1957

Problems of Federalism in the Air Age - Part II

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Recommended Citation
Eugene A. Weibel, Problems of Federalism in the Air Age - Part II, 24 J. Air L. & Com. 253 (1957)
https://scholar.smu.edu/jalc/vol24/iss3/1

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ANTI-AIRCRAFT CAMPAIGNS IN THE NEW YORK AREA

In Part I of this paper it has been shown that the landowner-airman conflict has centered, generally, in tort law, the law of real property, and the fifth amendment. An archaic maxim has given way under the pressure of circumstances to a more intelligent and compromising resolution; a number of theories of airspace right have been forged upon the anvil of judicial decision ranging from conservative to progressive, generally within the ambit of civil actions of nuisance, trespass or the taking of property.

With the post-war expansion of civil air transportation, the increase in urban housing development with the return of veterans, and the increased birth rate during the war years, both the municipal airports and the residential areas surrounding them suffered congestion, and the airport and its neighbors fell into serious conflict. It is not surprising then that the smouldering unrest caused by air traffic encroaching upon the surface dweller should first be fanned into flame in the congested New York area. The heavy populations of great cities adjacent to airports, however, have not always found these remedies adequate and consequently have utilized the device of legislation to alleviate this annoying invasion of their peace. Background for this legislative pattern has been found in similar restraints on surface vehicles.  

Thus local ordinances based upon the police power have been upheld and the location of the airport beyond the city limits imposes no barrier to the exercise of this power. Moreover, regulation of the activities of the airman are not necessarily to be confined to the locus of the airport but may be enforced anywhere over the jurisdic-

89 Tatum v. Hallandale, 71 So. 2d 495, 41 ALR 2d 1308 (1954); Silverman v. Chattanooga, 165 Tenn. 642, 57 S.W. 2d 552 (1933).
90 Silverman v. Chattanooga, supra n. 89; compare Birmingham v. Lake 243 Ala. 367, 10 So. 2d 24 (1942).
tion. Thus the action of a New York police commissioner pursuant to a city ordinance in suspending permits to tow advertising banners after a pilot operating under such a permit "... made a forced 'upside-down emergency landing' in Dreamland Park, ... where about 800,000 persons were gathered, and wrecked his plane, ..." was held a proper and valid exercise of the police power.\textsuperscript{91}

In 1948 the city of New York enacted a law to regulate aviation activities in and over the city. It proscribes parachuting, except in the event of imminent danger; take-offs and landings at any place within the limits of the city other than places of landing designated by the Department of Marine and Aviation of the Port of New York Authority; aerial advertising in the form of towing banners, dropping of pamphlets, circulars or other objects, or use of a loud speaker or sound device. Dangerous or reckless operation of aircraft, operation under the influence of intoxicating liquor, narcotics or other habit forming drugs, or the operation of aircraft in a careless or reckless manner so as to endanger life or property, are forbidden, and in the prosecution of such carelessness or recklessness consideration shall be given to the standards for safe operation of aircraft prescribed by federal statutes or regulations governing aeronautics. Then, broadly encompassing all of the federal civil air regulations in an incorporation by reference, the law charges any violation of its provisions to be punishable as a misdemeanor.\textsuperscript{92}

In the Spring of 1949, the Administrator of Civil Aeronautics, with the participation of the local authorities and the airline interests, and pursuant to his power under the Civil Air Regulations "in the interest of safety" to prescribe specific airport traffic patterns,\textsuperscript{93} drew up and adopted traffic patterns which routed traffic over the least congested areas, prescribing fixed tracks and definite altitudes to be flown in approaching and departing from the airports serving the greater New York area—Newark, La Guardia, and Idlewild.\textsuperscript{94} This automatically made a violation of these procedures punishable by the city of New York as a misdemeanor. Soon after their promulgation, Captain George Neuhauser, piloting an aircraft for Northeast Airlines, was charged with a deviation from the airport traffic pattern while approaching for a landing at La Guardia Airport. The information alleged that Neuhauser was observed:

\textsuperscript{91} S. S. Pike Company v. City of New York, 169 Misc. 109, 110, 6 N.Y.S. 2d 957, 958 (1938); see also Reynolds v. Valentine, 169 Misc. 631, 7 N.Y.S. 2d 709 (1938).

\textsuperscript{92} Administrative Code of the City of New York, Chapter 18, § 435-16.0 (July 1, 1948).

\textsuperscript{93} 14 C.F.R. § 60.18(d) (Supp. 1955).

\textsuperscript{94} 14 Fed. Reg. 479, 4299 (1949). A statement that the Air Line Pilots Association concurred in the patterns prefaces their promulgation.

On August 5, 1950 the Administrator announced the abandonment of ground track traffic patterns at La Guardia, Idlewild and Newark and made effective on August 15, "... without delay in order to promote safety of the flying public. ..." the standard left-hand rectangular traffic patterns; 15 Fed. Reg. 5046 (1950). Ground track patterns are still in effect at Washington National Airport however; 14 C.F.R. § 60.18-7 (Supp. 1955).
In the course of navigating an aircraft, . . . [making] a landing in an unlawful manner, in that the defendant did not conform to the traffic pattern, prescribed for the said airport, by the Civil Aeronautics Board. That more particularly the defendant, in making a landing on Runway No. 31 of the said airport, did cut into the said pattern at a point not authorized by the Air Traffic Control, and at variance with the prescribed pattern for said runway.

. . . [Defendant was further observed making] his final approach to Runway No. 31 of the said airport, over the southwest section of Flushing Bay, at an altitude of 800 feet and did enter the prescribed pattern for said runway at a point approximately two and one half miles north of the said approach.95

Figure IV indicates the prescribed traffic pattern and the point where Neuhauser entered. The allegation also charges a deviation in alti-

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tude; the final approach is to be begun at 1200 feet whereas it was alleged that Neuhauser entered the pattern at 800 feet.

The court denied a motion to dismiss which claimed that the ordinance was an unlawful delegation of power by the legislature and was also repugnant to the following clause in the New York State constitution:

No act shall be passed which shall provide that any existing law, or any part thereof, shall be made or deemed a part of said act, or which shall enact that any existing law, or part thereof, shall be applicable, except by inserting it in such act.

Were such practice allowed, the defendant contended, an ordinance which incorporates other statutes by reference could impose laws the import of which the legislature may not be fully cognizant, whereby a bill could become a law which would not receive a legislator’s approval if he fully understood it. Principally the defendant cited in support of this contention, Darwager v. Staats, where the state of New York attempted to apply to intrastate transactions the codes promulgated for interstate transactions by providing that codes adopted under the National Industrial Recovery Act, when approved by the President and filed with the New York Secretary of State shall be in force in New York. The New York Court of Appeals deemed this legislative act void as an unauthorized delegation of legislative function contrary to the constitution of the state, and offensive under the provision against embodiment by reference. Neuhauser also relied on a New Jersey case—a state with a constitutional provision identical with that of New York—which refused to recognize such an act of reference where it could not be struck from the particular act without essentially altering or impairing it. But the court disagreed, holding that the legislation under Darwager was a mere shell leaving to national bodies or officials the power to form therein the laws of the state of New York which would make applicable to a new body of people—those engaged in intrastate activities—laws which hitherto had not applied to them whereas the case at bar was nothing more or less than an enforcement measure in aid of federal legislation merely giving added sanction to rules which nevertheless had to be obeyed. It cited, in support, People of New York v. Mailman upholding the mere enforcement of existing federal laws already applicable to the citizens of the state and two cases which upheld the conformance of local to state and state to federal regulation, where compliance had already

96 New York Const. Art. III § 1 provides: Legislative power. Section 1. The legislative power of this State shall be vested in the Senate and Assembly.
97 New York Const. Art. III § 16.
100 New Jersey Const., Art. IV § 7 par. 4 (1844) now Art. 4, § 7, par. 5 (1947).
been decreed by the higher jurisdiction. Against a claim of possible unfamiliarity with the federal regulations by the legislators, suggesting a possible delegation of legislative authority, the court noted that the local authorities had actually participated with the federal agencies in drawing up the three traffic patterns in question and attached no importance to the fact that the embodiment involved scores of other regulations with which, because of their magnitude and divergence, the legislators could not have been familiar.

Neuhauser's final contention—that since Congress has exclusive authority to regulate air commerce and has so done, hence the exercise of police power by a state or municipality in a field which the federal government has occupied is unconstitutional—was also rejected. Stating that the enactment of the local law in no way interfered with nor affected commerce, the court moved from considerations of federal constitutionality involving the invasion of a field which Congress has chosen to occupy, to state constitutionality involving an alleged over-extension of the scope of municipal legislative power and cited People of New York v. Lewis\(^{105}\) where a local penalty was imposed, heavier than the penalty imposed by the state, for black market transactions forbidden federally, since such transactions had the gravest effect upon the property, safety and health of New York City's crowded population. In further support of its decision the court cited a Michigan supreme court case\(^{106}\) where the ordinance of a home rule city enacted after the commencement of war and augmenting federal emergency price control statutes and regulations was deemed not to have unconstitutionally delegated its legislative power nor encroached upon Congress' war power, but gave no weight to a Minnesota district court decision\(^{107}\) (cited in defendant's brief) holding that certain sections of the Minnesota Aeronautics Act, which required that aircraft and pilots operating in Minnesota have federal licenses were unconstitutional (state-wise) because they constituted an unwarranted delegation of legislative authority. The fact that both the black market and the emergency price control municipal sanctions were war-time measures (when emergencies may require enactment of statutes or ordinances under the police power which might be held improper in normal times) was not considered. Concluding, the court held that there is nothing which precludes New York City—a home rule city\(^{108}\)—from passing local laws having for their sole purpose the proper and effective enforcement of federal regulations, for the protection of the security, welfare and health of its people. Infractions of air traffic rules are hard to prove. Captain Neuhauser was acquitted on the facts, reserving appellate review of the constitutional question for another day when a conviction can be had.

\(^{105}\) Id.
\(^{107}\) Nieman v. Brittin, 1 CCH Av. Cas. 558 (2d Dist. Minn. 1935).
\(^{108}\) The grant of power to the municipalities by the State has its origin in the Home Rule Amendment to the Constitution adopted in November 1923. New York Const. Art. IX § 12.
A highly practical explanation of the need for local control of flight activities was given by Chief Walter E. Klotzback, Chief of the Emergency Division of the New York City Police Department:

Local Law 55 is a safety law. It is intended for the itinerant flyer. It enables any violations of a rule of the CAR to be prosecuted in the Magistrate's court as a misdemeanor.

The idea behind the whole thing is this: Take a fellow flying over the city enroute Boston. He will not land at the Staten Island airport. He will land on a golf course. We charge him with a violation. He has failed to comply with the CAR. We will fine the fellow twenty-five or fifty dollars if the guy gets real tough. We then file an affidavit with the CAA supported by two witnesses. They don't have punitive enforcement but may suspend, revoke or even qualify the lad's license.

The CAA regulations didn't properly control: the flying of captive balloons; the using of airplanes for advertising; the dropping of objects; parachuting as a stunt or exhibition from an airplane. There had to be some way of controlling these things. It had happened three or four times that parachutists had dropped into Times Square. All we could get them on was Section 43 of the Penal Law—acting in a way that might seriously endanger another.

Now we prohibit: sky writing; everybody who has a forced landing to report to the police within ten hours—this is to prevent flying away crates that should be dismantled and towed away; advertising material; loud speakers; banner towing; dropping of objects; use of captive balloons of a size not approved by the CAA and within a certain area; congested areas for training purposes—no training over New York City; parachute stunts and acrobatics other than for emergency use.

Here is the kind of things we are troubled with: They call us up and want permission to drop 5,000 green carnations on the St. Patrick's Day parade marchers. The March of Dimes wants to drop bags with ten-cent pieces in them. The Republicans want to tow ten to twenty "dirigibles" sixty-five feet long, twenty feet wide by automobile up Broadway. "You can't do it. You are guiding an aircraft." So they towed them around Manhattan Island by tug boat. The things broke away—we told them they would. A fellow opens a gas station within three or four miles of one of the larger airports. He buys a balloon and uses it for advertising purposes. We prohibit this.

We are not interested in the scheduled airlines. The scheduled airlines are self-policing. Their entire procedures are far ahead of the minimum requirements. We are only interested in the Sunday warrior who flies down Fifth Avenue or through the Holland Tunnel.

The Neuhauser case was a test of the law. He was one of many flagrant violators who refused to comply with the instructions from the tower. We were getting a tremendous amount of complaints. "What were we doing about it?" We showed them what we were doing. We grabbed one of those fellows. We put one of our men in the tower. We have observation patrol. We follow the conversation on the radio . . .

The CAA is interested in safety of flight and of those flying. Our duty is to protect everybody, both in the air and on the ground. The CAA's interest could not very well get itself down into a local atmosphere. Their interest is in regulating aircraft. The CAA
prosecutes you passively. We prosecute you actively. We use punitive methods. For wrongdoings the CAA uses suspensions and revocations. We will fine you. Or we will throw you in the can.

And so the matter stands. During the Neuhauser prosecution the federal and local authorities had a "falling out" on the matter of who should initiate prosecution. Thereupon the New York police were "dismissed" from the La Guardia Airport control tower, which is operated by the Civil Aeronautics Administration. Nevertheless "Local 55" is still law and stands ready to throw an airline pilot "in the can" for any deviation from flight paths which, from time to time may be promulgated by the Administrator of Civil Aeronautics. Yet these "safety measures" which are in truth anti-noise patterns, are by actual airline pilot testimony, often dangerous procedures.109

In upholding Local 55 Judge Ramsgate stated:

The primary purpose of air control over any area is to secure the public safety and general health of the people. It cannot be said that aircraft flying at low altitudes and over populated areas are not a hazard. The local law involved herein is, in essence, nothing more nor less than an enforcement measure in aid of Federal legislation to regulate aircraft within the boundaries of the municipality. The air patterns adopted merely set up a lane of traffic that aircraft must follow to carry them away from populated areas, thus protecting the inhabitants below as much as possible. The law of gravity has never been repealed. Whatever goes up must come down. It is common knowledge that through no fault of a pilot or those servicing aircraft, the motor or motors may stop. Therefore the aircraft must immediately descend and if it follows the pattern set out by the civil aeronautics authorities, and incorporated in Local Law No. 55, the chance of its landing or crashing in populated areas is lessened, since, if following the pattern, it should not be over populated areas.110

This represents the traffic patterns as safety measures and adds force to the court's decision but does not contribute to its validity. Indeed it justifies the adoption of the patterns in that such adoption operates in the field of safety—unquestionably the most vital function to which the municipality is devoted. But whether or not the purport of the ordinance falls within the scope of the fundamental functions of a municipal government—that of protecting the health, safety and morals or even welfare of the people—was not in dispute. What was strongly in dispute was whether legislative authority in the intricate field of air traffic regulation over a municipality could be delegated. The federal administrators are not infallible and could therefore enact a dangerous measure whereupon it would become a law of the city without the city legislature having itself the expert knowledge, or having at its avail a commission with the knowledge to advise it. Indeed this is precisely what happened in the promulgation and adop-

109 See testimony of Harold Sherwood, Captain, Trans World Airlines, Appendix to Plaintiff-Appellees’ Brief, pp. 121-156, 201 F. 2d 273 (2d Cir. 1952).
tion of the anti-noise patterns. In its opinion the court mentioned two collisions by aircraft with tall buildings in New York City but the irrelevance of these accidents is obvious. They involved aircraft lost in the overcast whereas the case at bar was dealing with anti-noise patterns which are flown only in the immediate airport area during visual flight, requiring constant ground reference. Furthermore it is significant that these patterns were prescribed in 1949, some time before the unfortunate series of crashes in the New York area had occurred. As the court said, should an aircraft experience a complete power failure at a low altitude, it would indeed save lives were it to fall in open land, but with multi-engine aircraft this possibility would be extremely remote; what generally happens when a crash occurs is a partial power failure whereupon the aircraft, through some additional trouble, falters on the remaining power somewhere between the initial power failure and the airport. Meanwhile its shallow turn of wide radius necessitates a deviation from the prescribed path. In truth the traffic patterns were a tactic intended to appease a populace distraught by the continual presence of low-flying aircraft. That the measure did not contribute to safety is shown by testimony concerning these same anti-noise patterns taken a few years later during the Cedarhurst controversy.\textsuperscript{111} There it was adduced that turning or maneuvering an aircraft immediately after take-off or before landing in order to conform to such patterns may require the pilot to exceed the limits of optimum operational speeds.

Nor did the issues at the Neuhauser trial elicit the hard fact that anti-noise patterns may cause danger through increasing the fastest growing hazard to air travel—the mid-air collision. Experienced pilots concur in the opinion that the necessity of following a ground track during airport approaches or departures must in some measure subtract from that one-hundred percent quantum of attention demanded of the pilot by changing aircraft flight circumstances and essential traffic during the landing maneuver. Of this the court could not have been cognizant; it had to rely on crash statistics and could know nothing of near-misses. But if fixed altitudes and ground tracks continue to be enforced, courts may soon have this information merely by taking judicial notice of the public records of accidents in the vicinity of metropolitan airports.

After a series of three tragic airline crashes in Elizabeth, N. J. in the brief span of fifty-eight days from December 16, 1951, to February 11, 1952, a fourth occurred in populous Jamaica, N. Y., whereupon a Queens grand jury hearing was ordered.\textsuperscript{112} Its object was to investigate

\textsuperscript{111} Supra note 109.

\textsuperscript{112} The following is a summary of a presentment dated July 2, 1952 by the April 1952 Grand Jury for the County of Queens, Michael C. Krasner, Foreman, to the Honorable Alfred J. Hofman, County Judge of the County of Queens in regard to an inquiry “... into the question of whether any criminal or culpable negligence sufficient to warrant action by any agency of ... [the] county ... with respect to the airplane crash in Jamaica on April 5th, 1952 and into the adequacy of safety regulations governing air traffic insofar as it affects or may affect the safety of the people of Queens County.”
the operation of air transportation over its jurisdiction insofar as it affected the safety, welfare, health and comfort of the plane and its passengers and the citizenry of Queens. The jury findings recognized the national and international aspects of air traffic which generated the disturbance but to avoid chaos its control required uniformity of safety rules and sanctions against violators. The federal government had taken the lion’s share of control over air traffic leaving only two possible areas for local action—culpable negligence or public nuisance, both violations of the penal code. But culpable negligence or recklessness resulting in manslaughter, implies a disregard of the consequences which may ensue from the act; an indifference to the rights of others. The aircraft pilot guides a device with a monstrous destruction potential but to wield it would bring the temple down upon his head and the urge for self preservation would preclude the imputation of such motive when his aircraft crashes. The cause of the crash under investigation was determined to have been a mechanical defect in the fuel system; any possible dereliction of duty in the inspection of this component must have occurred outside of the Queens jurisdiction at remote Fort Lauderdale, Florida, far from where the forces of destruction were unleashed—reemphasizing the importance of federal control.

The area of public nuisance was explored: a crime against the order and economy of a state consisting of an unlawful act or omission against a considerable number of people which annoys, endangers or injures their comfort, health or safety or renders them insecure in life or the use of property. However, if the business engaged in is lawful and is properly conducted and not operated in a negligent manner, its operation cannot be held to constitute a public nuisance. Moreover, when the conduct of the activity conforms with the usual customs or practices in the art it is presumed to be properly conducted.

113 N.Y. Penal Law, §§ 1052, (3) and 1053-a (1944).
§ 1052—Manslaughter in second degree defined.
Such homicide is manslaughter in the second degree, when committed without a design to effect death:

3. By any act, procurement or culpable negligence of any person, which, according to the provisions of this article, does not constitute the crime of murder in the first or second degree, nor manslaughter in the first degree.

§ 1053-a Criminal negligence in operation of vehicle resulting in death.
A person who operates or drives any vehicle of any kind in a reckless or culpably negligent manner, whereby a human being is killed, is guilty of criminal negligence in the operation of a vehicle resulting in death.


115 N.Y. Penal Law, § 1530 (1944).
§ 1530. Public nuisance defined.
A "public nuisance" is a crime against the order and economy of the state, and consists in unlawfully doing an act, or omitting to perform a duty, which act or omission:

1. Annoys, injures or endangers the comfort, repose, health or safety of any considerable number of persons; or,

2. In any way renders a considerable number of persons insecure in life, or the use of property.

jury concluded that low-flying aircraft while enroute could be in violation of the federally prescribed safe altitudes of flight over congested areas,\textsuperscript{117} but they are specifically exempted from such violation by existing federal regulations when engaged in take-offs and landings. This left the question of whether take-offs and landings in the Queens area were in conformity with the usual custom and practice and evidence presented to the Grand Jury brought forth an affirmative conclusion.

The grand jury, apparently going beyond a grand jury's general function of determining whether there is a sufficiency of facts to support an indictment, unhappily concluded that in view of the present state of the law, local authorities in New York are powerless to take any action to safeguard the life, property, welfare, comfort, health, safety and well-being of its citizens endangered by low-flying planes. The same factors in low flying which bar the use by local authorities of the public nuisance statute to punish safety violations, apply with equal force to the problem of noise from low-flying planes in taking off and landing or in pre-flight and maintenance run-ups.\textsuperscript{118}

\textit{Cedarhurst Raises the “Umbrella of Death”}

In 1953 New York International Airport (Idlewild) was already a vast installation consisting of more than ten miles of runways and seven and one half square miles of land. It handled 87,885 flights in both domestic and international operations, the latter being ninety-four percent of the New York district’s scheduled overseas air passenger traffic. The airport, at the confluence of airways fingerling across the United States and reaching out to foreign lands, plays a starring role in world air commerce.

The incorporated village of Cedarhurst, encompassing approximately a square mile area and, in 1953, comprising some 6,500 residents is, at its nearest point, 4,000 feet from the eastern boundary of Idlewild and 9,200 feet from the end of a runway and in line with an approach zone. Within its delegated powers as a home-rule municipal corporation it enacted, to become effective on June 15, 1952, an ordinance which provided in substance that it shall be unlawful for any person,

\begin{itemize}
  \item[117]\textsuperscript{117} 14 C.F.R. Part 60, Air Traffic Rules (1952);
  \textsuperscript{118}\textsuperscript{118} What legal basis supports the commission regulation of the Port of New York Authority that “no jet or turbo-prop aircraft may land or take off at an air terminal without permission”? Assume that a scheduled citizen air carrier with a route specifying New York City as a terminal desires to serve this route with a jet aircraft, all of which have been federally approved and certificated. Or suppose that a carrier of a foreign nation holding rights granted under treaty and executive agreement to operate commercial services to New York City, U.S.A. with a jet aircraft conforming to ICAO standards, which the United States has agreed to recognize, also wishes to begin services. Assume further that the airport operational noise level of the aircraft is within tolerances for safe airport operation. Could PONYA bar these aircraft from operating into its airports if in its opinion “they have noise characteristics which are intolerable to the airport’s neighbors”? 
\end{itemize}
1. to operate or cause to be operated an aircraft at an altitude below 1,000 ft. over the surface of the Village.

2. to maintain or use the altitudes below 1,000 ft. over the Village for so-called turning or maneuvering zones or the approach and transition zones claimed to have been established for the New York International Airport by the Administrator of Civil Aeronautics; or

3. to carry by air at altitudes of less than 1,000 ft. over the Village any gasoline or other explosives or inflammable material.

The ordinance provided a penalty of one hundred dollars for each violation and also declared any person who violated it to be guilty of disorderly conduct punishable by imprisonment in a county jail or workhouse for a term not exceeding six months or by a fine not exceeding fifty dollars or both.¹¹⁹

Aircraft operating to and from Idlewild must perforce fly over Cedarhurst at less than 1,000 feet in landing and taking off under a variety of conditions. Figure V dramatically demonstrates that enforcement of the ordinance would substantially restrict the operation of aircraft in interstate and foreign commerce to and from New York International Airport and would at times cause the airport's complete shutdown. Additionally, if other communities adjoining the airport were to pass similar ordinances, it would, for all practical purposes, have to be closed. The Port of New York Authority, the major scheduled airlines, individual airline pilots, the Air Line Pilots Association, and the Civil Aeronautics Authority joined to fight the ordinance.²⁰

The aviation interests relied first upon the argument of federal preemption by Congress in the field of interstate commerce to the exclusion of the states. Assuming that the ordinance were not in conflict with federal regulation it would be invalid nevertheless as an invasion of a field exhaustively occupied by Congress where even coincident legislation is repugnant. Where Congress has constructed a framework of legislation and an administrative agency has filled the interstices as has been done in air commerce a finding can be made therefrom of Congress' intention fully to occupy the field, even if a particular area were not specifically regulated. But the Cedarhurst ordinance actually conflicts sharply with the federal legislative structure grounded on the commerce clause hence even if there were no showing of pre-emption, the ordinance violates the supremacy clause of the Constitution. Although invasion of a pre-empted field and conflict with federal legislation are individually sufficient to strike down the ordinance, yet a further reason for its invalidation is that it constitutes an undue burden on interstate commerce. States may not impede the free flow of commerce, or regulate those phases of it which

¹¹⁹ New York Village Law § 90.

Figure V

"Local exactions and barriers to free transit in the air would neutralize its indifference to space and its conquest of time."

(Mr. Justice Jackson concurring in Northwest Airlines v. Minnesota, 322 U.S. 292, 303 [1944])
call for conformance to a universal pattern. The barrier built by the ordinance would distort this uniformity.

The defendant contended that both legislative intent and judicial interpretation have preserved at least some area of air for the surface parcel. Both New York in its common law and New York and New Jersey in their delegation of powers to the Port of New York Authority have recognized this by including among them the power of eminent domain. Further Congress recognized it in both the Civil Aeronautics Act and the Federal Airports Act by specifying the power to acquire air easements.121 Hence both federal and state recognize the reservation of some area of air for the landowner. The State of New York has never delegated its police power to the federal government. The greatest concentration of air tragedies such as those in the New York area occurred principally within a widening path extending outward from the runway threshold. Cedarhurst is within such a path, therefore the ordinance is intended to safeguard not only the surface dweller's property rights but his comfort and life. Congress in specifying navigable airspace in its legislation has recognized two strata or areas—navigable and subnavigable airspace. In the federal legislation navigable airspace is that above the minimum altitude of flight which is 1,000 feet in congested areas.122 No public right in the subnavigable airspace has been decreed in the Civil Aeronautics Act. Hence when the Civil Aeronautics Board attempts to regulate flight activity in the subnavigable airspace it is either going beyond its powers or Congress has made a too broad and loosely defined delegation. In either case, whether an invalid construction by the Board or whether the act itself is an improper delegation, to assert federal control in the subnavigable airspace area would be an overextension of delegated power and constitute a taking of property for public use without compensation—a fifth amendment violation.

Although all facets of landowner-airman relationship were touched upon during the course of legal action by the many interested parties, the court, in deciding,123 devoted itself to the task of determining what it considered the basic question: whether Congress pre-empted the field of regulation and control of the flight of aircraft, including the fixing of minimum safe altitudes for take-offs from and landings at airports, despite that such altitudes might be less than 1,000 feet. Specifically what, if any, airspace below the altitude of 1,000 feet has Congress determined to be navigable airspace, subject to flight control?

The court emphasized the need for federal control of all phases of transportation, particularly that of air travel, and quoted a Supreme Court expression by Justice Jackson on congressional control of air commerce:

122 Supra n. 117.
Congress has recognized the national responsibility for regulating air commerce. Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands. The moment a ship taxis onto a runway it is caught up in an elaborate and detailed system of controls. It takes off only by instruction from the control tower, it travels on prescribed beams, it may be diverted from its intended landing, and it obeys signals and orders. Its privileges, rights and protection, so far as transit is concerned, it owes to the Federal Government alone and not to any state government.\textsuperscript{124}

Although the town officials of Cedarhurst, as property owners, had withdrawn their counterclaims of nuisance and trespass, the court paused to examine property rights of airspace in owners of subjacent land. The corpse of \textit{Cuius est solum} was dug up and reinterred. The court here leaned toward the concept that the owner can lay claim only to airspace which he can use and enjoy: he has a paramount right in the superjacent airspace only in that no one can acquire a right to the space above his land which will limit whatever use he can make of it as part of his enjoyment of the land. All other airspace, particularly that which is navigable, belongs in the public domain. The court then cited the pre-eminence of Congress in the field of interstate commerce, federal pre-emption of air safety through legislative action and pursuant regulations and concluded that the states, including the Village of Cedarhurst, are precluded from enacting valid contrary and conflicting legislation.

This led to the main question at bar. Clearly Congress had the right to regulate commerce in the navigable airspace and clearly through the setting of a minimum safe altitude of flight the federal regulatory agency, supported by judicial decision, had determined that airspace 1,000 feet above the surface was navigable. Although no specific reference was found in the regulations to take-offs and landings, the words "except when necessary for take-off or landing no person shall operate an aircraft below the following altitudes" were construed as establishing a minimum altitude rule of specific applicability to these maneuvers. By judicial decision, then, federal control and regulation of traffic in the navigable airspace above the minimum safe altitude of flight is found to extend to the airspace through which aircraft must necessarily fly for take-offs and landings at public airports—it should never have been in dispute.

Upon appeal\textsuperscript{125} the aviation interests were again upheld: although the appellant's brief contained substantially the same contentions as below, only two additional issues relative to the controversy were discussed in the decision. Using the District Court's holding—invasion and conflict in a pre-empted field—the court fortified this structure

\textsuperscript{124} Northwest Airlines, Inc. v. Minnesota, 322 U.S. 292, 303 (1944).

\textsuperscript{125} Allegheny Airlines, Inc. v. Village of Cedarhurst, 238 F. 2d 812 (2d Cir. 1956).
holding that the delegation by Congress of power to the Board to prescribe safety rules was not an unconstitutional delegation as where delegations are made without guiding standards. The policy declaration of Congress in the Civil Aeronautics Act is to assure, in the public interest, the highest degree of safety in air transportation. To accomplish this Congress has delegated to the Civil Aeronautics Board the duty to set "rules as to safe altitudes of flight." In view of this construction the village of Cedarhurst had contended that the word "safe" did not denote a "sufficiently definitive standard to permit valid administrative action under the delegation." But the court disagreed. With the multiplicity of variable conditions inherent in safety control, allowance for such variability does not signal the use of too broad a structure in its delegation. There are other even less specific delegations that have been upheld by the courts. Against the allegation of a taking of private property for public use the court distinguished the Causby case where flights were so frequent and so low as to interfere directly with not only the enjoyment of the land, but its commercial use as a chicken farm as well. The imprecision of the volume, periods of intensity and altitudes of the flights over the village of Cedarhurst, and the lack of evidence that the flights constituted a trespass or nuisance to the village residents preclude the finding of a taking under the Causby doctrine.

**Universality and Fair Play**

Time can pass only through motion for a motionless state is eternity. Motion and its speed define distances and make them meaningful, for only through velocity—how long it takes to get there either in fact or fancy—can distances be conceived. Viewed in this light, the distance between two points is no longer fixed, but variable; what is far today is near tomorrow.

It is not difficult to realize that thrusting skyward state and municipal boundaries would stultify air commerce. What is sometimes overlooked, however, is that the rapidity of flight and the instantaneousness of communications gives every function of government a "national" quality. This is not to say that all local problems shall cease to exist and that local control will soon be unnecessary, rather it urges the understanding that state, local and municipal and national and federal can no longer be associated with fixed synonyms such as near, close at hand, democratic, grass roots; or distant, centralized, national state, bureaucratic; for even as we stand the world is shrinking beneath our feet. In aviation a pilot cannot heed state lines; when flying through the overcast, or at altitudes of three to five miles above the terrain it is

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difficult or impossible to take cognizance of local political boundaries, for with altitude, even though ground contact is maintained, topographical features are often indistinguishable.

In support of our second contention—that communication and transportation have nationalized other functions of government—we must begin with the assertion of an obvious fact yet often overlooked. Communication and transportation are of no vitality in and of themselves—they only serve when they transport, integrate, and disseminate the ideas and substances of our people and our country's vital processes. Hence only those activities, processes and phase of society which cannot be advanced by communications and transportation can escape a trace of nationalism in this little world. A thousand instances could be cited: the nation-wide conference where experts situated all over the country not only converse but see each other yet never leave the comfort of their studies; the speed with which a vaccine is rushed to an area of epidemic; the assistance of the ubiquitous federal police with their vast system of record keeping and advanced scientific methods to bring to the bar of justice thieves who have never bothered to move beyond the shadow of the local police station. What must be overcome is the reluctance of government officials to face the prejudices against upsetting the status quo in making the needed changes which arise through force of circumstances. The great trouble in federalizing functions of government which cry for centralized control is the need to overcome the pressures of those who see in nationalization the loss of influence which they wield in local affairs.

The time limit for appeal of the Cedarhurst case to the Supreme Court has expired but it does not move into the archives of legal record to be forgotten; while it has settled some questions of law it has left a greater social problem unanswered. As the issues narrowed in the Cedarhurst case to the final specific question of whether that portion of airspace used for take-off and landing was navigable airspace, hence susceptible of federalization, the broader issues were lost from sight. The Cedarhurst ordinance was declared invalid but this does not go to the heart of the problem. Here was a community of enraged homeowners attempting to do what they could to keep from their doors this intruder who invaded both day and night. Admittedly fears are often overworked and the discomfort from noise is sometimes masqueraded by the terrors of physical harm. But the intrusion is there nevertheless.

Town officials, civic groups and the people of the communities surrounding the New York airports generally conveyed the feeling of frustration and resignation in their attempt to cope with the problem. Generally the complaint was an unjust taking of property without compensation by both the government and large airline corporations who were profiting by the "seizure" of property. The idea that air commerce is a necessary adjunct to present-day life was not disputed. The property-owner did not want to impede progress; he merely wanted the air carriers to remain within bounds. This could be done
by declaring navigable airspace to be that above 1,000 feet, the present minimum safe altitude of flight; later it should be raised to 5,000 feet. Any invasion below this minimum should constitute a taking for which compensation should be made.

One centralized authority, such as the Administrator of Civil Aeronautics, vested with complete authority over all public airports was recommended. Giving him the power entirely or partially to close down an airport when it became dangerous would avoid the reluctance of the airport operator fearful of destroying his investment. In a situation where the airports are not owned and operated by the city, the municipal authorities are free to take action against the offender without fighting themselves. This is more often true with activities other than municipal airports such as railroads, steel mills, etc. But with the city owning the airport, its neighbors are at some disadvantage in getting any action. The City of New York has far too much invested in La Guardia and Idlewild to abandon them. With the commitments as great as they are, the consensus is that the airports will just have to remain. The inaccessibility of the courts without exorbitant costs is another complaint. The small communities or individual home owners are not able to cope with the great array of legal talent representing the airlines, the government, and the Port Authority. In general the grass roots feeling of the multitude of neighbors of the large New York airports is that an injustice is being done but that a preponderance of wealth, influence and vested interests impedes vindication.

A study of so vexing a problem cannot leave one barren of ideas. The suggestions below favor centralized control since it is firmly believed that the benefits growing out of uniformity can be enjoyed without sacrificing those individual rights to which, sometimes more firmly than others, our nation has always been dedicated.

1. Congress, through regulatory legislation, should assume control of all navigable airspace, regarding it as part of the public domain—an area owned by our national government and subject to national sovereignty to the complete exclusion of state or local regulation. This navigable airspace should not be rigidly fixed but rather should vary with circumstances and should lie upon the surface dweller’s and begin at the plane where that airspace necessary for the surface dweller’s use and enjoyment leaves off. In the vicinity of public airports this navigable airspace should also include that necessary to effect safe take-offs and landings. A free right of passage in navigable air should continue to be afforded to all citizens of the United States. The federal government should regulate all flight activities in this area with proper and adequate civil and criminal sanctions to the complete exclusion of

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127 This control could be fortified by the conclusion by the federal government of treaties with foreign nations concerning the public domain of air. By an application of the Missouri v. Holland (252 U.S. 416 (1920)) doctrine the necessity for a reconciliation between state and national policies under the concept of delegated and reserved powers fades since legislative power is divided between the federal government and the states while the treaty power is delegated in toto. See supra n. 40.
any state regulation or embodiment by reference. The plane which divides the property owner's airspace from air in the public domain should not be confused with the minimum safe altitudes of flight which are safety measures and which vary with the nature of the aircraft to which they apply. The landowner's needs and not the safety of flight should determine the envelope of air protecting the surface occupants.

2. The "envelope of air" doctrine should apply to the ownership of airspace by the subjacent landowner. This doctrine should be adopted by state legislatures and applied by the courts. In the resolution of legal controversies, the "then existing use" yardstick should apply to determine actions affecting present rights such as nuisance or trespass; the "probable future use" doctrine should apply to determine the extent of a taking. The size of the envelope of air should, through experience be allowed to jell into a fixed areal dimension of definite depth providing a sufficient buffer over whatever is reasonably constructed on the land generally to ward off dangerous intrusions depending upon the nature of the use or probable use of the property. Annoyances to the landowner beyond this envelope of air should be actionable as a nuisance or as a partial taking of the surface property through interference with the enjoyment and use. Flight barrier penetration causing damage or injury on the surface should be regarded as a physical intrusion upon the surface property.

3. Legislation should be enacted or the present legislation should be strengthened and public funds provided to facilitate the federal ownership of at least major public airports and to enable the federal licensing of all airports.\textsuperscript{128} This will add the last segment in a now almost completely rounded area of federal control of the civil air transportation function.

4. The Congress should clarify the federal government's power and funds should be provided to enable it to acquire land for airports and runway over-run areas and for air easements and to regulate the height of present and future structures through eminent domain and zoning regardless of whether or not the airports which these areas are intended to serve are federally owned or operated.

5. Whenever the navigable airspace or other airport activities conflict with the envelope of air of the landowner and public interest requires that part of it is needed for the public domain of the air, or when the landowner suffers from activities outside his envelope of air, full and adequate compensation should be made for the harm or taking. This should apply to zoning as well, where a property owner should not only be compensated for the removal or alteration of structures but even when no alteration or removal is necessary should be compensated by the application of the probable future use yardstick when he suffers a substantial reduction in the value of his property through the imposition of the zoning regulations. Means should be provided to

permit the easy adjudication of any claims for damages for a trespass or nuisance or for a taking from whatever source without undue delay and exorbitant expense by the landowner. When property for an air easement is taken by eminent domain the condemnee should be afforded the right in a single suit to adequate compensation not only for the taking but the diminution in value of the remainder as well. Furthermore, actions for depreciation in value incident to the lower level of flights of aircraft over the premises should be guaranteed. The fairest way here may be to delay the initiation of this action until occurrence of the diminution, since such diminution will vary with the changing nature and volume of the aircraft in use over the land.

6. The federal jurisdiction should be extended to cover all crimes committed in the navigable air above the United States. State activities in this area should be strictly limited to the apprehension, during hot pursuit, of criminals whose criminal acts were committed on the surface in the local jurisdiction and who have fled into the navigable air. Federal authorities should police this public domain of the air.

7. All airspace below the navigable air should remain under the jurisdiction of the government of the subjacent land and waters. Hence the area of control of the local jurisdiction will be coterminous with the landowner's envelope of air and air in the public domain over which the federal government will exercise complete sovereignty will be coterminous with the navigable air.

These suggestions provide only the bare bones of a new structure, the building of which will be fraught with many complications. Yet if the goals which they suggest are realized, a great step forward will be made by:

1. Rededicating the control of air transportation to the promotion of air safety by bringing uniformity of regulations and sanctions in air commerce and eliminating the laws of a patch-work quilt of jurisdictions which could enfeeble air commerce and make the navigation of aircraft difficult if not impossible.

2. Eliminating inconsistencies which now exist in sanctions decreed by overlapping jurisdictions against violations of uniform rules or the promulgation of separate rules either of which destroys the universality which mature experience in aviation recognizes as an imperative of safety, and offends a sense of justice.

3. Eliminating the possibility of a jurisdiction adopting air commerce regulations which it does not understand and would not adopt if the entire import of these rules were fully comprehended.

4. Eliminating the difficulty of determining jurisdiction in the prosecution of crimes in the high air and yet reserving for local jurisdiction sufficient superjacent air properly to fulfill its function of safeguarding the health, safety, morals, welfare and property of its people.
5. Providing the most equitable landowner-airman balance of interests by raising air safety to its highest purpose by upholding the dignity and peace of the home through safeguards against its invasion while yet preserving the airman's right to fly.

How will these aims of safety, uniformity, dignity and justice in the advancement of air commerce be fulfilled? Although air is our medium, the boon which its safe regulation and peaceful use for the public welfare will bring will not drop from it as a windfall here as when the landlocked city by the magic of human flight suddenly found itself beneath a greater ocean. Twice in an era is too often for such blessings haphazardly to fall upon the same beneficiary. Vision is needed, but more—a sincere, generous and cooperative effort, this time purposefully to attain the conclusion to Tennyson's dream of the age of flight—a Parliament of man guiding a Federation of the World, where

... the common sense of most shall hold a fretful realm in awe,
And the kindly earth shall slumber, lapt in universal law.\textsuperscript{129}

\textsuperscript{129} Tennyson, op. cit. supra n. 1.