28, 2020 that "[i]t will be requiring Remote ID on Part 107 licensed drones." Jaron Schneider, *FAA Publishes Final Drone Rules: Remote ID Now Required*, PETAPIXEL (Dec. 28, 2020), <https://petapixel.com/2020/12/28/faa-publishes-final-drone-rules-remote-id-now-required/>. The rule is expected to be published in the Federal Register in January 2021. *Id.*

<sup>202</sup> Arthur Holland Michel, *Local and State Drone Laws*, CTR. FOR THE STUDY OF THE DRONE AT BARD COLLEGE (March 2017), <https://dronecenter.bard.edu/files/2017/03/CSD-Local-and-State-Drone-Laws-1.pdf>.

<sup>203</sup> See *Taylor v. Huerta*, 856 F.3d at 1093-94.

<sup>204</sup> *City of Newton*, 284 F. Supp. 3d at 132.

under the Federal Aviation Act, as it relates to the uncrewed aircraft industry, will depend upon whether a Court finds that uncrewed aircraft are instrumentalities of interstate commerce, following the holding from *Ickes*.<sup>205</sup> States must also be cognizant that legislation relating to the “rates, routes or services” would likely be preempted under the *Morales* holding.<sup>206</sup> Also, any legislation that establishes a standard of care within aviation safety will be found to be preempted under the *Abdullah* holding.<sup>207</sup>

Other areas of the law not previously addressed such as criminal activity, tortious activity, interests relating to the rights of real property owners, among other things should fall within the state’s scope to regulate uncrewed aircraft operation. The scope may be narrow but powers do remain for states to regulate uncrewed aircraft that are not field preempted by the Federal Aviation Act and not expressly preempted by the Airline Deregulation Act.

### III. ZONE OF STATE AUTHORITY

#### A. *ABA Proposal on Aerial Trespass*

In response to the increasing popularity of uncrewed aircraft and cases involving the preemption of uncrewed aircraft becoming more frequent,<sup>208</sup> the American Bar Association (ABA) Section of Real Property, Trust and Estate Law released a draft resolution and report in February of 2020 outlining recommendations to the federal government, state governments and other political subdivisions of the state.<sup>209</sup> The proposed resolution:

urges federal, state, local, territorial, and tribal governments, and their respective agencies and departments, to protect real property interests, including common law trespass and privacy rights, with respect to any statute, ordinance, regulation, administrative rule, order, or guidance pertaining to the

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<sup>205</sup> *Ickes v. Fed. Aviation Admin.*, 299 F.3d 260, 299 (3d Cir. 2002).

<sup>206</sup> *Morales v. Trans World Airlines, Inc.*, 504 U.S. at 384.

<sup>207</sup> *Abdullah v. Am. Airlines, Inc.*, 181 F.3d. at 376.

<sup>208</sup> See *Taylor v. Huerta*, 856 F.3d; *City of Newton*, 284 F. Supp. 3d.

<sup>209</sup> Matt Reynolds, *ABA House of Delegates Passes Resolution on Drones; Delegate Calls it ‘a Hot Topic,’* ABAJOURNAL.COM (Feb. 17, 2020), <https://www.abajournal.com/news/article/resolution-111>.

development and usage of unmanned aircraft systems over private property.<sup>210</sup>

The report acknowledges both the potential for tortious and criminal activity over real property and benefits of uncrewed aircraft. Thus, a legal framework would be necessary to protect the interests of real property owners and occupants as “[e]merging technologies such as UAS do not fit squarely within existing trespass and privacy rights laws.”<sup>211</sup> In order to protect these interests, the report advised government entities to consider existing frameworks of common law trespass and privacy rights as a foundation for governing uncrewed aircraft over real property but to keep in mind that “a ‘one-size fits all’ approach to rules governing the operation of drones is not appropriate.”<sup>212</sup>

The proposal highlights the necessity for states to act in the race against the federal government to regulate uncrewed aircraft. Furthermore, the ABA’s report draws upon the seminal 1946 decision in *United States v. Causby*—which allowed that while a landowner does not own all the airspace above his farm, there does exist some exclusivity in the “immediate reached of the enveloping atmosphere”<sup>213</sup>—to demonstrate that traditional laws on real property are flexible and can evolve to handle emerging technologies.<sup>214</sup> The ABA’s analysis would have been stronger had it also drawn upon the holdings in *Griggs v. Allegheny City*<sup>215</sup> and *Brown v. United States*.<sup>216</sup>

Granting *certiorari* from the Supreme Court of Pennsylvania, the US Supreme Court heard a case in 1962 that extended the holding in *Causby* to include takings by local governments.<sup>217</sup> After

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<sup>210</sup> AM. BAR ASSOC., Midyear Meeting 2020 – House of Delegates Resolution 111, [https://www.americanbar.org/news/reporter\\_resources/midyear-meeting-2020/house-of-delegates-resolutions/111/](https://www.americanbar.org/news/reporter_resources/midyear-meeting-2020/house-of-delegates-resolutions/111/) (last visited Dec. 30, 2020).

<sup>211</sup> *Id.* at 1. The Report can be found by following the “Proposed Resolution and Report” hyperlink.

<sup>212</sup> *Id.*

<sup>213</sup> *United States v. Causby*, 328 U.S. 256, 264, (1946).

<sup>214</sup> AM. BAR ASSOC., Midyear Meeting 2020, *supra* note 210, at 4-6.

<sup>215</sup> *Griggs v. Allegheny Cty., Pa.*, 369 U.S. 84 (1962);

<sup>216</sup> *Brown v. United States*, 73 F.3d 1100, 1102 (Fed. Cir. 1996).

<sup>217</sup> *Allegheny Cty., Pa.*, 369 U.S. at 89.

analyzing Congress' re-definition of "navigable airspace,"<sup>218</sup> Justice Douglas held that

respondent, which was the promoter, owner, and lessor of the airport, was in these circumstances the one who took the air easement in the constitutional sense....[t]he Federal Government takes nothing; it is the local authority which decides to build an airport vel non, and where it is to be located.<sup>219</sup>

Over thirty years later, the Federal Circuit heard *Brown v. United States* laying out three factors:

determining whether noise and other effects from overflights interfered with the property owner's rights in such a way as to constitute a taking of an avigation easement and hence require compensation: (i) the planes flew directly over the claimant's land; (ii) the flights were low and frequent, and (iii) the flights directly and immediately interfered with the claimant's enjoyment and use of the land....caselaw following *Causby* has added a gloss on the third factor, requiring that the interference with enjoyment and use be "substantial."<sup>220</sup>

As Daniel Thompson correctly highlights, "[h]armonizing federal, state, and local airspace property laws will be one of the most frustrating obstacles for this integrated drone infrastructure above highways,"<sup>221</sup> because, "cases after *Causby* did not clarify the 'precise limits' of vertical property rights."<sup>222</sup> An interesting interpretation of *Causby*, as it relates to uncrewed aircraft, was presented by Robert Heverly. Heverly indicates that the holding in *Causby* would "allow states to step in and set navigable airspace for drones below that limit set by the FAA for other aircraft. . . [s]o long as the height set by a state meets the *Causby* overflight test, however, it is likely to be upheld."<sup>223</sup> If a state government chooses to set navigable airspace for drones below the limit, then a court, should

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<sup>218</sup> *Id.* at 88.

<sup>219</sup> *Id.* at 89.

<sup>220</sup> *Brown v. United States*, 73 F.3d at 1102.

<sup>221</sup> Daniel Thompson, *Rethinking the Highway: Integrating Delivery Drones into Airspace Above Highways*, 95 IND. L.J. SUPPLEMENT 8, 10 (2020).

<sup>222</sup> Robert A. Hazel, *Privacy and Trade Secret Law Applied to Drones: An Economic Analysis*, 19 COLUM. SCI. & TECH. L. REV. 340, 348 (2018).

<sup>223</sup> Robert A. Heverly, *The State of Drones: State Authority to Regulate Drones*, 8 ALB. GOV'T L. REV. 29, 46 (2015).

remember that, in *Causby*, the federal government exercised its power in a way that infringed on the useful enjoyment of the land, in contravention of the state property law rights.<sup>224</sup> If a court rejects a state government's attempt to set the limits of navigable airspace, an alternative would be for the states to advocate for an auction of navigable airspace, where the federal government could auction geographic, exclusive assignments of airspace to the states.<sup>225</sup>

The ABA's proposal was a step in the right direction to harmonize airspace property laws, but the holding from *Griggs* and the three factors laid out by the Federal Circuit in *Brown* would have solidified the ABA's position and provided an updated analysis of the holding in *Causby*. That said, there are a number of municipalities, counties and states that have already put measures in place that regulate aspects of the operation of uncrewed aircraft.

### B. State Preemption of Uncrewed Aircraft

Seventeen states have passed legislation that preempt municipal or county rules, regulations, codes or ordinances that seek to regulate aspects of the operation of uncrewed aircraft in their jurisdictions, including the registration of uncrewed aircraft. Arizona,<sup>226</sup> Connecticut,<sup>227</sup> Delaware,<sup>228</sup> Florida,<sup>229</sup> Louisiana,<sup>230</sup> Maryland,<sup>231</sup> Michigan,<sup>232</sup> New Jersey,<sup>233</sup> Oregon,<sup>234</sup> Pennsylvania,<sup>235</sup> Rhode Island,<sup>236</sup> and Virginia all passed express preemption provisions of uncrewed aircraft in their state with no exceptional circumstances.<sup>237</sup> An interesting note about Virginia is that a debate emerged in 2018 about whether or not county park authorities are able to regulate the use of uncrewed aircraft when there is a state

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<sup>224</sup> *Causby*, 328 U.S. at 264.

<sup>225</sup> Brent Skorup, *Auctioning Airspace*, 21 N.C. J. L. & TECH. 79, 93 (2019).

<sup>226</sup> ARIZ. REV. STAT. ANN. § 13-3729 (2020).

<sup>227</sup> CONN. GEN. STAT. ANN. § 7-149(B) (West 2020).

<sup>228</sup> DEL. CODE ANN. tit. 11, § 5.1334 (West 2020).

<sup>229</sup> FLA. STAT. ANN. § 330.41 (West 2020).

<sup>230</sup> LA. STAT. ANN. § 2:2 (2020).

<sup>231</sup> MD. CODE ANN., ECON. DEV. § 14-301 (West 2020).

<sup>232</sup> MICH. COMP. LAWS ANN. § 259.305 (West 2020).

<sup>233</sup> N.J. STAT. ANN. § 2C:40-29 (West 2020).

<sup>234</sup> OR. REV. STAT. ANN. § 837.385 (West 2020).

<sup>235</sup> 53 PA. STAT. AND CONS. STAT. ANN. § 305 (West 2020).

<sup>236</sup> 1 R.I. GEN. LAWS ANN. § 1-8-1 (West 2020).

<sup>237</sup> VA. CODE ANN. § 15.2-926.3 (West 2020).

preemption provision in place.<sup>238</sup> The Attorney General of Virginia issued an opinion in March of 2018 stating “a public park authority may adopt rules or regulations concerning the operation of uncrewed aircraft systems, commonly known as drones, in its parks.”<sup>239</sup>

Alaska specifically chose only to preempt municipalities in the state from passing ordinances permitting the release of images captured by uncrewed aircraft.<sup>240</sup> Georgia chose to pass an express preemption provision that allows existing ordinances to stay in place, municipalities to pass ordinances reinforcing FAA regulations and municipalities to pass ordinances regulating uncrewed aircraft on public property.<sup>241</sup> Illinois passed an express preemption provision that excluded Chicago from its requirements, which would allow the political subdivisions within Chicago’s jurisdiction to implement measures regulating uncrewed aircraft.<sup>242</sup> Texas preempted political subdivisions from passing measures regulating uncrewed aircraft unless the measure is related to special events, public use of an uncrewed aircraft or use of an uncrewed aircraft near public property.<sup>243</sup> Finally, Utah preempted political subdivisions from passing measures regulating uncrewed aircraft unless the political subdivision is an airport operator.<sup>244</sup>

### *C. State Registration, Licensing and Permitting of Uncrewed Aircraft*<sup>245</sup>

California, Louisiana, Minnesota, Nevada, North Carolina, Oregon and West Virginia have enacted legislation that establish a registry or licensing system of uncrewed aircraft operators. In

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<sup>238</sup> Courtney Wootton, Michael Bradley & Ray Neal, *Drones in Parks: It’s All About Perspective*, NAT’L RECREATION AND PARKS ASS’N (Dec. 7, 2018), <https://www.nrpa.org/parks-recreation-magazine/2018/december/drones-in-parks-its-all-about-perspective/>.

<sup>239</sup> The Honorable David L. Bulova, Op. Va. Att’y Gen. 17-047 (2018).

<sup>240</sup> ALASKA STAT. ANN. § 29.35.146 (West 2020).

<sup>241</sup> GA. CODE ANN. § 6-1-4 (West 2020).

<sup>242</sup> 620 ILL. COMP. STAT. ANN. 5/42.1 (West 2020).

<sup>243</sup> TEX. GOV’T CODE ANN. § 423.009 (West 2019).

<sup>244</sup> UTAH CODE ANN. § 72-14-103 (West 2020).

<sup>245</sup> See generally Arthur Holland Michel, *Local and State Drone Laws*, CTR. FOR THE STUDY OF THE DRONE AT BARD COLLEGE (March 2017), <https://dronecenter.bard.edu/files/2017/03/CSD-Local-and-State-Drone-Laws-1.pdf>; Jonathan Rupprecht, *US Drone Laws (2019)* — *Drone Laws by State*, RUPPRECHT LAW, P.A. (Jan. 2019), <https://jrupprechtlaw.com/drone-laws-state/>.

California, anyone wishing to operate an uncrewed aircraft for pest control must obtain a license from the state of California in addition to requirements from the FAA.<sup>246</sup> In Louisiana, “[e]ach person operating an unmanned aerial system in the course of an agricultural commercial operation shall obtain a license from the department” and “[e]ach unmanned aerial system operated in the course of an agricultural commercial operation shall be registered with the department.”<sup>247</sup> The statute goes on to state that licenses will be issued after applicants submit a written application to the department and “complete an agricultural education and safety training course administered by the Louisiana Cooperative Extension Service or the Southern University Agricultural Research and Extension Center.”<sup>248</sup> In Minnesota, commercial operators are required to register and license their uncrewed aircraft, implied as an aircraft in Minnesota law,<sup>249</sup> with the Minnesota Department of Transportation.<sup>250</sup> In addition, commercial operators are required to hold uncrewed aircraft insurance with the requirements outlined in the statute.<sup>251</sup> Nevada has codified that the Department of Public Safety shall create and maintain a registry of uncrewed aircraft operated by public agencies within the state of Nevada.<sup>252</sup> In 2015, a commercial uncrewed aircraft permitting system was created within the North Carolina Department of Transportation.<sup>253</sup> Recreational operators are not affected by the permitting scheme, however, any operator flying for commercial or governmental purposes has to pass a knowledge test and register with the department.<sup>254</sup> While this state statute is a permitting scheme, not a registry, it shows that field preemption is not as broad as some think and express preemption under the ADA might not apply to drone rates, routes, services.

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<sup>246</sup> CA. FOOD AND AGRIC. CODE § 11901 (West 2020).

<sup>247</sup> LA. STAT. ANN. § 3:43 (2020).

<sup>248</sup> *Id.*

<sup>249</sup> MINN. STAT. ANN. § 360.013 (West 2020).

<sup>250</sup> MINN. STAT. ANN. § 360.60 (West 2020).

<sup>251</sup> MINN. STAT. ANN. § 360.59(10)(A) (West 2020).

<sup>252</sup> NEV. REV. STAT. ANN. § 493.118 (West 2020).

<sup>253</sup> N.C. GEN. STAT. ANN. § 63-96 (West 2020).

<sup>254</sup> *Id.*

In Oregon, a statute, codified in the Oregon Administrative Code,<sup>255</sup> directs the Oregon Department of Aviation to establish a registry of uncrewed aircraft systems operated by public bodies, other than educational institutions,<sup>256</sup> in the airspace of Oregon<sup>257</sup> where violators can be fined up to \$10,000.<sup>258</sup> The implementation of this registry is highlighted in subsections (2)(a) and (2)(b) which state “[a] public body, other than an educational institution, may not operate an unmanned aircraft system in the airspace over this state without registering the unmanned aircraft system with the Oregon Department of Aviation”<sup>259</sup> but that

[a]n educational institution may not operate an unmanned aircraft system in the airspace over this state without registering as a user of unmanned aircraft systems with the department. The department may not require an educational institution to register individual unmanned aircraft systems under this section.<sup>260</sup>

In West Virginia, “[p]ersons who intend to operate an unmanned aircraft system shall register at the area superintendent’s office prior to engaging or participating in the operation of any unmanned aircraft system and specify where the activity will take place.”<sup>261</sup> It is important to note that this registry is only in place for West Virginia uncrewed aircraft operators who wish to fly in the airspace of state parks, forests and rail trails. The way in which the language of the statute is written gives West Virginia state park superintendents broad discretion to “prohibit, issue directives, or implement time and place restrictions on unmanned aircraft system use”<sup>262</sup> in their jurisdiction.

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<sup>255</sup> OR. ADMIN. R. 738-080-0045 (2020).

<sup>256</sup> OR. REV. STAT. ANN. § 837.360 (West 2020).

<sup>257</sup> *Id.*

<sup>258</sup> *Id.*

<sup>259</sup> OR. REV. STAT. ANN. § 837.360(2)(A) (West 2020).

<sup>260</sup> OR. REV. STAT. ANN. § 837.360(2)(B) (West 2020).

<sup>261</sup> W. VA. CODE ANN. § 20-5-2 (West 2020).

<sup>262</sup> *Id.*

*D. Municipal and County Registration of Uncrewed Aircraft*<sup>263</sup>

Newton, Massachusetts is the only city known in the US which attempted to establish its own uncrewed aircraft registry and faced litigation.<sup>264</sup> However, there are other cities and counties that passed ordinances regulating uncrewed aircraft in similar ways to Newton. Oxford, Alabama passed an ordinance in November 2016 that states no person can operate an uncrewed aircraft without prior permission or designation by the chief of police.<sup>265</sup> Hermosa Beach, California passed an ordinance in 2016 requiring uncrewed aircraft operators to obtain a city-issued permit,<sup>266</sup> but other cities in California are refusing to follow suit, instead encouraging state officials to pass a uniform set of rules and regulations.<sup>267</sup> In Telluride, Colorado, people cannot operate uncrewed aircraft in the city without prior permission from the Town Manager or if they have physical or mental conditions impeding the operation of uncrewed aircraft.<sup>268</sup>

Citizens of Greenwich, Connecticut cannot operate uncrewed aircraft in any city park without the prior authorization of the Greenwich Director of Parks and Recreation.<sup>269</sup> Commercial operators of uncrewed aircraft in Defuniak Springs, Florida must register with and notify the local police department four hours in advance before conducting any commercial work with uncrewed aircraft in the city.<sup>270</sup> Operators of uncrewed aircraft in Miami, Florida are required to apply for permission with the City Manager for certain activities, which are not listed in the language of the ordinance.<sup>271</sup> In addition to FAA authorization, uncrewed aircraft operators in Augusta, Georgia must obtain permission from the Augusta, Georgia Commission to launch or operate uncrewed aircrafts within the

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<sup>263</sup> See generally, Michel, *supra* note 245.

<sup>264</sup> See *City of Newton*, 284 F. Supp. 3d.

<sup>265</sup> OXFORD, ALA., CODE art. 11, § 26-293 (2016).

<sup>266</sup> HERMOSA BEACH, CAL., CODE ch. 9, § 38.030 (2016).

<sup>267</sup> Tom Lindsey, *Response to 2015-2016 Orange County Grand Jury Report "Drones: Know Before You Fly,"* CITY OF YORBA LINDA (Aug. 23, 2016), [http://www.ocgrandjury.org/pdfs/2015\\_2016\\_GJreport/2016-08-23\\_City\\_of\\_Yorba\\_Linda.pdf](http://www.ocgrandjury.org/pdfs/2015_2016_GJreport/2016-08-23_City_of_Yorba_Linda.pdf).

<sup>268</sup> TELLURIDE, COLO., CODE ch. 10, art. 11, § 30 (2017).

<sup>269</sup> GREENWICH, CONN., CODE ch. 7, art. 2, § 28(19) (1983).

<sup>270</sup> DEFUNIACK SPRINGS, FLA., CODE ch. 22, art. 4, § 52 (2016).

<sup>271</sup> MIAMI, FLA., CODE ch. 37, § 12(D)(1) (2020).

limits of Richmond County, Georgia.<sup>272</sup> Uncrewed aircraft operators in Fort Wayne, Indiana must notify and provide information to the city before flying anywhere above the Downtown Aerial District or within a five hundred yard radius of a public event.<sup>273</sup>

Operators in Anoka County, Minnesota must obtain a special permit from the parks and recreation department before flying their uncrewed aircraft over parks in the county.<sup>274</sup> Columbia, Missouri uncrewed aircraft operators are not allowed to fly their aircraft unless issued a special permit from the city prior to flight.<sup>275</sup> The Parks, Recreation and Historic Preservation Department of New York does not allow operators to fly uncrewed aircraft in department owned and operated land without a special permit from the department.<sup>276</sup>

### *E. Conclusion*

It has been said that the *Singer* decision shows how “even if a municipality may regulate certain aspects of drone operations, it cannot do so in such a way that affects operation in the national airspace”<sup>277</sup> It has also been noted that “[a]llowing local governments to regulate the nature of drone use while leaving operational safety and licensing regulation to the exclusive control of the federal government would help to stave off the “patchwork” problem of inconsistent local regulation.”<sup>278</sup> This a somewhat unfounded concern, as a patchwork already exists, yet the drone industry is moving forward. While there is a balance to be struck, states have shown they have the authority to regulate under their traditional police powers, yet the patchwork effect can still be mitigated by states preempting local authorities. State governments are best

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<sup>272</sup> AUGUSTA, GA., CODE art. 1, ch. 3, §44(B) (2016).

<sup>273</sup> FORT WAYNE, IND., CODE ch. 96, § 30(D) (2019).

<sup>274</sup> ANOKA COUNTY, MINN., REV. ORDINANCES ch. 4, § 5 (2018).

<sup>275</sup> COLUMBIA, MO., CODE art. 4, div. 8, §17-134 (2016).

<sup>276</sup> *Regulating Unmanned Aircraft Systems*, N.Y. PARKS, RECREATION AND HIST. PRES. (Jan. 6, 2015), <https://parks.ny.gov/inside-our-agency/documents/GuidancePolicies/RegulatingUnmannedAircraftSystemsDronesModelAirplanesQuadCopters.pdf>.

<sup>277</sup> Chuck Tobin et al., *Will Federal Preemption Push Drone Journalism to New Heights? State, Municipal Regulations Suspect Following Singer v. City of Newton*, COMM. LAW., 10, 13 (Spring 2019).

<sup>278</sup> *Federalism-Preemption-Massachusetts District Court Finds Portion of Local Drone Ordinance Preempted by FAA Regulation.-Singer v. City of Newton*, No. Cv 17-10071, 2017 WL 4176477 (D. Mass. Sept. 21, 2017), 131 HARV. L. REV. 2057, 2063 (2018).

positioned to both protect citizens while creating a safe environment that will foster the drone industry. In order for a state-operated uncrewed aircraft registry to operate efficiently, state legislatures must assert their preemption power to stop political subdivisions from implementing measures regulating uncrewed aircraft.<sup>279</sup>

#### IV. FLYING FORWARD: THE NECESSITY FOR STATES TO ACT

##### A. *Municipalities' and Counties' Missteps To-date*

To date, there have been a number of troubling events in the field of uncrewed aircraft state policy and law. Texas and Virginia started a dangerous movement in 2013 when they became the first of many states and municipalities to pass legislation and ordinances that banned the use of uncrewed aircraft altogether.<sup>280</sup> Since then, there have been a number of instances where counties and municipalities are aimlessly enacting uncrewed aircraft regulations that have affected their residents in negative ways.

The first example is a resident of Carroll County, Maryland who wanted to become a full-time drone pilot but encountered a major issue: Carroll County required him to have a permit and a one million dollar flight insurance plan.<sup>281</sup> Law Professor Michael Greenberger argued that “whatever Carroll County is doing is inconsistent on a macro basis with the Maryland statute,” while Carroll County Parks Director Jeff Degitz contended that the measure was to focus on “safety and making sure we don’t have unintended consequences of that use [of uncrewed aircraft].”<sup>282</sup> The Attorney General of Maryland and Maryland State Senator Jim Rosapepe, the author of the bill preempting political subdivisions of Maryland from passing rules and regulations pertaining to the use of uncrewed aircraft, have yet to comment on the situation.<sup>283</sup> However, Maryland State Senator Haven Shoemaker recalled that the

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<sup>279</sup> See *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907).

<sup>280</sup> Ray Carver, *State Drone Laws: A Legitimate Answer to State Concerns or A Violation of Federal Sovereignty*, 31 GA. ST. U. L. REV. 377, 382 (2015).

<sup>281</sup> Jon Kelvey, *Drone Pilots Also Navigating Conflicting State, Local Laws*, GOVERNING (Feb. 7, 2020) <https://www.governing.com/now/Drone-Pilots-Also-Navigate-Conflicting-County-State-Laws.html>.

<sup>282</sup> *Id.*

<sup>283</sup> *Id.*

discussion which led to the passage of the bill centered around the idea that there would be “some measure of statewide uniformity of the law relating to drones, instead of a county-by-county piecemeal approach.”<sup>284</sup>

Secondly, a report from the Oregon State Bar Bulletin showed that there is significant tension between cities, such as Lake Oswego, and the state government of Oregon.<sup>285</sup> An expert on the forensic analysis of uncrewed aircraft argued that “[c]ities cannot control overflight . . . but they can control takeoffs and landings.”<sup>286</sup> However, the city attorney of Lake Oswego countered that the city’s ordinance prohibiting uncrewed aircraft flight without the park director’s permission was “not an aviation regulation.”<sup>287</sup> The conflicting statements of the forensic analysis expert and city attorney of Lake Oswego highlight that there is confusion over the question of what aspect of uncrewed aircraft operations states and municipalities are allowed to regulate.

Third, a number of cities and states have begun to release guidelines for uncrewed aircraft operators and other interested parties to follow for safe uncrewed aircraft operation. In 2019, the Virginia Department of Aviation released a guide for airports to follow regarding the current landscape of uncrewed aircraft and guidance on how to approach situations when uncrewed aircraft enter into an airport’s airspace.<sup>288</sup> North Carolina,<sup>289</sup> Pennsylvania and Texas have released similar guidelines in their jurisdictions.<sup>290</sup> In addition, the municipal government of San Diego, California released a

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<sup>284</sup> *Id.*

<sup>285</sup> Cliff Collins, *Eyes in the Sky As Drone Use Grows, Regulations Are Scrambling to Catch Up*, 20, 23, OR. ST. B. BULL., (May 2019).

<sup>286</sup> *Id.* at 23.

<sup>287</sup> *Id.*

<sup>288</sup> Mark Flynn & Dr. Amber Wilson, *Unmanned Aircraft Systems 2019 Guide for Virginia Airports*, VA. DEP’T OF AVIATION (Jan. 2019), [https://doav.virginia.gov/content-tassets/3bdc791a908e4f2da75900faa141747c/suas\\_-guide-for-virginia-airports-2019.pdf](https://doav.virginia.gov/content-tassets/3bdc791a908e4f2da75900faa141747c/suas_-guide-for-virginia-airports-2019.pdf).

<sup>289</sup> *Unmanned Aircraft Systems*, N.C. DEPT. OF TRANSP. (Dec. 6, 2019), <https://www.ncdot.gov/divisions/aviation/uas/Pages/default.aspx>.

<sup>290</sup> *Unmanned Aircraft Systems/Drones*, PA. DEPT. OF TRANSP. (2020), [https://www.pennidot.gov/Doing-Business/Aviation/Licensing%20and%20Safety/Pages/Unmanned-Aircraft-Systems-\(Drone\)-Information.aspx](https://www.pennidot.gov/Doing-Business/Aviation/Licensing%20and%20Safety/Pages/Unmanned-Aircraft-Systems-(Drone)-Information.aspx); *Unmanned Aircraft System (UAS) Standard Operating Procedure*, TEX. DEPT. OF PUB. SAFETY (Sept. 1, 2019), <https://www.dps.texas.gov/docs/prCh4Anx11.pdf>.

guide for uncrewed aircraft operators in the area.<sup>291</sup> The trend of state agencies providing guidelines for operators should continue to grow to show the FAA that states are capable of regulating uncrewed aircraft; however, municipal and county governments need to stop passing ordinances until state governments establish a framework.

### B. *The Case for Mississippi Regulation*

#### i. Current Legislative Proposals

While one legal practitioner is concerned about a “power grab” by states to control their municipalities,<sup>292</sup> the buck must stop somewhere. In the case of the regulation of uncrewed aircraft, the buck must stop at the state-level. Phenomena in the battle between state and local authority are steadily increasing, especially in states with “sanctuary jurisdictions.”<sup>293</sup> Lauren Phillips contends that “[s]tates are increasingly restricting the power of local governments, and, in doing so, impeding innovation and experimentation.”<sup>294</sup> Just as states are petri dishes for innovation that guides federal choices, there is good reason to think that subunits within states can be petri dishes for innovation that guides state governments; however, uncrewed aircraft affect the state as a whole and innovation is best fostered by putting into place state-wide rules that encourage innovation whilst protecting real property owners and their property.

The case of uncrewed aircraft regulation poses an issue of subsidiarity on a state, rather than federal, level. Municipalities with millions of residents may have resources available to address policy issues that states traditionally would,<sup>295</sup> but in rural areas where

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<sup>291</sup> *What You've Always Wondered, But Didn't Know to Ask: A Drone Operator's Guide*, CITY OF SAN DIEGO (2020), [https://www.sandiego.gov/sites/default/files/2019.03.05\\_drone\\_operator\\_guide.pdf](https://www.sandiego.gov/sites/default/files/2019.03.05_drone_operator_guide.pdf).

<sup>292</sup> Emily S. P. Baxter, *Protecting Local Authority in State Constitutions and Challenging Intrastate Preemption*, 52 U. MICH. J.L. REFORM 947, 949 (2019).

<sup>293</sup> Toni M. Massaro & Shefali Milczarek-Desai, *Constitutional Cities: Sanctuary Jurisdictions, Local Voice, and Individual Liberty*, 50 COLUM. HUM. RTS. L. REV. 1, 18 (2018).

<sup>294</sup> Lauren E. Phillips, *Impeding Innovation: State Preemption of Progressive Local Regulations*, 117 COLUM. L. REV. 2225, 2262 (2017).

<sup>295</sup> See 620 ILL. COMP. STAT. ANN. 5/42.1 (West 2020).

political subdivisions may be ill-equipped to handle policy issues such as the regulation of uncrewed aircraft, the intervention of the state government is warranted. The bill that Mississippi Senator Brice Wiggins introduced in the legislature in Spring 2020 is a great example of warranted regulation of uncrewed aircraft.<sup>296</sup> The legislation expressly labels an uncrewed aircraft as an instrumentality of criminal and tortious activity, protects real property owners by not allowing uncrewed aircraft operators to claim a prescriptive right in their airspace, expressly preempts municipal and county action regarding the operation of uncrewed aircraft, establishes a commission to inform agencies and the public about the integration of uncrewed aircraft into Mississippi's airspace, as well as definitions among other things.<sup>297</sup> The bottom line is that the bill is a wonderful example of legislative action by a state government that falls within the scope of a state's authority to regulate uncrewed aircraft and should be followed as model legislation for other states.

ii. The Case for Advisory Nonpreemption and Legislation

Echoing the sentiment of Stephen Migala, “[w]hen the correct authorities are analyzed in concert with their legislative intent and historical context, it becomes evident that states are not preempted from restricting UASs in their low-lying non navigable airspace.”<sup>298</sup> Given the holding in *Singer* and the FAA's updated Registration Rule,<sup>299</sup> it is reasonable to question how the existing state statutes, county rules and municipal ordinances have not been preempted as the Newton, Massachusetts ordinance had.<sup>300</sup> Following the release of the FAA's State and Local Regulation of Unmanned Aircraft Systems (UAS) Fact Sheet (FAA Fact Sheet) in 2015,<sup>301</sup> “it is not at all clear what level of restriction would rise to a level of conflict with

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<sup>296</sup> S.B. 2282, 135<sup>th</sup> Leg. Sess., Reg. Sess. (Miss. 2020)

<sup>297</sup> *Id.*

<sup>298</sup> Stephen J. Migala, *UAS: Understanding the Airspace of States*, 82 J. AIR L. & COM. 3, 12 (2017).

<sup>299</sup> 49 U.S.C. § 40101; *City of Newton*, 284 F. Supp. 3d at 127.

<sup>300</sup> Michel, *supra* note 245.

<sup>301</sup> Fed. Aviation Admin, State and Local Regulation of Unmanned Aircraft Systems (UAS) Fact Sheet (Dec. 17, 2015) [hereinafter Fact Sheet].

Congress's intent sufficient to render them preempted – all that is clear is that the Newton Ordinance did.”<sup>302</sup>

The FAA Fact Sheet provides examples of state and local laws for which consultation with the FAA is recommended and that are within the state and local government police power; it does not elaborate upon examples of state and local laws that are preempted by the federal framework.<sup>303</sup> Further, the FAA Fact Sheet invites states, counties and municipalities to consult with the FAA's Office of the Chief Counsel before implementing measures regulating aspects of the usage and operations of uncrewed aircraft.<sup>304</sup> Also, it is important to note that the FAA stated in the FAA Fact Sheet that “[b]ecause Federal registration is the exclusive means for registering UAS for purposes of operating an aircraft in navigable airspace, no state or local government may impose an additional registration requirement on the operation of UAS in navigable airspace without first obtaining FAA approval.”<sup>305</sup> However, that has not stopped municipalities, counties and states from passing measures that establish a registry or registry-like system of uncrewed aircraft in place, operated by the political division that passed the measure without consultation from the FAA.

Sarah E. Light commented that “cooperative federalism” and “advisory nonpreemption” are alternatives to traditional preemption that could serve as a reasonable solution to the issue of whether or not states can regulate uncrewed aircraft in their navigable airspace.<sup>306</sup> She goes on to highlight that “[h]ow the FAA interprets what constitutes “navigable airspace” may likewise have significant implications for whether there remains a role for states in regulating the safety of technological innovations like drones.”<sup>307</sup> This leaves significant room for “cooperative federalism” and “advisory nonpreemption” to have a significant impact on how courts interpret “navigable airspace” for states to regulate.<sup>308</sup>

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<sup>302</sup> Nicholas Cody, *Flight and Federalism: Federal Preemption of State and Local Drone Laws*, 93 WASH. L. REV. 1495, 1512–13 (2018).

<sup>303</sup> *Id.*

<sup>304</sup> *Id.*

<sup>305</sup> *Id.*

<sup>306</sup> Sarah E. Light, *Advisory Nonpreemption*, 95 WASH. U.L. REV. 327, 347 (2017).

<sup>307</sup> *Id.* at 345.

<sup>308</sup> *Id.*

The US Supreme Court found in *Hodel v. Virginia Surface Min. and Reclamation Ass'n Inc.* that cooperative federalism “allows the States, within limits established by federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs.”<sup>309</sup> Andrew Ayers highlights two Acts that promote “cooperative federalism without forcing decisions into state legislatures:” the Clean Water Act and the Occupational Health and Safety Act of 1970.<sup>310</sup> He goes on to state that the Clean Water Act

gives states the power to avoid federal preemption by developing their own programs for issuing permits to polluters...the Act requires that the state’s attorney general certify that state law provides adequate authority for the program...states can promulgate water-quality standards under the Act if they submit a certification from “the State Attorney General or other appropriate legal authority within the State that the water quality standards were duly adopted pursuant to State law.” Thus, the federal government remains neutral as to which entity within the state government promulgates the standards...Each of these provisions, in short, leaves it to the state to decide which entity takes the action that avoids federal preemption.<sup>311</sup>

In addition, “[t]he Occupational Health and Safety Act of 1970 (OSHA) allows states to avoid federal preemption by submitting a state plan for the development of occupational health and safety standards.”<sup>312</sup> The elements of cooperative federalism found in the Clean Water Act and OSHA would provide a sound foundation for future legislation introduced by Congress. Furthermore, Gluck points out a key element of cooperative federalism, where “each federal program that gives.... implementation authority to the states

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<sup>309</sup> *Hodel v. Virginia Surface Min. & Reclamation Ass'n, Inc.*, 452 U.S. 264, 289, (1981).

<sup>310</sup> Andrew B. Ayers, *Federalism and the Right to Decide Who Decides*, 63 VILL. L. REV. 567, 581-582 (2018).

<sup>311</sup> *Id.* at 581 (“Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief....”).

<sup>312</sup> *Id.* at 582.

makes those states....partners with the federal government.”<sup>313</sup> The partnership created by cooperative federalism allows state legislatures to exercise their autonomy while satisfying the intent of the FAA to have a uniform system in place, where states work in unison to integrate uncrewed aircraft into the national airspace.

Advisory nonpreemption is an abstract legal concept created by Light, where she writes that it is

a federal agency’s informal, advisory statement in policy guidance (rather than notice-and-comment rulemaking) that it has authority to regulate in a particular area. But the statement *does not actually preempt* states from regulating—at least temporarily (hence the moniker “nonpreemption”). And the agency sets a timetable to revisit the issue.<sup>314</sup>

Light goes on to write in future authorship that advisory nonpreemption acts as a necessary condition, some action on the part of the federal government to place either some or all of a regulatory program into a secondary institution, to create a regulatory horcrux, which requires both a necessary condition and sufficient condition, acceptance by the secondary institution.<sup>315</sup> Advisory nonpreemption is a great solution to the confusion that has been created by the mix of the FAA fact sheet, FAA directives, the *Taylor* and *Singer* decisions, and patchwork of municipal, county and state regulations.<sup>316</sup> As the capabilities and usage of uncrewed aircraft exponentially increase, it would be unwise for the FAA to continue to preempt state actions when situations, such as the COVID-19 pandemic, have led to more frequent and relaxed usage of uncrewed aircraft in the national airspace.<sup>317</sup>

By passing legislation that gives state governments the opportunity to develop a plan to oversee the operation of uncrewed aircraft in their jurisdiction and allowing the FAA to pass a

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<sup>313</sup> Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 YALE L.J. 534, 552 (2011).

<sup>314</sup> Light, *supra* note 306 at 333.

<sup>315</sup> Sarah E. Light, *Regulatory Horcruxes*, 67 DUKE L.J. 1647, 1659–60 (2018).

<sup>316</sup> 49 U.S.C. § 40101; *Taylor v. Huerta*, 856 F.3d at 1090; *City of Newton*, 284 F. Supp. 3d at 127; Michel, *supra* note 242; Fact Sheet, *supra* note 298.

<sup>317</sup> Jed Pressgrove, *Drones Become Part of Local U.S. Responses to COVID-19*, GOV'T TECH. (Apr. 22, 2020), <https://www.govtech.com/products/Drones-Become-Part-of-Local-US-Responses-to-COVID-19.html>.

complimentary statement of policy guidance for states' plans, "co-operative federalism" and "advisory nonpreemption" are pieces that would benefit an argument that states' have the right to regulate aspects of uncrewed aircraft activity and operation. "Cooperative federalism" and "advisory nonpreemption" alone would not suffice; a uniform piece of legislation drafted and passed by all fifty state governments is necessary to distinguish a state's right to regulate their own intrastate navigable airspace from the FAA's right to regulate the US' interstate navigable airspace.

Sarah E. Light is right, states should not be left to the mercy of the FAA to regulate activities of uncrewed aircraft that are not expressly prescribed to the states; which until now, the FAA has been slow to address these activities.<sup>318</sup> States have traditional police powers that guide them in prescribing rules and regulations that can oversee the activities of uncrewed aircraft in their airspace.<sup>319</sup>

Further, uncrewed aircraft are a cause of concern for states, as opposed to larger airplanes, because most uncrewed aircraft activity affects commerce locally, like small businesses, and the FAA needs to take this into consideration.<sup>320</sup> In the past, the discussion of the FAA's exclusive authority over American "navigable airspace" has revolved around the notion that traditional activities taking place in the American "navigable airspace" occur in an interstate context.<sup>321</sup> Scholars neglect to discuss the fact that the activities of uncrewed aircraft provide the first series of cases in the field of aviation law where the majority of activities occur in an intrastate context.<sup>322</sup>

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<sup>318</sup> Henry H. Perritt, Jr. & Albert J. Plawinski, *One Centimeter over My Back Yard: Where Does Federal Preemption of State Drone Regulation Start?*, 17 N.C. J. L. & TECH. 307, 389 (2015).

<sup>319</sup> Fact Sheet, *supra* note 301, at 3.

<sup>320</sup> Migala, *supra* note 298.

<sup>321</sup> See generally Lindsey P. Gustafson, *Arkansas Airspace Ownership and the Challenge of Drones*, 39 U. ARK. LITTLE ROCK L. REV. 245, 277 (2017); Michael Kamprath, *A Legal and Practical Overview of How Local Governments Can Help Protect the Safety of Manned Flight in the Vicinity of Airports*, 49 URB. LAW. 563, 576 (2017); Timothy T. Takahashi, Ph.D., *Drones in the National Airspace*, 77 J. AIR L. & COM. 489, 519 (2012); Jeffrey A. Berger, *Phoenix Grounded: The Impact of the Supreme Court's Changing Preemption Doctrine on State and Local Impediments to Airport Expansion*, 97 NW. U. L. REV. 941, 965 (2003).

<sup>322</sup> *Taylor v. Huerta*, 856 F.3d at 1090; *City of Newton*, 284 F. Supp. 3d at 127.

The fundamental reason to register commercial and recreational airplanes with the federal government is that oftentimes the activities of commercial and recreational airplanes require them to cross state and even international borders.<sup>323</sup> Uncrewed aircraft are tasked with activities that qualify as interstate commerce, however, one report shows that “most commercial drone activity takes place at limited altitudes close to the ground and within short horizontal ranges—typically no more than one mile.”<sup>324</sup> A compelling point is that the public is far more likely to encounter a FedEx uncrewed aircraft delivering a package in their neighborhood than a FedEx airplane delivering their package to another state or country. For example, while a FedEx airplane would not deliver a package within the borders of Memphis, Tennessee, a FedEx uncrewed aircraft may deliver a package from Memphis International Airport to the FedExForum in Downtown Memphis. This daily encounter is evidence enough that state governments, charged with the responsibility to oversee municipalities and townships within their borders,<sup>325</sup> should be provided the authority to regulate the operations of uncrewed aircraft that are operating in their navigable intrastate airspace.

## V. CONCLUSIONS

### A. *What the Future Holds*

There are two court cases that the legal community should look forward to in the world of uncrewed aircraft: *National Press Photographers Assn. v. McCraw*, an on-going Federal court case in Texas, and *Michigan Coalition of Drone Operators v. Genesee County*, a pending State court case in Michigan. An on-going District Court case in Texas also has the potential to be a force in the case-law of uncrewed aircraft.<sup>326</sup> *National Press Photographers*

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<sup>323</sup> *Air Traffic by the Numbers*, FED. AVIATION ADMIN. (June 2019), [https://www.faa.gov/air\\_traffic/by\\_the\\_numbers/media/Air\\_Traffic\\_by\\_the\\_Numbers\\_2019.pdf](https://www.faa.gov/air_traffic/by_the_numbers/media/Air_Traffic_by_the_Numbers_2019.pdf).

<sup>324</sup> Connot, *supra* note 167, at 3.

<sup>325</sup> *Cities 101—Delegation of Power*, NAT'L LEAGUE OF CITIES (Dec. 13, 2016), <https://www.nlc.org/resource/cities-101-delegation-of-power>.

<sup>326</sup> See generally Plaintiffs' Complaint for Declaratory and Injunctive Relief, Nat'l Press Photographers Association v. McCraw, No. 1:19-cv-00946 (W.D. Tex. Sept. 26, 2019), 2019 WL 4689362.

*Assn. v. McCraw* showcases what has been portrayed as a civil rights battle regarding privacy concerns between news associations and the Texas Privacy Act of 2013, which established rules and regulations pertaining to the operation of uncrewed aircraft in the state of Texas.<sup>327</sup> Despite the media portrayal of this case as a matter of civil rights, the complaint, filed in September of 2019, stated that the “[p]laintiffs seek a judgment....declaring that the No-Fly Provisions violate the Supremacy Clause.”<sup>328</sup> The complaint went on to state that

state drone regulations promulgated to protect aviation safety impermissibly infringe upon a field of exclusive federal regulation....[b]y banning drone use within the airspace around critical infrastructure and other facilities, Texas is attempting to regulate aviation safety through its No-Fly Provisions. The No-Fly Provisions are thus preempted by the federal government’s exclusive authority to regulate aviation safety.<sup>329</sup>

In response, the defendants filed a Motion to Dismiss in November of 2019, which stated that the plaintiffs “seek nothing less than unrestricted information gathering on any private citizen, anywhere, at any time, by anyone.”<sup>330</sup> The plaintiffs contended in December 2019 that “[t]he No-Fly Provisions are preempted by federal aviation law both because Congress has preempted state aviation safety regulations and because they directly flout and impede the objectives of federal aviation safety law.”<sup>331</sup> Time will tell how this case unfolds but Judge Pitman’s holding has the potential to establish further precedent in the 5th Circuit as uncrewed aircraft continue to be integrated into the national airspace.

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<sup>327</sup> See Christopher Collins, *It’s Illegal to Take Drone Photos of Cattle Feedlots in Texas. Press Groups Say That Violates the First Amendment.*, DALLAS OBSERVER (Feb. 13 2020), <https://www.texasobserver.org/drone-cattle-feedlots-first-amendment-panhandle/>; *Federal Lawsuit Challenges Texas Drone Law That Unconstitutionally Restricts Visual Journalists*, NAT’L PRESS PHOTOGRAPHERS ASS’N (Sept. 26, 2019), <https://nppa.org/news/nppa-files-lawsuit-austin-federal-court-challenging-texas-drone-law>.

<sup>328</sup> *McCraw*, 2019 WL 4689362, at 3.

<sup>329</sup> *McCraw*, 2019 WL 4689362, at 29-30.

<sup>330</sup> Defendants’ Motion to Dismiss at 18, Nat’l Press Photographers Association v. McCraw, No. 1:19-cv-00946-RP (W.D. Tex. Nov. 5, 2019), 2019 WL 8883956.

<sup>331</sup> Plaintiffs’ Response in Opposition to Defendants’ Motion to Dismiss at 26, Nat’l Press Photographers Association v. McCraw, No. 1:19-cv-00946-RP (W.D. Tex. Dec. 3, 2019), 2019 WL 2019 WL 8329485.

A Michigan state court case filed in the 7th Circuit has the potential to gain traction for the state preemption of the usage of uncrewed aircraft.<sup>332</sup> In *Michigan Coalition of Drone Operators v. Genesee County*, an uncrewed aircraft was confiscated and the operator, Jason Harrison, was handcuffed and detained by police, claiming that flying the uncrewed aircraft in parks was illegal.<sup>333</sup> Although this was found out not to be true, the Genesee County Board of Supervisors passed a regulation banning the operation of uncrewed aircraft in the parks.<sup>334</sup> In response, Jason Harrison formed the Michigan Coalition of Drone Operators and sued the Board of Supervisors in state court.<sup>335</sup> Circuit Judge Joseph Farah held in favor of the Coalition, concluding that “this Court prohibits the enforcement of any ban on possession, use or operation....by the Genesee County Parks Commission....that is inconsistent with the dictates of state and federal law.”<sup>336</sup> Only time will tell how this case proceeds. Regardless, this is a case to keep an eye for the time being.

### B. Final Thoughts

With the future of uncrewed aircraft regulation unknown, the industry needs a ranger to oversee the rules and regulations in the field to induce economic growth and serve as a check on centralized power.<sup>337</sup> Let it be clear, the ranger must stem from the power of the state government only. This article showed the Federal Aviation Act impliedly preempts the field of aviation safety;<sup>338</sup> while the

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<sup>332</sup> *Michigan Coalition of Drone Operators v. Genesee County*, 19-113058-CZ (Mich. Cir. Ct. 2020); See Kara Murphy, *US Judge Rules Against County Seeking to Ban Drone Flights in Their Parks*, DIGIT. PHOTOGRAPHY REV. (Feb. 17, 2020) <https://www.dpreview.com/news/1042631835/judge-rules-against-county-seeking-to-ban-drone-flights-in-their-parks#:~:text=On%20February%2010th%2C%20the%20Honorable,battle%20was%20ignited%20after%20R.>

<sup>333</sup> Jason Reagan, *Judge Strikes Down Michigan County's Drone Ban*, DRONE LIFE (Feb. 17, 2020) <https://dronelife.com/2020/02/17/judge-strikes-down-michigan-countys-drone-ban/>.

<sup>334</sup> *Id.*

<sup>335</sup> *Id.*

<sup>336</sup> *Id.*

<sup>337</sup> Richard C. Schragger, *Federalism, Metropolitanism, and the Problem of States*, 105 VA. L. REV. 1537, 1586 (2019).

<sup>338</sup> 49 U.S.C. § 1421.

ADA expressly preempts aviation routes, rates and services.<sup>339</sup> It is important to note that those might overlap, because we are dealing with two different statutes and two different sources of preemption. In addition, despite the directive from the FAA to consult with them before enacting a registration system of uncrewed aircraft, a number of states, counties and municipalities have established registry-like systems in place that have yet to be disputed.<sup>340</sup>

The *Singer* holding and Congressional response to the *Taylor* holding highlight that the patchwork of uncrewed aircraft statutes and regulations that exist in the US needs to be revisited.<sup>341</sup> In the past, there has been a degree of caution exercised by the FAA in addressing what state and local laws would be preempted.<sup>342</sup> The first two sections of the FAA Fact Sheet, “Why the Federal Framework” and “Regulating UAS Operations,” are rather persuasive and expressly demonstrate that states have some latitude in this area.<sup>343</sup> The greatest issue that remains is the National Defense Authorization Act language that resulted from and overruled Taylor.<sup>344</sup> Ultimately, it is a field preemption issue, unless a compelling argument can be made that a registry is a ‘service’ under the ADA, but that is unlikely. Some cases on the ADA found no preemption because the thing at issue was not a ‘service.’ Some cases on the Federal Aviation Act found no preemption because the thing at issue was outside of the preempted field. It would be useful for the FAA to clarify what those boundaries are and whether the National Defense Authorization Act overrule of Taylor and the FAA’s subsequent registry preempts a state registry.

From this point on, the FAA must be clear and concise in its determination of what aspects of the operation of uncrewed aircraft are federally preempted. States can play a role in regulation of drones, but a registry, unless narrowly tailored for a specific purpose other than just cataloging or identifying drones, as it currently stands, seems to likely be preempted. There is a large scope for states to regulate uncrewed aircraft, particularly given real

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<sup>339</sup> Silversmith, *supra* note 96.

<sup>340</sup> Fact Sheet, *supra* note 301.

<sup>341</sup> 49 U.S.C. § 40101; *City of Newton*, 284 F. Supp. 3d at 127.

<sup>342</sup> Fact Sheet, *supra* note 301, at 1-3.

<sup>343</sup> *Id.*

<sup>344</sup> National Defense Authorization Act § 143.

property interests that have always fallen under the traditional police powers of a state.

However, states must retain a degree of flexibility to regulate emerging technologies that are affecting their own navigable airspace. A model piece of legislation that states should pass that would likely pass judicial muster should be drafted as follows:

**Definitions.** In this act, (a) An “unmanned aircraft” means an aircraft that is constructed or operated without the possibility of direct human intervention from within or on the aircraft, including every object that is on board or otherwise attached to the aircraft, or carried or operated during flight, regardless of weight. For the purposes of this act, this term is synonymous with the term “drone.” (b) An “unmanned aircraft system” means an unmanned aircraft and all associated elements, including, but not limited to, communication links, sensing devices and components that control the unmanned aircraft. (c) “Intrastate airspace” means an airspace of defined dimensions wholly within this State.

**County and municipal preemption.** Except as expressly authorized by statute, a political subdivision shall not enact or enforce an ordinance, resolution, regulation or policy that regulates the ownership or operation of non-recreation or recreational unmanned aircraft or otherwise engage in the regulation of the ownership or operation of non-recreation or recreational unmanned aircraft systems. Any ordinance, resolution, regulation or policy of any county or municipality of this state regulating the ownership or operation of non-recreation or recreational unmanned aircraft shall be deemed preempted and shall be null, void and of no force or effect.

**Right to govern intrastate airspace.** (a) An unmanned aircraft is an instrumentality that operates in intrastate airspace. (b) An unmanned aircraft system is an instrumentality that operates in intrastate airspace. (c) Where the Federal Aviation Administration has the right to control navigable interstate airspace, this State has the right to establish legislation, rules and regulations governing the instrumentalities that operate in navigable intrastate airspace. (d) Where the Federal Aviation Administration has the right to control navigable interstate airspace, this State has the right to establish legislation,

rules and regulations governing the activities that occur in navigable intrastate airspace.

**Torts and crimes generally.** (a) This act applies to the operations of all unmanned aircraft systems and the acts of those who own, control or operate such systems, or are affected by such operations. (b) An unmanned aircraft system is an instrumentality by which a tort can be committed under the laws of this state. (c) An unmanned aircraft system is an instrumentality by which a crime can be committed under the laws of this state. (d) The criminal statutes of this state shall apply to any person who owns, controls or operates unmanned aircraft within this state, or to any other person liable under the criminal laws of this state.

**Prescriptive right.** Repeated or continual operation of an unmanned aircraft over a landowner's or lessee's real property does not create a prescriptive right in the airspace.

The bottom line is that a complete integration of uncrewed aircraft into Mississippi's airspace can only be completed if the state exercises their traditional police powers appropriately. The findings from this article show that while the creation of a Mississippi state registry would be ideal, such a measure would likely found to be preempted by the FAA, so instead the state should look to regulating aspects of uncrewed aircraft operation while showing their intentions to the FAA are clear: political subdivisions in the state are preempted from regulating uncrewed aircraft, a state's right to govern their navigable intrastate airspace is distinguished from the federal government's right to govern navigable interstate airspace, tortious and criminal activity committed with an uncrewed aircraft is actionable under state law and repeated operation of an uncrewed aircraft over someone's property does not create a prescriptive right to the real property owner's airspace.