



1953

# Possible Impact of the Tidelands Decisions on Airspace Sovereignty

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## Recommended Citation

Armine C. Ernst, *Possible Impact of the Tidelands Decisions on Airspace Sovereignty*, 7 Sw L.J. 280 (1953)  
<https://scholar.smu.edu/smulr/vol7/iss2/7>

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## NOTES AND COMMENTS

POSSIBLE IMPACT OF THE *TIDELANDS* DECISIONS  
ON AIRSPACE SOVEREIGNTY

**A**SIDE from the immediate importance of the points decided in the *Tidelands* cases,<sup>1</sup> the holdings have raised significant questions in the far reaches of sovereignty. Other than special consideration of Texas' claim that a distinguishing pre-admission history had given her ownership of the contested submerged lands, the crucial question decided by the Supreme Court of the United States in all the *Tidelands* cases was that the States were not the owners of the marginal belts along their respective coasts or the underlying lands and that the Federal Government, rather than the States, had paramount rights in and power over that belt, which gave also full dominion over the resources of the soil under that water area. While Federal control and power have been so rapidly extended in recent years as to make a new assertion thereof not startling, the holding that the thirteen original colonies did not acquire ownership of the three-mile marginal ocean belt along their coasts or the lands underlying that belt, and that the first claim to the marginal sea was asserted by the National Government and that protection and control of it are a function of national external sovereignty,<sup>2</sup> indicates the urgent need of re-examining some presently assumed areas of sovereignty. In no field is this more important than in aviation law — in the contemplation of airspace sovereignty. The question arises whether

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<sup>1</sup> U. S. v. California, 332 U. S. 19 (1947); U. S. v. Louisiana, 339 U. S. 699 (1950); U. S. v. Texas, 339 U. S. 707 (1950). "While these lands are often popularly known as 'tidelands,' literally the tidelands are those lands regularly covered and uncovered by the ebb and flow of the tide, and the United States made no claim to them. The submerged lands, the subject of litigation, lie seaward of the tidelands." Moore, *Expropriation of the Texas "Tidelands" by Judicial Fiat*, 3 Baylor L. Rev. 130, n. 3 (1951).

<sup>2</sup> U. S. v. California, *supra* note 1, at 31-34.

the Federal Government or the States have sovereign rights in the airspace above.

In international law there is no question as to sovereign rights in the airspace. Every nation is recognized as having complete and exclusive sovereignty over the airspace above its territory and territorial waters. Conversely, areas not part of the territory of any nation, such as the high seas, are open to the use of all. The United States adheres to this principle; it has been asserted by both treaty and legislation.<sup>3</sup> Control of aviation in the United States, however, presents a problem not only on an international scale — external sovereignty — but involves the question of power as between the various States of the Union and the Federal Government — internal sovereignty. Recognition of the airspace of the United States as part of the domain of the United States as against all foreign nations does not necessarily resolve the question as to whether the airspace above any one of the United States is also a part of the domain of that State; the States may nevertheless have sovereign rights in this airspace for internal regulatory and police powers.

Sovereignty has been defined as the “supreme, absolute, and uncontrollable power by which any independent state is governed. . . .”<sup>4</sup> Such governmental powers are, under the United States Constitution, distributed between the Federal and State Governments. That document is usually construed as retaining sovereign power of self-government in the States, or in the people, except for specified grants of power, expressly or impliedly, dele-

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<sup>3</sup> *The Convention for the Regulation of Aerial Navigation, Paris, 1919* (U. S. Dept. of State, Pub. No. 2143, 1944) included this basic doctrine. Although the United States was signatory to this Convention, it did not later ratify it. But the United States has adopted the same principle and has asserted its sovereignty over its airspace in the passage of the Air Commerce Act of 1926, 44 STAT. 568, 49 U. S. C. 1946 ed. §§ 171-184, and of the Civil Aeronautics Act of 1938, 52 STAT. 977, 49 U. S. C. 1946 ed. §§ 401-408, and by the signature and ratification of the *Pan American Convention on Commercial Aviation, Havana, 1928*, 4 TREATIES, CONVENTIONS, INTERNATIONAL ACTS, PROTOCOLS, AND AGREEMENTS BETWEEN THE U. S. AND OTHER POWERS (U. S. Govt. Printing Office, 1938) 4729 and of the *Convention on International Civil Aviation, Chicago, 1944* (U. S. Dept. of State Conf. Series 64, Article 1, Appendix II).

<sup>4</sup> BLACK'S L. DICT. (4th ed. 1951) 1568.

gated to the Federal Government.<sup>5</sup> There was thus established a dual form of sovereignty with the States considered to be sovereign or quasi-sovereign in character, retaining those powers not surrendered to the Federal Government by the Constitution, and the Federal Government sovereign in those rights which it holds under the Constitution.<sup>6</sup> If the airspace is Federal domain, the Federal Government has exclusive legislative powers therein, but if the airspace is part of a State's domain, then the sovereignty of the State and of the Federal Government would follow the ordinary constitutional pattern regarding State and Federal powers. The question of sovereignty of airspace, therefore, involves momentous problems in the control of aviation — the economic regulation of air commerce and jurisdiction of crimes committed and tortious acts occurring in the air.<sup>7</sup>

Until comparatively recently it was generally assumed that the airspace was part of the State below. There appeared to be a practical division of airspace sovereignty between the States and the Federal Government by regulation according to the boundaries of the Constitution. Federal control was effected by reliance principally upon the constitutional provision of power to regulate commerce, although other constitutional powers, such as the postal power, the treaty-making power, the war power, and the maritime power have also been used. State control rested on the States' reserved police powers. This idea is reflected in declarations of legislation, in treaties, and in judicial decisions.

#### The Air Commerce Act of 1926<sup>8</sup> and the report of the Inter-

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<sup>5</sup> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U. S. CONST. AMEND. X.

<sup>6</sup> See THOMAS, *ECONOMIC REGULATION OF SCHEDULED AIR TRANSPORT* (1951) Ch. 2, § 2, pp. 24 ff., for a discussion of "Airspace Sovereignty and the Dual Nature of the Government."

<sup>7</sup> Cooper, *Crimes Aboard American Aircraft: Under What Jurisdiction Are They Punishable?* 37 A. B. A. J. 257 (1951). This article analyzes the present undefined jurisdiction regarding crimes committed on board United States aircraft flying over foreign territory, the high seas, the marginal seas, and the states of the Union.

<sup>8</sup> Cited *supra* note 3.

state and Foreign Commerce Committee of the House of Representatives<sup>9</sup> relative thereto, contain interesting statements. Section 4 of the Act<sup>10</sup> authorized the President to provide for airspace reservations by executive order, and, in addition, it authorized the States to establish necessary airspace reservations if they were "not in conflict either with the airspace reservations established by the President under this section or with any civil or military airway designated under provisions of . . . [the Act]." In reference to this section, the House Committee observed:

. . . [T]he power of the President to establish Federal government airspace reservations in the States in no wise diminishes the power of the States to establish airspace reservations for such other purposes as they deem advisable so long as such reservations are within the airspace over which the States have acquired or retained sovereignty under the Constitution and so long as the establishment of the reservations is an exercise of a Constitutional power reserved to the States and does not interfere with the Federal airspace reservations or with the Federal airways.<sup>11</sup>

Section 6 of the Act<sup>12</sup> declared:

. . . [T]he 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.

In its comments on this section, the House Committee said:

. . . The Section in no wise 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.<sup>13</sup>

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<sup>9</sup> This report is contained in an article by Lee, *The Air Domain of the United States* in CIVIL AERONAUTICS LEGISLATIVE HISTORY OF THE AIR COMMERCE ACT OF 1926 CORRECTED TO AUGUST 1, 1928 (U. S. Govt. Printing Office, 1943).

<sup>10</sup> 44 STAT. 570, 49 U. S. C. 1946 ed. § 174.

<sup>11</sup> Lee, *supra* note 9, at 36.

<sup>12</sup> 44 STAT. 572, 49 U. S. C. 1946 ed. § 176.

<sup>13</sup> Lee, *supra* note 9, at 38.

The comments by the House Committee are indefinite as to what, if any, airspace sovereignty was held by the States at the time the Constitution was adopted or as to whether the States had actually acquired such sovereignty since that time. Too, the validity of the Air Commerce Act was not based solely on the Commerce Clause of the Constitution. Apparently, however, Congress did not intend to take from the States any airspace sovereignty which they might then have.<sup>14</sup> Impliedly, sovereignty was acquired by a State before it was admitted into the Union and was retained afterward, or sovereignty was acquired subsequent to statehood. Neither of these suppositions would seem to be suitable, however, because in the former, assertion of control over the airspace, other than surface airspace, was not made until long after the last State was admitted into the Union, and in the latter, power to extend domain or territory vests solely in the Federal Government by the Constitution.<sup>15</sup>

State statutes and court decisions likewise have supported the proposition that the Federal Government does not have complete sovereignty over the navigable airspace of the United States to the exclusion of State authority. In *Smith v. New England Aircraft Company, Inc.*,<sup>16</sup> the court concluded that in the interests of safety of the State it must possess jurisdiction to control airspace above its territory. The court there said:

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 [Massachusetts] 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

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<sup>14</sup> Cooper, *State Sovereignty vs. Federal Sovereignty of Navigable Airspace*, 15 J. Air L. 27, 34 (1948).

<sup>15</sup> THOMAS, *op. cit. supra* note 6, at 27.

<sup>16</sup> 270 Mass. 511, 170 N. E. 385 (1930).

of passage through the air in large part was surrendered to the United States by the adoption of the Federal Constitution.<sup>17</sup>

*Erickson v. King, State Auditor, et al.*,<sup>18</sup> is in accord with the position of the Massachusetts court, which it cites. In this case, the court said:

Subject to the jurisdiction conferred upon congress by the federal constitution relative to post roads, interstate commerce, and national defense, the state has complete sovereignty of the air above its territory and may assert its police power therein.<sup>19</sup>

*Parker v. James E. Granger, Inc.*,<sup>20</sup> later approved by the Supreme Court of California,<sup>21</sup> with certiorari denied by the United States Supreme Court,<sup>22</sup> contained this holding:

The flight of the planes mentioned herein was intra-state, and under the Federal Constitution and the California Aircraft Act enacted in 1929 (St. 1929, page 1874), the state of California was vested with exclusive power to prescribe air traffic rules to govern the operation of aircraft in flying in purely intra-state flights.<sup>23</sup>

Statutory claim to state sovereignty over the navigable airspace has also been asserted. Fifteen<sup>24</sup> States have in effect the so-called Uniform State Law for Aeronautics, which adopts the principle that sovereignty over the airspace is vested in the State. Section 2 of that law provides:

Sovereignty in the space above the lands and waters of this State is declared to vest in the State, except where granted to and assumed by the United States, pursuant to a constitutional grant from the people of this State.

These state decisions seem to indicate proper jurisdiction of the

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<sup>17</sup> *Id.* at 521, 170 N. E. at 389.

<sup>18</sup> 218 Minn. 98, 15 N. W. 2d 201 (1944).

<sup>19</sup> From the syllabus by the court.

<sup>20</sup> 39 P. 2d 833 (Cal. App. 1934).

<sup>21</sup> 4 Cal. 2d 668, 52 P. 2d 226 (1935).

<sup>22</sup> 298 U. S. 644 (1936).

<sup>23</sup> 39 P. 2d at 835.

<sup>24</sup> Arizona, Delaware, Idaho, Indiana, Maryland, Montana, Nevada, New Jersey, New Mexico, North Dakota, South Carolina, South Dakota, Tennessee, Vermont, Wisconsin.

State Governments over certain phases of air navigation and a legal duty on the State Governments to protect the local interests of their inhabitants. But state laws passed for the protection of their citizens will, of course, not be valid in so much of the navigable airspace as may be found not to be within the territory of the several States.<sup>25</sup> State declarations of their sovereignty in the airspace can be based on one of two theories:

... either, first, that the several original American colonies became vested with sovereignty over and title to the airspace as part of their original territory and had such territory at the time of the adoption of the Constitution of the United States even though the art of flight did not then exist; or, second, that the States have acquired the airspace as additional territory since the adoption of the Constitution and the development of the art of flight.<sup>26</sup>

Capable writers have argued that it was not until the art of flight was developed, long after the United States had been established as a nation, that navigable airspace could be considered State or National territory, as prior to that time such navigable airspace was completely unusable by man. They have concluded, therefore, that the navigable airspace is exclusive Federal territory.<sup>27</sup> Frederic P. Lee has put forth the argument that, as there was no substantial and continual use of the airspace until the present century, either by air navigation or radio communication, no nation by occupation or need of protection acquired any domain in the upper airspace prior thereto.<sup>28</sup> It was his view, accordingly, that the United States did not acquire sovereignty in the upper airspace until long after the Federal Constitution was adopted. Since the original colonies had no domain in the upper airspace and it was not part of their territory when the Constitution was adopted, and since after the adoption of the Constitution no State could acquire

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<sup>25</sup> Cooper, *State Sovereignty vs. Federal Sovereignty of Navigable Airspace*, 15 J. Air L. 27, 32 (1948).

<sup>26</sup> *Ibid.*

<sup>27</sup> Cooper, *Crimes Aboard American Aircraft: Under What Jurisdiction Are They Punishable?* 37 A. B. A. J. 257, 327 (1951).

<sup>28</sup> *Supra* note 9. This article inquires into the whole question of Federal and State airspace sovereignty.



territory, as it would amount to the acquisition of new or additional domain, a right belonging only to the Federal Government, airspace domain, therefore, was exclusive Federal territory and came under the exclusive sovereignty of the Federal Government as any other new territory thus acquired. Similarly, Clement L. Bouvé insisted that in international law "new territory has, as the result of the capacity of mankind to fly, been added to that hitherto subject to state [national] sovereignty."<sup>29</sup> In the same tenor, later, he asserted that "national sovereignty over navigable airspace could not exist in fact until the discovery of the art of human flight over a century following the adoption of the Constitution, during which time capacity to control — a *sine qua non* of national sovereignty — was lacking."<sup>30</sup> Both Lee and Bouvé were of the opinion that national sovereignty in the navigable airspace embraces both external and internal sovereignty.<sup>31</sup>

In *United States v. Causby*<sup>32</sup> the owner of a dwelling and chicken farm near an airport outside of Greensboro, North Carolina, claimed that the United States had taken an easement over his property by continued low flights of military aircraft entering and leaving the airport.<sup>33</sup> Substantially, the Court held "that the mili-

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<sup>29</sup> *The Development of International Rules of Conduct in Air Navigation*, 1 Air L. Rev. 1, 6 (1930).

<sup>30</sup> *State Sovereignty or International Sovereignty over Navigable Airspace*, 3 J. Bar Assn. D. C. 5, 11 (1936).

<sup>31</sup> Cooper, *State Sovereignty vs. Federal Sovereignty of Navigable Airspace*, 15 J. Air L. 27, 30 (1948).

<sup>32</sup> 328 U. S. 256 (1946).

<sup>33</sup> N. C. GEN. STAT. (Michie, 1943) § 63-11 provided that sovereignty in airspace was in the State except where granted to and assumed by the United States. It further provided that flight in aircraft over the state was lawful unless at such a low altitude as to interfere with the then existing use to which the land was put by the owner. The ownership of the space above the lands and waters of the state was declared to be vested in the several owners of the surface beneath subject to the right of flight. Federal statutes as contained in 49 U. S. C. 1946 ed. Ch. 9, taken in part from the Air Commerce Act of 1926 and in part from the Civil Aeronautics Act of 1938, include provisions that navigable airspace means airspace above the minimum altitudes of flight prescribed by regulations issued under this Chapter. Also, the Acts recognize and declare to exist in behalf of any citizen of the United States a public right of freedom of transit in air commerce through the navigable airspace of the United States. The Civil Aeronautics Board has the power and duty to promote safety of flight in air commerce by prescribing and revising air traffic rules.

tary flights, complained of were below the minimum altitudes prescribed by the [Civil Aeronautics] Board, that such flights were not within the navigable air space, and that there had been a taking of claimant's property."<sup>84</sup> Apparently, the Court divided the airspace into two zones: a lower zone, below minimum altitudes of flight fixed by Federal statutes, in which the landowner has property rights incident to normal enjoyment of the surface, and an upper zone, the navigable airspace, which Congress has placed within the "public domain" as a public highway for transit free of trespass claims. The Court rejected the ancient common law doctrine, *Cujus est solum ejus est usque ad coelum*,<sup>85</sup> saying that it had "no place in the modern world," and affirmed that navigable airspace is within the public domain.

The treatment by the Court of the airspace over the United States implies that the navigable airspace is Federal territory which Congress can dispose of and regulate.<sup>86</sup> The Court said: "The air is a public highway, as Congress has declared."<sup>87</sup> And again: "... the flights in question were not within the navigable airspace which Congress placed within the public domain."<sup>88</sup> The Court did not "indicate how or in what manner the state of North Carolina had granted its claimed sovereignty over the navigable airspace to the United States in such manner that Congress could place such navigable airspace in the public domain,"<sup>89</sup> nor did the opinion "disclose what rights, if any, the State retained in the navigable airspace in which the right of private property contem-

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<sup>84</sup> Cooper, *Crimes Aboard American Aircraft: Under What Jurisdiction Are They Punishable?* 37 A. B. A. J. 257, 260 (1951).

<sup>85</sup> "Whose is the soil, his it is up to the sky. Co. Litt. 4a. He who owns the soil, or surface of the ground, owns, or has an exclusive right to, everthing which is upon or above it to an indefinite height. 9 Coke 54; Shep. Touch. 90; 2 Bl. Comm. 18; 3 Bl. Comm. 217; Broom. Max. 395." BLACK'S L. DICT. (4th ed. 1951) 453.

<sup>86</sup> Cooper, *Crimes Aboard American Aircraft: Under What Jurisdiction Are They Punishable?* 37 A. B. A. J. 257, 260 (1951).

<sup>87</sup> 328 U. S. at 261.

<sup>88</sup> *Id.* at 264.

<sup>89</sup> Cooper, *Crimes Aboard American Aircraft: Under What Jurisdiction Are They Punishable?* 37 A. B. A. J. 257, 260 (1951).

plated by the state statute was held in substance to be contrary to the action of Congress in declaring the upper strata or navigable airspace to be a public highway and part of the public domain."<sup>40</sup> It would appear from the opinion in the *Causby* case that the Court considered the navigable airspace to be Federal territory and that no state sovereignty exists therein.<sup>41</sup>

The *Causby* case holding is made even more pertinent when it is considered in connection with the *Tidelands* cases, which held that the theory on which the territorial waters or marginal sea became part of national territory did not arise until after the United States became a nation. One writer has concluded that the cases create this inference:

... Either the several states may be held under these rulings to be entirely without sovereignty or right of control in the navigable airspace over their surface territories, or the power and rights of the Federal Government may be found so paramount in the navigable airspace as to procure the same legal results.<sup>42</sup>

The *Tidelands* cases clearly show that the Court felt that the acquisition of rights of ownership in the submerged lands had been effected subsequent to the adoption of the United States Constitution.

At the time this country won its independence from England there was no settled international custom or understanding among nations that each nation owned a three-mile water belt along its borders. . . .

It did happen that shortly after we became a nation our statesmen became interested in establishing national dominion over a definite marginal zone to protect our neutrality. Largely as a result of their efforts, the idea of a definite three-mile belt in which an adjacent

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<sup>40</sup> Cooper, *State Sovereignty vs. Federal Sovereignty of Navigable Airspace*, 15 J. Air L. 27, 36 (1948).

<sup>41</sup> "The only logical conclusion which can be drawn from the entire opinion of the Court in the *Causby* case is that the Court believed the navigable airspace to be federal territory and not part of the territory of the States below." Cooper, *Crimes Aboard American Aircraft: Under What Jurisdiction Are They Punishable?* 37 A. B. A. J. 257, 326 (1951).

<sup>42</sup> Cooper, *State Sovereignty vs. Federal Sovereignty of Navigable Airspace*, 15 J. Air L. 27, 28 (1948).

nation can, if it chooses, exercise broad, if not complete dominion, has apparently at last been generally accepted throughout the world...<sup>48</sup>

The theory was thoroughly and deliberately developed.<sup>44</sup> Likewise, the doctrine of "paramount rights" as a basis for national sovereignty was just as thoughtfully considered.<sup>45</sup> The opinion in *United States v. California* continues with the statement that "[n]ot only has acquisition, as it were, of the three-mile belt been accomplished by the National Government, but protection and control of it has been and is a function of national external sov-

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<sup>43</sup> U. S. v. California, 332 U. S. 19, 32, 33 (1947).

<sup>44</sup> "... [T]he Court went out of its way to hold that the theory on which the tideland waters or marginal seas became part of national territory did not come into being until after the United States became a nation." Cooper, *Crimes Aboard American Aircraft: Under What Jurisdiction Are They Punishable?* 37 A. B. A. J. 257, 326, 327 (1951).

<sup>45</sup> The Court stated the proposition repeatedly in emphatic language. To cite a few examples:

"The ocean, even its three-mile belt, is thus of vital consequence to the nation in its desire to engage in commerce and to live in peace with the world; it also becomes of crucial importance should it ever again become impossible to preserve that peace. And as peace and world commerce are the paramount responsibilities of the nation, rather than an individual state, so, if wars come, they must be fought by the nation..." U. S. v. California, 332 U. S. at 35.

"... Conceding that the state has been authorized to exercise local police power functions in the part of the marginal belt within its declared boundaries, these do not detract from the Federal Government's paramount rights in and power over this area..." *Id.* at 36.

"... [N]ational interests, responsibilities, and therefore national rights are paramount in waters lying to the seaward in the three-mile belt..." *Ibid.*

"... Now that the question is here, we decide for the reasons we have stated that California is not the owner of the three-mile marginal belt along its coast, and that the Federal Government rather than the state has paramount rights in and power over that belt..." *Id.* at 38.

"... Protection and control of the area are indeed functions of national external sovereignty... The marginal sea is a national, not a state concern. National interests, national responsibilities, national concerns are involved. The problems of commerce, national defense, relations with other powers, war and peace focus there. National rights must therefore be paramount in that area." U. S. v. Louisiana, 339 U. S. 699, 704 (1950).

"... If the property, whatever it may be, lies seaward of low-water mark, its use, disposition, management, and control involve national interests and national responsibilities. That is the source of national rights in it... Unless any claim or title which the Republic of Texas had to the marginal sea is subordinated to this full paramount power of the United States on admission, there is or may be in practical effect a subtraction in favor of Texas from the national sovereignty of the United States..." U. S. v. Texas, 339 U. S. 707, 719 (1950).

ereignty.”<sup>46</sup> The two findings combined, that acquisition was effected after adoption of the United States Constitution and that national interests require national sovereignty, suggest the theories of Lee and Bouvé.<sup>47</sup>

The “paramount rights” idea might be susceptible of different interpretations. Was it only explanation and reinforcement of the argument that national sovereignty was required and had existed from the beginning — that the States never could have owned — or was it an assertion of the doctrine of inherent national power to justify taking? Proponents of a strong national government have from time to time advanced the principle that the Federal Government possesses such powers as are necessary to contend with any truly national problem in addition to express and implied powers. The Supreme Court has held in many decisions that in dealing with foreign nations the United States is sovereign and must possess the necessary concomitant powers therefor without limitation by specific delegation under the Constitution.<sup>48</sup> Under

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<sup>46</sup> 332 U. S. at 34.

<sup>47</sup> “No one reading this opinion [*U. S. v. California*] can fail to note the striking similarity between the line of reasoning adopted by the Court and the position taken by both Lee and Bouvé in asserting 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. . . .” Cooper, *State Sovereignty vs. Federal Sovereignty of Navigable Airspace*, 15 J. Air L. 27, 37 (1948).

<sup>48</sup> *E. g.*, “. . . 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 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 *then possessed by the states* 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. . . .”

“It results that the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. . . . The power to acquire territory by discovery and occupation. . . the power to expel undesirable aliens. . . the power to make such international agreements as do not constitute treaties in the constitutional sense. . . none of which is expressly affirmed by the Constitution, nevertheless exist as inherently inseparable from the conception of nationality. . . .” *U. S. v. Curtiss-Wright Export Corp.*, 299 U. S. 304, 315, 316, 318 (1936).

such inherent power the Federal Government easily could assert sovereignty as it might deem conditions compelled. However, in view of the specific holding in the *Tidelands* cases that the colonies had never owned the contested lands, such an inference would appear to be unreasonable apprehension. Nevertheless, in view of the claims in the *Causby* opinion of complete and exclusive national sovereignty in the navigable airspace, the assertion of paramount rights in the *Tidelands* cases, and the possibility of the airspace being considered territory created by and since the art of flight, it would seem not radical to say that the trend reasonably appears to be toward the affirmation of exclusive national airspace sovereignty.

*Armine C. Ernst.*