PROBLEMS OF FEDERALISM
IN THE AIR AGE—PART I

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In the beginning of the age of world commerce, cities could only be great if they were port cities, for the vast oceans of water which enfold our earth provided the early avenues of commerce—level highways where vagrant winds propelled ships of trade to distant ports in an ancient world. Occasionally a few landlocked cities at the crossroads of overland trade routes also thrived. When the airplane came these landlocked cities suddenly found themselves, without plan, at the floor of a new ocean—without Tennyson's vision they became the beneficiaries of his dream: each could be a port of call for the "pilots of the purple twilight, dropping down with costly bales." The ocean of air had always been there but it was of little use; now that it provided new highways where giant ships would ply their way, the race of competition compelled the city to prepare a port to bring these vessels to dock. As early as 1928 bond issues for the development of an airport were held to be a valid municipal purpose and the

1 For I dipt into the future, far as human eye could see,
Saw the Vision of the world, and all the wonder that would be;
Saw the heavens fill with commerce, argosies of magic sails,
Pilots of the purple twilight, dropping down with costly bales;
   Alfred Lord Tennyson, Locksley Hall (1842).

2 The acquisition and development of an airport is generally held to be a "public purpose" or "municipal purpose" within the purview of a state constitution, which permits the legislature to delegate to a city the power to incur an indebtedness for such a purpose. Dysart v. City of St. Louis, 321 Mo. 514, 11 S.W. 2d 1045 (1928). It is not a necessary expense, and the state constitution may require a vote of the people before a debt may be incurred or taxes levied for the purpose; but the municipal authority, once obtained, to maintain and operate the airport may be confided to a municipal corporate authority created for that purpose by appropriate legislative action. See Greensboro-High Point Airport Authority v. Johnson, 226 N.C. 1, 36 S.E. 2d 803 (1946).

For a general summary of early decisions in this field, see Rhyne, Airports and the Courts (Washington 1944) pp. 20-48.
city that did not prepare itself for the air age was likened to Chalcedon, the city of the blind.  

In aviation’s earlier years when aircraft were smaller in size and fewer in number than today, airport sites were selected beyond the city limits where land was cheap and man-made obstructions were few. But with normal growth, augmented by wartime’s stimulus and the movement of people to the cities, urban areas reached out to surround the airport. Similarly the burgeoning airport community merged with the city’s urban periphery.

Progress in the art of aviation has made possible larger and faster airplanes of greater efficiency and economy. But since the basic design of currently operating and near-future air transports has not changed since the first powered flight at Kitty Hawk, the take-off and landing speeds of the modern aircraft still are functions of its in-flight operational speeds. However with improvement of the aerodynamic qualities of wings, of wing flaps and generally in the low-speed flying qualities of aircraft, the rate of increase of airport operational speeds has been held down. Thus, as the cruising speed of the aircraft increases, so too at a diminishing rate do the take-off and landing speeds and the distance necessary to accommodate these maneuvers. Meanwhile aircraft gross weights are steadily increasing.

Commercial application of aviation progress follows a certain process: research development, military application and finally commercial use. With aircraft and component aviation devices increasing in complexity this process requires an ever increasing time lag; the maturing process has ranged from approximately thirteen years in the past to twenty years today. Charting scientific progress therefore, with the lag in commercial application should afford us some idea of what to expect in the future for the commercial air transport. Figures I and II demonstrate this trend — both gross weights and airport operational speeds will continue to rise and will determine the paths the air transport will follow in approaching and leaving an airport. As the aircraft attains higher speed and greater weight its paths become shallower and of greater radius; moreover the future trend will be the same and as landing speeds increase to 120 to 130 miles per hour the flight paths may be twenty to thirty per cent flatter than those in the 100 mile per hour range — still approximately the landing speed of today’s commercial transports.

Thus the airport and its neighbors have been drawn closer together and through such proximity have found themselves impinging upon each other from the effect of three circumstances: (1) The urbanization of areas immediately surrounding the airport boundary, (2) The increase in frequency of air traffic and general intensification of all

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3 "The city that is without the foresight to build the ports for the new traffic may soon be left behind in the race of competition. Chalcedon was called the city of the blind because its founders rejected the nobler site of Bysantium lying at their feet. . . . The dweller within the gates even more than the stranger from afar, will pay the price of blindness." Hess v. Rath, 249 N.Y. 436, 438, 164 N.E. 342 (1928).
Maximum speeds and maximum weights go ever higher. As speeds and weights go up, paths become flatter and turns have a greater radius. Noise increases with power.

Statistics from *Aircraft Year Book* and *American Aviation*
flight operations, (3) The alternation of approach flight paths to a more shallow configuration as aircraft weights and speeds increase. Hence scientific progress, population increase and economic growth have caused a clash of interests between the landowner, either as an individual or as a member of a community, and the airman, as he approaches and leaves the airport serving that community. Through the creation of noise, the blowing of dust, noxious gasses and fumes, the glare of lights and the fear of an actual physical intrusion through the violence of a plane falling out of control, he may invade the home owner's privacy, disturb his peace and actually diminish the value of his property. And although the problem stems from the basic controversy between the sky-farer and the surface dweller, its branches reach out to the field of intricate conflict between local and federal government and indeed beyond, to the field of international relationships. Furthermore our military air power could not exist without a smooth functioning civil air arm since a nation's air power is not dichotomous; its strength lies in its unity.

Recent air tragedies demonstrate the coextension of federal and local problems in the control of this new activity utilizing an area hitherto unattainable, hence unregulated. In Figure III a broken landing gear fallen from the sky-lanes of world commerce looms on the lawn of a dwelling; a twisted propeller menaces a modest home and goes to the essence of our problem.

LAW OF LANDOWNER-AIRMAN RIGHTS

Airspace Ownership and Use

There existed in the ancient common law a maxim concerning the rights of landowners—Cujus est solum ejus est usque ad coelum et ad inferos: "Whosoever has the soil, also owns to the heavens above and to the centre beneath." With the advent of the aircraft, however, it soon became apparent that this maxim was propounded as law only when it could not be effectively breached. Farsighted jurists, upon first consideration realized its sterility; there exists a case in the English reports where, through fear of subjecting early aeronauts to limitless trespass suits, a noted jurist refused to regard an overhanging board as a breaking of the close. Literal application of the

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4 The Report of the President's Airport Commission, J. H. Doolittle, Chairman, The Airport and Its Neighbors (Wash.: G.P.O., 1952) presents a thorough analysis of this problem. This report and a Law Note, op. cit. infra n. 39; Pogue and Bell, op. cit. infra n. 17; Hunter, The Conflicting Interests of Aircraft Owner and Nearby Property Owner, 11 Law & Contemp. Prob. 539 (1945-1946), and Rhyno, Federal, State and Local Jurisdiction over Civil Aviation, ibid., p. 459, presented a thorough background for the preparation of this work. For a strong, early advocation of the federal viewpoint see McDonald and Kuhn, The Ocean Air—State or Federal Regulation, 31 Va. L. Rev. 363 (1945).

5 "Nay, if this board overhanging the plaintiff's garden be a trespass, it would follow that an aeronaut is liable in an action of trespass quare clausum fregit at the suit of the occupier of every field over which his balloon passes on the course of his voyage." Lord Ellenborough in Pickering v. Rudd, 4 Camp. 219 220-221, 171 Eng. Rep. 70, 71 (1818).
PROBLEMS OF FEDERALISM IN THE AIR AGE—PART I

This Eastern Airlines Constellation crashed on landing at Jacksonville, Florida on December 21, 1955.

—Wide World Photos

This chartered DC-4 fluttered and fell after take-off at Seattle, Washington on November 18, 1955.
maxim can be found only in non-aviation cases providing small background for the greater interplay of social and economic forces later to resolve the differences. Thus encroaching telephone wires, angrily projecting one's arm, an overhanging flashboard, or tree, leaning walls, and overhanging roof, projecting eaves and the shooting of guns have all been regarded as invasions of the superincumbent airspace—the exclusive realm of the landowner.

Jurists, generally, sensing the magnitude and divergence which the forces exerted by the landowner and airman would assume have tried to balance them in the public interest. They have pursued several avenues of approach, resulting in different theories but arriving, usually, at a common goal. Moreover, the legal basis on which the aggrieved landowner has sought relief has sometimes been a factor in fashioning the law. At times the remedy chosen was an action in trespass into the airspace above the property owner's land by aircraft, usually from an adjacent airport; more frequently an action alleging a nuisance, when the airport's operation disquieted the landowner, was entertained.

How were these discords resolved and upon their settlement, what theories of airspace ownership were built? The most conservative theory, the beginning of which may very well have been based upon the *ad coelum* maxim holds that the landowner's title to airspace above his land extends upward without limit, subject only to an easement or privilege of flight in the public. This concept is contained in the Uniform Aeronautics Act, which was in effect in twenty-two states in 1943 when the Commissioners on Uniform State Laws ceased advocating its adoption, and in the Restatement of Torts.

The most general theory is based upon the premise that the landowner owns that airspace above his property which he is able to occupy or use in the enjoyment of his land. This is known as the possible effective possession theory. There appears to be some confusion here as to the import of this concept which may stem from the

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8 Thrasher v. City of Atlanta, 178 Ga. 514, 173 S.E. 817 (1934); Vanderslice v. Shaun, 26 Del. Ch. 225, 27 A. 2d 87 (1942).


10 Restatement, Torts § 194 (1934).

word "possible" viewed in connection with time: some believing that present title would vest in the landowner all that space which he could possibly use for all time in the future but this would not be reasonable yet when we combine reasonableness with future possibility we move into the area of likelihood or probability making the distinction meaningless. A holding that the landowner does own some airspace would cause the nature of his action against the encroaching airman to vary with the circumstance of the injury: trespass for an obstruction into airspace which is owned; nuisance for injury from acts done outside the envelope of ownership.

The view expressed by the Supreme Court in *United States v. Causby*—similar to state court holdings mentioned above—is that the landowner owns at least as much of the airspace above his land as he can occupy and use in connection therewith. Here the court held that continued flights, the glare of lights and the deafening roar of heavy army aircraft while passing but a few feet over the plaintiff's dwelling on final approach to the field, caused fright to those living therein, virtually destroyed the productive use of the land as a chicken farm and thus constituted a taking of property. The court found reason for its decision in an earlier non-aviation controversy, where the imposition of a servitude by the firing of heavy projectiles above the property deprived the owner of profitable use and constituted a taking; but it may well be that had the *Causby* case followed the passage of the Federal Tort Claims Act, one of the more conventional avenues of approach would have been traveled by the plaintiff. The case was remanded to the Court of Claims which determined an area of probable possession—in view of the nature of the land and the use to which it would likely be put, considering its location and surroundings—and designated that area as being owned by the subjacent landowner.

On the basis of this holding, some writers have chosen to find another category of airspace ownership, that of probable effective possession as distinguished from possible effective possession; however this

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12 328 U.S. 256 (1946).

The court of Claims held that there was a "taking" up to 365 feet, which was 300 feet over the tallest object on plaintiff's property. The Court concluded:

"The result of this, we recognize, is to vest in the United States the right to fly its airplanes at any altitude above 365 feet with impunity. This, of course, would prevent the plaintiff's from erecting on their property a building of the height of the Empire State Building or of any structure more than 365 feet in height. Were this property located at a place where there was any likelihood that such a structure would be erected on it, the defendant, without paying for it, would have no right to the airspace above the property to an altitude so low as would prevent such a structure from being erected. But here there was but the most remote possibility that plaintiffs would ever put this property to such a use." *109 Ct. Cl.*, at 771, 75 F. Supp., at 264.
is needlessly confounding a subject which is not yet clear with observers of air law\textsuperscript{17} or settled by judicial decision. What is significant in the \textit{Causby} case is the remedy—for it was the remedy which moved the theory of ownership as the basis for recovery out of the possible and into the probable effective possession concept. An action in tort could not be had. But the taking of an easement may be either temporary or perpetual—beginning at a fixed time and terminating later, or continuing endlessly. Wherefore the Court of Claims would be disposed to assert actual use and probable future use for the purpose of determining a property taking which could conceivably be fixed for all future time.\textsuperscript{18} This view was taken in a recent eminent domain case for an obstruction easement where a federal district court mentioned as a factor of depreciation the fact that the property could not fully participate in future residential development.\textsuperscript{19}

On the other hand, cases which have been determinative of the possible effective possession concept have usually been actions in trespass and nuisance. Under this concept and the nature of the legal actions determinative of it, what is not owned today may be owned

\textsuperscript{17} E.g., Venneman, \textit{supra}, n. 15, at p. 114, says of the \textit{Causby} case: "But here now there is a judicially sanctioned formula. The Court says, 'The landowner owns at least as much of the space above the ground as he can occupy and use in connection with the land. . . . The fact that he does not occupy it in a physical sense—by the erection of buildings and the like—is not material.' This has been known as the possible effective possession theory as adopted by other courts in previous cases."

Rhyne, in \textit{Airport Legislation and Court Decisions}, 14 J. Air L. & Com. 289 at 295 (1947), lists five theories of airspace and rights:

\begin{itemize}
  \item [1.] The landowner owns all the air space above his property without limit in extent;
  \item [2.] the landowner owns the air space above his property to an unlimited extent, subject to an 'easement' or 'privilege' of flight in the public;
  \item [3.] the landowner owns the air space up to such heights as is fixed by statute, with flights under that height 'trespasses';
  \item [4.] the landowner owns the air space up as far as it is possible for him to take effective possession but beyond the 'possible effective possession zone' there is no ownership in air space; and
  \item [5.] the landowner owns only the air space he actually occupies and can only object to such use of the air space over his property as does actual damage.
\end{itemize}

"... The fifth or 'actual use' theory has been adopted by the ... Supreme Court of the United States in the \textit{Causby} case."

Pogue and Bell in \textit{The Legal Framework of Airport Operations}, 19 J. Air L. & Com. 253 at 255-257 (1952) define the first three of the five airspace ownership theories the same as Rhyne does, and then continue as follows:

"4. The landowner owns the air space up as far as it is possible for him to take effective possession.

"5. The landowner owns the air space up as far as he actually occupies or of which it is \textit{probable} that he will ever take effective possession.

"The distinction between (4), which appears to have been followed by a number of state courts and (5), which is the one pronounced by the Supreme Court in the \textit{Causby} case, is the difference between air space which \textit{could conceivably be used} if, for example, the landowner wanted to demolish his house and build another (Empire State Building) or which he is actually using or probably ever will use. These two theories are predominant today but there has been no final agreement as to which is to be followed."

Undoubtedly the divergences in the above resulted from the Venneman and Rhyne articles having appeared prior to the report of the \textit{Causby} action in the Court of Claims (\textit{supra}, n. 16) advancing the "probable effective possession" theory.\textsuperscript{18} Actually the easement was found to be temporary, 109 Ct. Cl. at 770, 75 F. Supp. at 263; however the idea of a continuum is inherent in the concept of a taking.\textsuperscript{19}

\textsuperscript{18} United States v. 48.10 Acres of Land, 144 F. Supp. 258 (S.D. N.Y. 1956).
tomorrow; whatever a landowner can effectively occupy he owns, plus an additional area—ownership of a continuing envelope of atmosphere surrounding whatever reasonable use to which the land may be put. Actions thus brought (it is highly unlikely that an air easement could be acquired by prescription\(^{20}\)), concern the then existing use of the land and can, with much greater freedom and without affecting the future possessory privilege of the plaintiff at bar, advance a theory of ownership based on some idea of possible effective possession. The significant contribution of the Causby case is its extension of the remedies available to the landowner against obnoxious air activities; in addition to actions in negligence, trespass, or nuisance he now has at his avail, against the government at least, an action to recover for a taking of property based on the prohibition in the fifth amendment against the taking of "... private property ... for public use, without just compensation."

Other significant decisions have helped to fashion the law. One court has found the landowner without title to any airspace other than that presently occupied or used.\(^{21}\) Here the only legal right to property was held to be dominion over it and only use by aircraft of the space above, which in fact does actual or substantial damage resulting in injury to the land or which interferes with possession or beneficial use would be actionable as a trespass. Actions alleging nuisance would of course still be available. Deemphasizing legal theories and recognizing economic exigencies, a federal district court enjoined the further use of an airport after weighing the losses suffered by both parties to determine the one who had the least to lose monetarily.\(^{22}\) Using statutory flight minimums fixed by state instrumentalities under the police power and by Congress under the Commerce Clause to gauge the scope of private rights, a Massachusetts court suggested a consideration of the statutory rules in determining technical trespass;\(^{23}\) a federal district Court in Ohio has held that an allegation of such a violation constitutes a case for negligence,\(^{24}\) and one in Utah regarded flights above the minimum safe altitude of flight prescribed by the Civil Aeronautics Board as determinative of a zone where no negligence can be imputed regardless of the surface damage caused.\(^{25}\) Hence the

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\(^{20}\) At least without some refashioning of the law. See Hinman v. Pacific Air Transport, 84 F. 2d 755, 759 (9th cir. 1936), cert. denied 300 U.S. 654 (1937) where the court said, "We therefore hold that it is not legally possible for appellants to obtain an easement by prescription, through the airspace above appellants' land." Also see authorities cited therein.

But cf. Strother v. Pacific Gas and Electric Co., 94 Cal. App. 2d 525, 211 P. 2d 624 (1949), where the court found it unnecessary to determine whether prescriptive rights to an airline may have been acquired by adverse use when the right of way was lost by the owner's beneficial construction and use without opposition for a period of more than five years. Hinman v. Pacific Air Transport, 84 F. 2d 755 (9th Cir. 1936), cert. denied 300 U.S. 654 (1937).

\(^{21}\) Hinman v. Pacific Air Transport, 84 F. 2d 755 (9th Cir. 1936), cert. denied 300 U.S. 654 (1937).

\(^{22}\) Swetland v. Curtiss, 41 F. 2d 929 (N.D. Ohio 1930).


\(^{24}\) Neiswanger v. Goodyear, 35 F. 2d 761 (N.D. Ohio 1929).

following five theories of landowners' rights in airspace may be useful to illustrate the basis on which these rights can be determined.

1. The "ad coelum" or "absolute ownership" theory—obsolete.
2. The "privilege of flight" theory—the landowner owns all airspace above his property subject to a privilege of flight in the public. This theory—becoming archaic—bears some relationship to the "minimum safe altitude of flight" theory since early statutes generally granted this right of flight through the surface-owner's airspace.
3. The "envelope of air" theory—whatever space a landowner can legally use above his land, plus an additional envelope of air to insure the reasonable use and enjoyment of such occupancy, becomes his whenever he uses it—the most popular theory.
4. The "minimum safe altitude of flight" theory where minimum altitudes, propounded for safe navigation and the protection of flight as well as surface activities, are used as some determinant of liability or the extent of airspace ownership—has had some currency.
5. The "ownership only to the extent of occupancy" theory—the landowner owns only the airspace he actually occupies hence can object only to such use of the airspace over his property as does actual harm—varying from (3) mainly in the nature of the action brought.

Air Passage and Surface Rights

A balance of equities is generally the legal tack taken by the courts in resolving the conflicting claims between the airport operator and the airman. As a general rule the case law in this area has recognized the airplane as an integral part of modern life. Those who reside near airports cannot be entirely free of the annoyances which may result, but their enjoyment of surface property cannot be diminished inordinately without compensation therefor. In a case where property owners were denied an anticipatory injunction against the construction of an airport to prevent forthcoming damages through noise, dust, crowds, fright, depreciation of property values, and general annoyance, the court expressed the conflict between the principle of free use of property and the opposing principle that in such use the user must save his neighbors from harm:

The law of nuisance plies between two antithetical extremes: the principle that every person is entitled to use his property for any purpose that he sees fit, and the opposing principle that everyone is bound to use his property in such a manner as not to injure the property or rights of his neighbor. For generations, courts, in their tasks of judging, have ruled on these extremes according to the wisdom of the day, and many have recognized that the contemporary view of public policy shifts from generation to generation.

In our business of judging in this case, while sitting as a court of equity, we must not only weigh the conflict of interests between the airport owner and the nearby landowners, but we must further recognize the public policy of the generation in which we live. We must recognize that the establishment of an airport of the kind
contemplated is of great concern to the public, and if such an airport is abated, or its establishment prevented, the consequences will be not only a serious injury to the owner of the port property but may be a serious loss of a valuable asset to the entire community.

The necessities of a social state, especially in a great industrial community, compel the rule that no one has absolute freedom in the use of his property, because he must be restrained in his use by the existence of equal rights in his neighbor to the use of his property. This rule has sometimes been erroneously interpreted as a prohibition of all use of one's property which annoys or disturbs his neighbor in the enjoyment of his property. The question for decision is not simply whether the neighbor is annoyed or disturbed, but is whether there is an injury to a legal right of the neighbor. The law of private nuisance is a law of degree; it generally turns on the factual question whether the use to which the property is put is a reasonable use under the circumstances, and whether there is "an appreciable, substantial, tangible injury resulting in actual, material, physical discomfort, and not merely a tendency to injure. It must be real and not fanciful or imaginary, or such as results merely in a trifling annoyance, inconvenience or discomfort." . . .

All systems of jurisprudence recognize the requirement of compromise in the social state. Members of society must submit to annoyances consequent upon the reasonable use of property. *Sic utere tuo ut alienum non laedas* [use your own rights so that you do not hurt those of another] is an old maxim which has a broad application. If such rule were held to mean that one must never use his own property in such a way as to do any injury to his neighbor or his property, it could not be enforced in civilized society. People who live in organized communities must of necessity suffer some damage, inconvenience and annoyance from their neighbors. For these annoyances, inconveniences and damages, they are generally compensated by the advantages incident to living in a civilized state.

A city's airport may be a public utility, yet an airport can become a nuisance through the circumstance of its construction, location or operation. The most frequent complaints of aggrieved landowners are directed against the noise of aircraft during the effort of run-up, take-off and climb-out, the fright caused by their low flying and the dust and fumes they cast upon the land. The airport operator, relying on an implicit balance of benefits concept whereby he can usually outweigh the scale, claims that the operation of his enterprise is in the public interest and far exceeds the inconveniences suffered by adjacent residents. Although continual low altitude flights which may endanger the life or affect the health of the surface dweller or unreasonably disquiet him are actionable wrongs, the mere fear of harm from

27 See Pogue and Bell, op. cit. supra n. 17, at 257-8.
28 Id. at 258. For a thorough analysis of the conflicting claims between airport operations and property owners until 1944, see Rhyne, *Airports and the Courts*, (Washington 1944).
aerial activity is not sufficient to authorize an injunction against flights over the property of proximate home owners. One state court has held that it may enjoin flights even in interstate commerce when conducted below the minimum safe altitude of flight as during take-offs and landings if they constitute a real danger to the life or property of the landowner and there is no showing that the paths flown are reasonably necessary for safe take-offs and landings or that an injunction will burden interstate commerce.

Conversely the courts have increasingly recognized the public interest involved in an airport's operation; whereas in earlier days airport activities were sometimes permanently enjoined as a nuisance, more recently injunctions requiring minimum altitudes during take-offs and landings are even becoming less common and greater severity of the causes necessary for the issuance of such injunctions must be shown. In suits by airports against landowners which hamper airport operation, the courts have shown little patience with devices purposely erected to obstruct flight operations such as tall poles or useless towers. But where a construction fulfills a useful purpose upon the land yet obstructs the flow of airport traffic, the chance of prevailing against it seems to turn upon the extent to which the airport participates in interstate commerce and the timeliness of the objection. Lack of public purpose or diligence in objecting favor the landowner and where the construction is reasonable, legal and useful, yet obstructive, removal will require condemnation by eminent domain.

However, the effective length of an airport's runways could be diminished or made useless by obstacles in the vicinity of an airport. "Land usage control of the first half mile from either end of a runway is the absolute minimum to assure the proper control of flight obstructions. In fact, such control outwardly for 2 miles is extremely desirable. The problem of proper zoning around airports must be faced in order to insure investment, minimize encroachment of residential areas, and eliminate flight obstructions." S. Doc. No. 95, The National Airport Program, 83d Cong., 2d Sess. (Wash.: G.P.O., 1954) p. 28.

There is no reason why obstructions to an airport's use cannot be controlled by a state's instrumentality through the zoning power just as land use may be restricted generally for community benefit. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). Yet the practice, though grounded in basic zoning principles, is relatively new and as late as 1945 a city ordinance which undertook to zone for an airport without the authority of a specific enabling statute, and which constituted a taking of private property without due process of law, was set aside. Yara Engineering Corporation v. City of Newark, 132 N.J.L. 370, 40 A. 2d 569 (1945).

Nevertheless, as navigation by air becomes more common, curtailment of the free use of airspace by surface devices even for a sanctioned public purpose such as a public utility's transmission lines has been held. In Yoffee v. Pennsylvania Power and Light Co., 385 Pa. 520, 123 A. 2d 636 (1956), a public utility whose wires were permissibly strung across a river in such an inconspicuous manner as

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80 Batcheller v. Commonwealth ex rel. Rector and Visitors of Univ. of Virginia, 176 Va. 109, 10 S.E. 2d 529 (1940); Thrasher v. Atlanta, 178 Ga. 514, 173 S.E. 817 (1934).
82 See Kuntz v. Werner Flying Service, 257 Wis. 405, 43 N.W. 2d 476 (1950); Antonik v. Chamberlain, 81 Ohio App. 465, 78 N.E. 2d 752 (1947).
84 Pogue and Bell, op. cit. supra n. 17, at 259.
86 See Pogue and Bell, op. cit. supra n. 17, at 259.
The power to zone and of eminent domain are a concomitant of the police power and may generally be exercised by local governments when property must be regulated or taken for a municipal purpose such as an airport. With the federal government these powers could be found to hinge upon the Commerce Clause, the postal or war powers, but doubt exists whether under present legislation, Congress intended fully to assume these powers, particularly that of zoning or that of exercising eminent domain for air easements where the airport is not federally owned and operated. Where eminent domain has been exercised by the federal government the path of the condemnee is sometimes a thorny one; it is not clear whether recovery of damages for the taking of the air easement and consequent reduction in value to the remainder may be combined with compensation for a diminution to cause a hazard, was found responsible for the death of an aviator who collided with them at an altitude of 175 feet above the surface of the water. Stating that with small cost, when weighed against human life, the wires could have been marked conspicuously, the negligence of this omission made the owner of the installation as responsible as if “he had shot down the aircraft.” In dictum the court stated that even had the utility company “... hung its wires over land to which it had a free simple title it still could not be indifferent to legitimate air traffic passing over it. ...” contra the holding in an earlier California case where those flying in a plane which struck an electric company’s wires strung across its own property were held to be trespassers to whom was owed no duty to warn of the presence of the wires. Strother v. Pacific Gas and Electric Co., 94 Cal. App. 2d 625, 211 F. 2d 624 (1949).

But when the zoning power is delegated to the local government, the state may still assert its sovereign power over the delegated power, as in Davidson County, Tennessee v. Harmon, 292 S.W. 2d 777 (1956) where the state held itself immune from injunctive relief against its exercise of a governmental function—the construction of a mental health institution in the approach zone to a runway of a county airport higher than that permitted by the county’s zoning ordinance. Here the assertion of sovereign immunity against an injunction aimed to enforce local aviation-safety regulatory power demonstrates the danger of a downward delegation of such power. A sovereign, for the sake of essential uniformity in air commerce, should never willfully distort the flow of commerce which its delegated power seeks to accomplish, nor should the sovereigns be “multiple.” A state in weighing the care of its mentally ill charges against the flow of air commerce, may strike a different balance from the federal government where alone the real need for the development of the inseparable functions of air commerce and national defense can best be realized.

By setting such needs in their proper place in the federal scheme, certainly fewer compromises of air safety would be made, especially when we combine this purpose with the sovereign power of Congress through legislation directly, or through an agency, to condemn property owned by a municipality and already devoted to a public use, when such property is needed to facilitate interstate commerce such as for the regulation of the use of navigable streams, including the erection of dams therein and bridges thereover. City of Davenport v. Three-Fifths of an Acre of Land, 147 Fed. Supp. 794 (D.C.S.D. Ill., 1957). Hence with the activation of the dormant power of the federal government to zone airport approaches to maintain the free flow of interstate commerce (see note 87 infra) would go the same characteristics which attend the power that the federal government exercises over the states in eminent domain—a power which is plenary, supreme and exclusive—guaranteeing the uniformity essential to air safety.


87 Civil Aeronautics Act of 1938, section 302 (c), (2) 52 Stat. 985, as amended by 62 Stat. 1216 (1948), gives the Administrator power to acquire by condemnation real property or interests therein.

On zoning, see Pogue and Bell, op. cit. supra n. 17 at 264-268.
tion in the value of the remaining property caused by anticipated air traffic, or indeed whether recovery for the latter loss can be had at all.\(^{38}\)

**Civil Aeronautics and Federal Control**

Today the exercise of federal control over aviation through the commerce clause, as a means of navigation in interstate commerce seems obvious yet prior to the enactment of the Air Commerce Act of 1926 when aviation as a means of commerce was not so firmly fixed, there was some worry as to the constitutionality of any exercise of federal control in this field.\(^{39}\) Consequently at least three delegations of our Constitution in addition to the commerce clause have been advanced as a basis upon which the federal control of aviation may rest—the admiralty jurisdiction, the war clause and the treaty power.\(^{40}\)

It is the commerce clause however which is most generally assumed to form the basis of federal control of aviation. Since 1824,\(^{41}\) when the Supreme Court first pronounced upon the scope of national authority and the limitations upon the states implied in the power conferred upon Congress “to regulate Commerce with the foreign Nations and among the several States,”\(^{42}\) it has been settled law that commercial intercourse embracing, as time went on, electronic communication in all of its forms, is an element of commerce which fell within the regulating power of Congress. Moreover commerce includes navigation;\(^{43}\) hence since the control of commerce has been held to extend to those navigable waters which “form a continuous channel for commerce among the States or with foreign countries,”\(^{44}\) it has been suggested that the “continuous channel” test may be applied equally well to aviation, giving Congress complete control over the airspace medium.\(^{45}\) And a comprehension of the ubiquity of the air ocean leads to a clear conclusion that, “... air as an element in which to navigate is even more inevitably federalized by the commerce clause than is navigable water.”\(^{46}\)

In 1926 the first comprehensive federal code for the regulation of air navigation was enacted.\(^{47}\) The power to regulate aircraft registra-
tion and airworthiness, airman certification, navigational facilities, air traffic rules and the suspension of certificates was conferred upon the Secretary of Commerce.48

The need for consolidation in the federal control of aeronautics gathered momentum in the nineteen-thirties: as the industry grew, regulation of the airlines, scattered among the Department of Commerce for safety, the Post Office Department for airmail contracts and the Interstate Commerce Commission for rate fixing in the carriage of mail called for unification. The debacle of the government's air mail contract cancellation in 1934, followed by the disastrous attempt by the Army to fly the mails and a growing need for the regulation of air carrier services and rates, led in 1938 to union under on federal statute and agency of both the economic and safety control of civil aviation.49

The legislative intent of Congress in conferring regulatory powers of broad scope is expressed in the Civil Aeronautics Act's declaration of policy:

In the exercise and performance of its powers and duties under this Act, the Authority shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity—

(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(e) The regulation of air commerce in such manner as to best promote its development and safety; and

(f) The encouragement and development of civil aeronautics.50

A further illustration of the breadth of scope which Congress contemplated in the Civil Aeronautics Act is found in the act's definition of air commerce:

"Air commerce" means interstate, overseas, or foreign air commerce or the transportation of mail by aircraft or any operation or navigation of aircraft within the limits of any civil airway or any

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operation or navigation of aircraft which directly affects, or which may endanger safety in, interstate, overseas, or foreign air commerce.51

The chief function of the regulatory power conferred upon the Civil Aeronautics Authority is the control of safety; the keystone of a successful civil air arm. Full control over the production and use of aircraft from drawing board and flight performance to overhaul and obsolescence, the margin of reserves from aircraft parts to flight fuel minima, the maximum pilot hours, minimum safe altitudes of flight, and air traffic rules are all enumerated in the act and are followed by a residuary clause leaving to one legatee, the Civil Aeronautics Board, plenary safety control.52 It is now settled law that the Civil Aeronautics Authority has complete control over safety regulation of air commerce in both interstate and intrastate activities. A reading of the definition of air commerce to which all safety measures pertain illustrates the broad sweep of the act and why, with little difficulty, the courts have concluded that “affecting commerce” embraces all areas in which this fast-moving activity could operate. The network of civil airways connecting control areas and zones at terminal points was already vast during the period of low frequency four-course range navigation; now with the omni-range system our land is a basket-weave of airways making all flight activity—no matter how local—a possible hazard to interstate commerce and thus within the act’s compass. Furthermore, in reserving this field of aviation for federal regulation, no new legal furrows had to be ploughed by the courts; for ample precedent was at hand from railroad and water navigation cases holding that wherever the interstate and intrastate transactions of carriers are so related that the regulation of one involves the control of the other, it is Congress and not the state which is entitled to prescribe the dominant rule. If this were not true, the nation would lose its supremacy even in the national field.53 As the searching wind diffuses the smallest substances into the running streams of the ocean air, so does the most isolated flight affect the main stream of air commerce. The Civil Aeronautics Board knew this when it required certification for all aircraft and all airmen for flights of any kind, anywhere in the United States, and when the courts confirmed its scope not only to encompass intrastate flights on civil airways54 but off airways as well,55 they made the Board’s control of flight-safety universal in the ocean air above our land.

This judicial favor of national control has sustained the supremacy

54 Rosenhan v. United States, 131 F. 2d 932 (10th Cir. 1942), cert. denied 318 U.S. 790 (1943).
of federal recordation statutes over those of the individual states; an aircraft owner has been held to be exempt from the registration requirement under the state statute when he had already complied with the registration provisions of the Civil Aeronautics Act; and the attempted assertion of a lien under a state recordation statute governing a chattel mortgage of aircraft will fail before one recorded federally. The trend toward federal regulation of air safety and its affirmance by judicial interpretation of the Civil Aeronautics Act was recognized by the removal, in 1943, of four of the Uniform State Acts regulating various aspects of aeronautics from the active list of uniform acts: The Uniform Aeronautics Act of 1922, the Uniform Air Licensing Act of 1930, the Uniform Aeronautical Regulatory Act of 1935, and the Uniform Airports Act of 1935.

On state-federal conflict in railroad cases, the same rule appears to apply to both economic and safety regulation. Here the Commerce Clause has been held to mean that whenever interstate trade is burdened or impeded by local government regulation, such impediment must fall by the force of federal supremacy. Thus Congress has the power to control intrastate charges of an interstate rail carrier to the extent necessary to prevent injurious discrimination against interstate commerce; and to protect persons and property moving in interstate commerce from all danger from whatever source, thereby requiring all intrastate railroad traffic moving on highways of interstate commerce to be so equipped as to avoid danger to persons and property moving in interstate commerce.

The same uniformity of attitude toward control does not exist in air commerce, however. In a case of first impression a federal District Court found that an air carrier which operates between points entirely within a state is an intrastate carrier even though it carries persons whose journeys originate or terminate outside the borders of the state. Consequently the air carrier's economic regulation was held to be within the jurisdiction of the state and not of the Civil Aeronautics Board. The court inferred, in arriving at its decision, a difference in scope between the definitions of air commerce and air transportation in the Civil Aeronautics Act. The former, applicable to safety regulations, is extremely broad in scope and includes activities which "affect" interstate air commerce; the latter, applicable to economic regulation, is defined as meaning "interstate, overseas, or foreign air transportation" with no mention made of activities which affect such transportation. Congress could have explicitly included such transportation; since it failed to do so, the court held, the Civil Aeronautics Board

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65 1955 Handbook of the National Conference of Commissioners on Uniform State Laws 297. The acts are still in force in several states, however. See Id. 299.
cannot achieve, by judicial interpretation, that which could easily have been accomplished by explicit legislation.\textsuperscript{61}

Litigation in both state and federal courts concerning the power of the Public Utilities Commission of California to regulate intrastate fares of interstate carriers has been inconclusive, yet has left the control of such fares under the state commission. In \textit{Western Airlines v. California},\textsuperscript{62} an appeal to the United States Supreme Court from a holding by the California Supreme Court that the Civil Aeronautics Act did not pre-empt the field of economic regulation and that the Public Utilities Commission of California had jurisdiction to regulate fares in intrastate air transportation, but without considering whether Congress had constitutional power so to do, was dismissed \textit{per curiam} "for want of a substantial federal question." There is some indication, then, that the economic regulation of the intrastate activities of interstate air carriers may be reserved for the states. This may appear as a loss of ground for plenary federal control, yet the above cases do not settle the constitutional question; rather they are an interpretation of the area of control which Congress intended to occupy through legislation and not determinative of its full scope were it to change the present legislation.

\textit{Airspace Sovereignty}

About fifty years ago, coevally with the air age, was born the concept of a nation’s sovereignty in its overlying atmosphere. It sprang from a rule of necessity, for although it could not then have been certain that whosoever rules the air can subdue the land, it soon did appear that complete territorial dominion required control of this third dimension of travel. The necessity to conclude bilateral executive agreements, or any agreement or treaty with foreign nations concerning the exchange of privileges in air navigation or commerce, springs from the rule of air sovereignty, now a fixed principle of international law. In earlier years, a country always exercised sovereignty over its land and territorial waters; now it embraces the overlying airspace as well. Thus each state not only controls the privilege of foreign aircraft to land and trade within its borders, but to over-fly as well—a right which it particularly and jealously safeguards.

The validity of sovereignty in airspace was conclusively set down at the Paris Convention of 1919. It was again declared in the Ibero-American Congress of 1926 and the Havana Convention of 1928. Great Britain reasserted it in its Air Navigation Act of 1920, the United States did so in its Aviation Acts of 1926 and 1938, and the Soviet


Union did so in its Air Code of 1932.63 Once decided among concurring nations, airspace sovereignty was never challenged. Indeed at the International Civil Aviation Conference at Chicago in 1944 it was reiterated, making the “Five Freedoms” concept more alliterative than precise, for the convention began not with a recognition of the right to fly as an international commitment but rather with an assertion by the contracting states that each has complete and exclusive sovereignty over the airspace above its territory. It then contained a multilateral grant of privileges in such sovereign airspace but never asserted rights antagonistic to airspace sovereignty.64

The Air Commerce Act of 1926 proclaimed exclusive national sovereignty when it declared:

FOREIGN AIRCRAFT—The Congress hereby declares that the Government of the United States has, to the exclusion of all foreign nations, complete sovereignty of the airspace over the lands and waters of the United States, including the Canal Zone. . . . 65

The Civil Aeronautics Act of 1938 amended this pronouncement by striking “foreign nations” from the definition and changing the term “sovereignty” to “national sovereignty”:

FOREIGN AIRCRAFT—The United States of America is hereby declared to possess and exercise complete and exclusive national sovereignty in the air space above the United States, including the air space above all inland waters and the air space above those portions of the adjacent marginal high seas, bays, and lakes over which by international law or treaty or convention the United States exercises national jurisdiction. . . . 66

In defining navigable airspace the Air Commerce Act provided:

NAVIGABLE AIRSPACE—As used in this Act, the term “navigable airspace” means airspace above the minimum safe altitudes of flight prescribed by the Secretary of Commerce under Section 3, and such navigable airspace shall be subject to a public right of freedom of interstate and foreign air navigation in conformity with the requirements of this Act.67

This definition was later modified by the Civil Aeronautics Act of 1938 only to the extent of investing the Civil Aeronautics Authority, in place of the Secretary of Commerce, with the duty of determining minimum safe altitudes of flight.68 Concerning public right of transit, the Civil Aeronautics Act of 1938 reads as follows:

63 For early expressions of sovereignty in treaties and legislative acts see Colegrove, International Control of Aviation (Boston 1930); I. S. Pereterski, The Air Code of the Union of Soviet Socialist Republics, 4 Air L. Rev. 153 (1933); Hotchkiss, Aviation Law (New York 1938); Shawcross and Beaumont, Air Law (1 ed. London 1945).


There is hereby recognized and declared to exist in behalf of any citizen of the United States a public right of freedom of transit in air commerce through the navigable air space of the United States. 69

These pronouncements have led to a great deal of confusion between "internal" and "external" sovereignty. 70 Some believe that the declaration of sovereignty pertains only to the relation of this nation to other nations of the world in respect to the international use of the airspace over the United States and its territories. Others believe that these legislative declarations taken together evidence an intent by the federal government to control all of the airspace of the United States to the exclusion of the states. If the declaration of air sovereignty is viewed from the international aspect, there remains the question of whether the particular state retains dominion over its airspace for regulatory and police powers. From the conclusion that the superjacent air is within the state's domain, it would follow that the state's governing power extends to its airspace in the same manner as it extends to the surface areas—lands and waters—and the general cleavage of federal-state powers would inhere. Then federal control of all activities in the airspace would be determined by the extent of its constitutional powers in other spheres and the commerce clause would determine its power to regulate commerce "with foreign nations and among the several states" here as in other areas. This, then, would limit Congress in its regulation of airspace activities to the extent of the power reposed in the federal government through the commerce clause, the general welfare clause and the war and postal powers. This appears to be the dominant concept and has provided the basis for prominent decisions in the field. In Braniff Airways v. Nebraska Board 71 the court stated:

The provision pertinent to sovereignty over the navigable airspace in the Air Commerce Act of 1926 was an assertion of exclusive national sovereignty. . . . The Act, however, did not expressly exclude the sovereign powers of the states. . . . The Civil Aeronautics Act of 1938 gives no support to a different view. After the enactment of the Air Commerce Act, more than twenty states adopted the Uniform Aeronautics Act. It had three provisions indicating that the states did not consider their sovereignty affected by the National Act except to the extent that the states had ceded that sovereignty by constitutional grant. The recommendation of the National Conference of Commissioners on Uniform State Laws to the states to enact this Act was withdrawn in 1943. Where adopted, however, it continues in effect. . . . Recognizing this "exclusive national sovereignty" and right of freedom in air transit, this Court in United States v. Causby, 328 U.S. 256, 261, neverthe-

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less held that the owner of land might recover for a taking by national use of navigable air space, resulting in destruction in whole or in part of the usefulness of the land property.

These Federal Acts regulating air commerce are bottomed on the commerce power of Congress, not on national ownership of the navigable air space, as distinguished from sovereignty. . . .

The idea that a considerable area of jurisdiction and control of airspace is left to the states was well expressed in 1930 by Chief Justice Rugg of the Supreme Court of Massachusetts:

It is essential to the safety of sovereign States that they possess jurisdiction to control the airspace above their territories. It seems to us to rest on the obvious practical necessity of self-protection. Every government completely sovereign in character must possess power to prevent from entering its confines those whom it determines to be undesirable. That power extends to the exclusion from the air of all hostile persons or demonstrations, and to the regulation of passage through the air of all persons in the interests of the public welfare and the safety of those on the face of the earth. This jurisdiction was vested in this Commonwealth when it became a sovereign State on its separation from Great Britain. So far as concerns interstate commerce, postal service and some other matters, jurisdiction over the regulation of passage through the air in large part was surrendered to the United States by the adoption of the Federal Constitution . . . .

Adherents to this concept point out that in the adoption of the Air Commerce Act of 1926 no attempt was made to fix the extent of state sovereignty in airspace. This view finds substantiation in the comments of the House Committee on the act's declaration of sovereignty, as well as in a provision in the act recognizing the rights of states to establish airspace reservations. It has been forcefully argued that no state has the right to acquire new "territory" or to extend its boundaries and, as a matter of fact, the adherents to state sovereignty in air do not so claim. The structure of this concept rests on the idea that the original Colonies gained sovereignty over the airspace as part of their original territory upon winning freedom from the mother country even though practical and effective control of the airspace was yet a sesqui-century away. This would raise the question of when a state acquired sovereignty in its then yet unattainable airspace, and for this a thin thread is traced to ancient Rome when, at that early age, surface owners' rights in usable airspace were given sovereign protec-

73 Commenting on the Air Commerce Act's declaration of sovereignty, the House Committee stated: The Section in nowise affects the apportionment of sovereignty as between the several States and the United States, but only as between the United States and the rest of the world. Insofar as the States had sovereignty in the airspace at the time of the adoption of the Constitution and such sovereignty was not by that instrument delegated to the Federal Government, and insofar as the States may have subsequently acquired sovereignty in airspace in accordance with the Constitution, such sovereignty remains unchanged Legislative History of the Air Commerce Act of 1926, (Wash.: G.P.O., 1948) p. 38.
tion. Combining this with the will of a state to exercise its sovereignty over any unattainable land regions which may be contained within its borders such as dense jungles and the forbidding heights of mountains fortifies the historical approach. By contrast, the “new territory” school is grounded on control as a *sine qua non* of national sovereignty; the mastery of the air was necessary before it could be added to a nation’s territorial domain just as the scepter of rulership was held above newly acquired land.75

Two recent Supreme Court decisions, when read together, have caused some disquietude among advocates of the state sovereignty concept. In the *Causby* case76 the Supreme Court divides the airspace into two areas—an upper, or “navigable airspace” stratum and a lower or surface dweller’s envelope of air. Prefaced with the reminder that Congress has declared the navigable air to be a public highway, the court states that the upper stratum has been placed by Congress in the public domain. Significantly absent from this case is dependence upon the commerce clause for the assertion of federal dominion over navigable airspace. In *United States v. California*, the *Tidelands* case,77 the Supreme Court determined that the federal government has paramount rights in and power over the marginal ocean belt and the underlying land adjoining the California coast. The court found no substantial support in history for the view that the thirteen original colonies separately acquired ownership of the ocean’s bottom within the marginal belt; it attached no conclusive importance to the facts that the Federal Government did not seriously assert its increasingly greater rights in this area until after the formation of the Constitution and that at the time this country won its independence there was no settled international custom or understanding among nations that each nation owned a three-mile water belt along its borders. Only after the United States became a nation did it become interested in establishing national dominion over a definite marginal zone for reasons of international relationships—the protection of international commerce, national defense and the preservation of natural resources—and California, admitted into the union on an equal footing with the thirteen original colonies, could not possibly have acquired such national prerogatives.

The state is not equipped in our constitutional system with the powers or the facilities for exercising the responsibilities which would be concomitant with the dominion which it seeks. Conceding that the state has been authorized to exercise local police power functions in the part of the marginal belt within its declared

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boundaries, these do not detract from the Federal Government’s paramount rights in and power over this area. . . . 78

Read in context these decisions go far in undermining the concept of state sovereignty in air space if they do not destroy it altogether. This idea is further strengthened by the fact that Tidelands cites Causby as authority with the entire structure based on the Curtiss-Wright Case where Mr. Justice Sutherland expressed the Supreme Court’s views on a phase of American history:

It will contribute to the elucidation of the question if we first consider the differences between the powers of the federal government in respect of foreign or external affairs and those in respect of domestic or internal affairs. . . .

The two classes of powers are different, both in respect of their origin and their nature. The broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs. In that field, the primary purpose of the Constitution was to carve from the general mass of legislative powers such portions as it was thought desirable to vest in the federal government, leaving those not included in the enumeration still in the states. . . . That this doctrine applies only to powers which the states had, is self evident. And since the states severally never possessed international powers, such powers could not have been carved from the mass of state powers but obviously were transmitted to the United States from some other source. During the colonial period, those powers were possessed exclusively by and were entirely under the control of the Crown. By the Declaration of Independence, “the Representatives of the United States of America” declared the United [not the several] Colonies to be free and independent states, and as such to have “full Power to levy War, conclude Peace, contract Alliances, establish Commerce and to do all other Acts and Things which Independent States may of right do.”

As a result of the separation from Great Britain by the colonies acting as a unit, the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America.79

Some authorities in the field believe that this brings the Supreme Court to the brink of the conclusion that navigable airspace has the qualities of property; that its final and obvious step will be to apply the Tidelands test to assert that sovereignty in the navigable airspace never was vested in the original colonies nor in the states but that it was acquired long after the adoption of the Constitution by the Federal Government as exclusive Federal “territory” needed for national purposes; that even if some vestige of state sovereignty in navigable airspace remains, the government has such paramount power therein as to make

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state sovereignty of no practical importance.\textsuperscript{80} Such a circumstance as here envisaged would raise some perplexing problems:

Would the nationalization of navigable airspace find a vacuum in the federal law for the definition and punishment of crimes committed aloft or raise a barrier to the pursuit by the local police of a fugitive fleeing by air?\textsuperscript{81}

In August, 1948 Diego Cordova assaulted the crew of an air transport while traveling over the high seas. In due course Cordova was tried and found guilty, nevertheless the federal district judge arrested judgment because he found no federal statute which covered crimes committed on board American aircraft over the high seas.\textsuperscript{82} This defect has since been remedied by extending the special maritime and territorial jurisdiction of the United States, which asserts federal criminal jurisdiction over offenses committed upon the high seas (and out of the jurisdiction of any particular state) also to cover offenses committed in flight over the high seas.\textsuperscript{83} Hence, as Congress and the Supreme Court move toward greater federal control of airspace, a similar statute asserting jurisdiction over crimes committed in aircraft navigating above the several states becomes necessary. Until that time, the Cordova ruling will raise some doubt as to whether any crime committed in any airspace found to be federal “territory” is punishable, with the exception of four specific crimes against which Congress has declared—the transportation of stolen aircraft from one state to another,\textsuperscript{84} committing larceny from an aircraft in interstate commerce,\textsuperscript{85} stowing away aboard an aircraft\textsuperscript{86} (all based upon and consequently coextensive with the commerce clause), and either wilfully destroying or conveying false information relative to the destruction of an aircraft.\textsuperscript{87}

(Capt. Weibel's article will be concluded in the Summer, 1957, issue of the \textit{Journal}, with sections on "Anti-Aircraft Campaigns in the New York Area," and "Universality and Fair Play.")

\textsuperscript{80} Both Cooper and Dinu, \textit{ops. cit. supra} n. 70, express this view.
\textsuperscript{82} United States v. Cordova, 89 F. Supp. 298 (E.D. N.Y. 1950).