State Sovereignty in the Navigable Airspace

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There appeared in the Winter 1948 issue of the Journal an article entitled "State Sovereignty vs. Federal Sovereignty of Navigable Airspace" by John C. Cooper. It was a timely and a warning discussion of a legal question with which public officials, entrusted with the development and regulation of civil aviation in the United States at both federal and state levels have been and are continuing to be confronted.

This practical problem has been brought to the forefront of public attention recently because of interpretations of the implications in the 1946 and 1947 decisions of the United States Supreme Court in the Causby case and the California "Tidelands" cases. The Causby opinion rests on the theory that while owners of private property also own as much of the airspace above as may be required for normal enjoyment of the surface, the airspace above that is "within the public domain" and open for public transit free of any trespass claim. The California "Tidelands" case holds that the federal government has paramount interest in the area within the three mile limit off the coast of California, and in physical property above or beneath the water there. This, the Court stated, arose from the paramount national interest in protection of international commerce, national defense, and preservation of natural resources, and turns on the decision that the State of California never acquired such national prerogatives.

The implications drawn from these decisions upon State sovereignty call for vigorous and courageous action by Congress either through effective federal legislation definitely and clearly outlining the respective areas of jurisdiction in the airspace, or by the calling of a Constitutional Convention to amend the United States Constitution.

Lacking such action, the people of the respective states, as sovereigns of their own self-governments, will be projecting their future actions into a period of confusion and their tremendous investments will be a loss so great as to affect our national economy in an unprecedented manner. Each member of the United States Congress, being a representative of the people of his or her respective state, should and must

1 15 J. Air L. & Com. 27 (1948).
2 U.S. v. Causby, 328 U.S. 256 (1946).
give exhaustive attention to the solution of this problem. As our civilization is projected more and more into the Air Age, the navigable airspace will be increasingly utilized for daily concerns.

I. What Is Sovereignty?

In a democracy the will of the people as expressed in their form of government, has created an entity clothed with civil and political powers with which to execute that will. In a definition of terms, one standard legal reference notes that "sovereignty" in its broadest sense means "supreme, absolute, uncontrollable power, the absolute right to govern." It describes "sovereign power" as:

"Power without limitation. Term has been applied to the people of the state in their sovereign capacity, acting through their representatives, the legislature. In all governments of constitutional limitations, sovereign power manifests itself in but three ways. By exercising the right of taxation; the right of eminent domain; and through its police power."

This same text offers a definition of "jurisdiction":

"In the absence of any particular agreement or of particular provisions in the acts of admission varying the ordinary rules, the jurisdiction of a state is coextensive with its boundaries, extending throughout its territorial limits and operating upon all the persons and things located or situated there, and, conversely, limited to its own territorial limits and not extending beyond its boundaries."

It must be remembered the thirteen sovereign colonies, in forming the United States, retained the sovereign power of self-government in the people. The people established themselves as separate sovereign states, and, after the adoption of the U.S. Constitution, whenever a new state was admitted to the Union, it was under specific written declarations that they were admitted as an equal sovereign state and retained the sovereign power of self-government save for the enumerated powers vested in the national government to wage war, enter into treaties, issue money, and govern commerce between the states and other nations. The Federal and State governments existed as separate sovereigns and jurisdiction of one over its particular field may not be interfered with by the other. This principle has been enunciated by the U.S. Supreme Court in numerous decisions from very early days.

There was therefore established a dual form of sovereignty, one which is basically "internal" in character, and the other "external" in effect. The several states reserved to themselves the power to regulate matters affecting their own people, but whenever those matters required action and treatment with other states or foreign nations, the na-
tional government was to exercise its "external" powers. The Tenth Amendment to the Constitution provides that "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."

It has therefore become a recognized rule of constitutional construction that the government of the United States is one of enumerated powers. Yet since the historic days of the adoption of the Constitution there has been a slow but consistent assumption by the federal government of powers affecting the internal affairs of the several states, allegedly to advance the general welfare and national economy. As the Honorable Julian P. Alexander wrote only two years ago:

"The reasons for these accessions of power cannot be simply stated. As safe a judgment as any is that the Union has expanded its powers because the States have spoken too often of States' rights when they should have been pondering States' duties. Usurpation of power by the National Government has developed because: (1) it has recognized new duties; and (2) because the States have ignored old duties. The Union has picked up a lot of loose powers which the States left lying around.

"Between the admitted sectors of powers granted and powers reserved lay a disputed area of 'implied powers' and of powers deemed 'necessary and proper.' Into this penumbra, the judiciary guided the steps of the executive and legislative branches with a flickering light which, while sufficient to locate and stake its claim of preemption, unfortunately, cast foreboding shadows.

"The 'interstate commerce' clause has been a golden gate of opportunity through which have poured the forces of federal usurpation under the aegis of 'implied powers.' Practically every activity is seen as being 'affected with a public interest.' I need not trace the history of a tendency that has been given repeated impulses and only token setbacks through the intervening years.

"By 1935, a federal court had asserted boldly that the States had virtually surrendered all powers they could not efficiently exercise. It was held in June of 1942 that Congress can regulate the wages and hours of work for anyone engaged in any occupation necessary to the production of goods not in but for, interstate commerce.

"No one need question the integrity and open frankness of the Supreme Court in pronouncing, without circumlocution, that legislation must be construed 'in the context of the history of federal absorption of governmental authority over industrial enterprise,' and the admission, nay the assertion, that the Act is one of those which 'radically readjusts the balance of state and national authority.' I quote further: 'To a considerable extent the task is one of

7 Toomer vs. Witsell, 73 F. Sup. 371; U.S. vs. Curtiss Wright Corp., 299 U.S. 304 (1936); 2 Tiedeman: State and Federal Control of Persons and Property, 1008 et seq.
9 U.S. vs. DeWitt, 9 Wall 41 (1869); Sullen vs. State, 4 So. (2d) 356 (1941); Bryce, The American Commonwealth 321.
10 R. C. Tway Coal Co. vs. Glenn, 12 F.Sup. 570, 589 (W. D. Ky. 1935).
11 A. B. Kirschbaum Co. vs. Walling, 316 U.S. 517 (1942).
12 Id. at 523.
13 Id. at 522.
accommodation as between assertions of new federal authority and historic functions of the individual states."\textsuperscript{14} Whence this "new federal authority'? Were such powers reserved, not to the States, but to the Union, after all? Bryce was right—the Constitution has not been broken—but its elasticity has met every requirement of the Federal Bureau of Standards."\textsuperscript{15}

Not only the states and their governments have realized the encroachments on their sovereign rights, but that great scholars and thinkers formerly associated with the United States Supreme Court have felt keenly the untenable position of conflicting Federal-State government is seen in "A Constitutional Amendment to Curb Federal Centralization," by the Honorable Owen J. Roberts, President of the Pennsylvania Bar Association, Retired Associate Justice of the Supreme Court of the United States.\textsuperscript{16} His proposal to remedy this situation follows:

"Nevertheless, I think it might be a salutary thing if political leaders and influential citizens should initiate a movement to amend \textbf{ARTICLE 1, SECTION 8}, so as to define the general welfare which Congress may promote by appropriation and to define what is a permissible federal regulation of interstate commerce. The provisions I have quoted seem to me to be the loop-holes through which the federal invasion has poured into the domain of the States. It would be interesting, I think, to determine how far our people generally are loyal to the spirit and concept of the Constitution in these respects. We should at least discover \textit{whether there is a sentiment to preserve, protect, and foster State jurisdiction and State power, or whether our people prefer something more nearly approaching alien systems, wherein the States are mere administrative districts of a central government.}"

There is a glimmering of light in the public awareness that taxes are the underlying moving force of the trend toward federal usurpation of power to govern the internal affairs of states. With more tax funds at its command, the federal government agencies are impelled to create more needs to be encompassed within "the public interest." The Michigan Legislature in April of 1949 passed a concurrent resolution making application to the Congress of the United States for the calling of a Convention to propose an Amendment to the Constitution of the United States to provide for a return to the states of certain taxes or portions thereof as a matter of right.\textsuperscript{17} It reads in part as follows:

"Whereas, the federal government is using and has been using for a number of years, the taxing power to produce revenue beyond a legitimate necessity of a federal government, other than defense needs, and \textit{has been using the funds so raised to invade the province...}"

\textsuperscript{14} Id. at 520.

\textsuperscript{15} President Roosevelt had given no little impetus to this tendency in a radio speech March 2, 1930. "The United States Constitution has proven itself a most marvelously elastic combination of rules of government ever written."


\textsuperscript{17} The Michigan Proposal to Amend the Constitution of the United States Relative to Taxing Power—By the Joint Committee of the Legislature Created to Advance the Proposal—booklets may be secured by writing to Eugene F. Sharkoff, Secretary, P.O. Box 240, Lansing, Michigan.
of legislation of the states and to appropriate in many fields that which amounts to a dole to the states of the money raised therefrom to accomplish many purposes, most of them worthy, but by the described process making the money available only under conditions which result in a control by the federal government from centralized agencies in Washington, in many cases unfit, and in other cases unable to administer the laws according to the local needs because of varying conditions in the country as a whole; resulting in inequities in the administration of the very benefits purported to be granted; and

"Whereas, State and local needs are disadvantaged because the people are already taxed far beyond the real need for any purpose other than forcing the centralization of all government in Washington; and

"Whereas, the framers of the Constitution of the United States clearly foresaw the possibility of a condition similar to that herein described, and made provision in the Constitution for safeguarding the states against any oppression or invasion of rights by the federal government; therefore be it

"Resolved, by the Legislature of the State of Michigan; That said Legislature, hereby and pursuant to Article V of the Constitution of the United States, makes application to the Congress of the United States to call a convention for the proposing of the following amendment to the Constitution of the United States: . . ."

The writer has felt it necessary to trace "sovereignty" in some detail, because there are many instances of unsound arguments being used for federal usurpation of power. This is now being seen in the field of aviation.

Before going into the navigable airspace sovereignty phase, there is cited one further recent example. The military services, without so much as a "beg your leave," attempted to set off a large area of one of the Great Lakes, more specifically two large areas in Lake Huron for an aerial gunnery range. It was their intention to exclude from these areas all boats, whether pleasure, commercial, or industrial, and also whether intra-state or inter-state. Through that area pass the endless number of ore and wheat and other commodities boats from the uppermost points in Lake Superior down to the Atlantic Ocean and intermediate industrial points. Obviously, to all intents and purposes, it was their further intention that these areas would be under the exclusive control and jurisdiction of the military establishments of the federal government to the end that their personnel might have free, unhampered, unhindered and uninterrupted control over and use of those areas of water!! As the Attorney General, the Honorable Stephen J. Roth, stated in his exhaustive brief in behalf of the sovereign state of Michigan: "The State of Michigan is one of the sovereign states of the

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United States of America. *It cannot be treated as occupied territory of an enemy nation.*"\(^{19}\)

**SOVEREIGNTY AS FOUND IN AVIATION LAW**

Section 6 of the Air Commerce Act of 1926\(^ {20}\) stated that the United States government "has, to the exclusion of all foreign nations, complete sovereignty of the airspace over the lands and waters of the United States"; and Section 10\(^ {21}\) defined navigable airspace as airspace above the minimum safe altitudes of flight set forth in the Act. Section 1107 (i) (3) \(^{22}\) of the Civil Aeronautics Act of 1938 amended Section 6 of the Air Commerce Act of 1926 so as to read:

"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.*" (Italics added.)

It should be noted also that the multilateral Convention on International Civil Aviation concluded at Chicago in 1944 is based\(^ {23}\) upon the complete and exclusive *national sovereignty* of the signatory powers, as are the bilateral executive agreements for the exchange of air landing rights negotiated both before and after that important compact.

Then came the oft discussed *Causby* decision of 1946 construing the 1926 and 1938 statutes, an opinion which one distinguished advocate of federal supremacy in the skies has interpreted\(^ {24}\) as meaning that "in the upper zone (the navigable airspace) the rights of the Federal Government seem to have been considered so paramount that Congress was able to place the navigable airspace, as stated in the Court's opinion, 'within the public domain.'"

Reading the *Causby* and *California “Tidelands”* cases together, that same author concluded that "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 produce the same legal results."\(^ {25}\)

There is also put forth the argument that the navigable airspace being capable of being construed as "public domain" by virtue of the

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\(^{19}\) Brief of the Attorney General of Michigan, the Hon. Stephen J. Roth, filed with U.S. Military Establishment and U.S. Corps of Engineers, January 1949.


\(^{22}\) 52 Stat. 1027, 49 USCA 877 (Supp. 1947).

\(^{23}\) Article 1.


\(^{25}\) Ibid.
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Tidelands decision it may be treated as “new territory” which the states have no constitutional right to acquire, a prerogative solely resting in the federal government!

Having reviewed the highlights of some of the points frequently utilized by those who preach complete federal supremacy, it is now necessary to test them in the light of the law. This may serve to illuminate properly certain aspects of the problem which have received comparatively little attention in an era of continually growing federal power.

External and Internal Sovereignty

One may begin by observing that the question of state or federal sovereignty over the navigable airspace is obviously a constitutional one, and can be resolved only by definitive interpretation of the United States Constitution by the appropriate judicial authorities, or by an amendment to the Constitution itself. Mere statements that complete and exclusive sovereignty is in the United States, such as those embodied in the Air Commerce Act of 1926 and in the Civil Aeronautics Act of 1938, cannot be of any genuine assistance in finding a solution. First, they must be viewed as legislative announcements by the national government that it has and will exercise full control over these skies in the society of nations, i.e., declarations of exclusive sovereignty vis-a-vis foreign powers, but hardly controlling on fundamental constitutional questions such as internal sovereignty. This distinction between internal and external sovereignty has been accepted even by those who favor federal supremacy. Second, it must be recognized that a mere statute cannot give the federal government power which it does not have under the Constitution.

Nor is the exclusive external federal sovereignty expressed and/or implied in the Chicago Convention and the bilateral agreements decisive, for while a treaty may be the supreme law of the land there is no basis for an argument that one may override the Constitution. In any case, both the Chicago text and the executive agreements deal solely with external sovereignty.

There is some good old-fashioned case law on the problem, however, decisions which clearly imply that the federal government does not have complete sovereignty over the navigable airspace above the United States to the exclusion of state authority. It was two years after passage of the Air Commerce Act that Chief Justice Rugg of the Supreme Judicial Court of Massachusetts held:

“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-protec-

26 Id at note 10.
27 Id at note 8.
tion. 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 passage through the air in large part was surrendered to the United States by the adoption of the Federal Constitution."

It was to achieve just this self-protection to which their citizens were entitled that the several governments of the States passed various regulations concerning the operation of aircraft within the airspace above their territories. In a 1935 decision in Parker v. Granger which was later approved by the Supreme Court of California, and which was denied certiorari by the United States Supreme Court, it was ruled:

"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, p. 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 intrastate flights."

In addition, one should take into account the 1944 Opinion of the Minnesota Supreme Court in Erickson v. King as State Auditor of the State of Minnesota which declared:

"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 exert its police power therein."

These cases seem to indicate that certain aspects of air navigation are properly within the jurisdiction of the state governments, and that there is a legal duty for the state governments to protect the local interests of their inhabitants.

Yet, despite these decisions, both the Civil Aeronautics Board and the Civil Aeronautics Administration appear to be intent upon interpreting Section 1 (3) of the Act of 1938 so that practically all flying comes under federal control. There has been a pursuing of this policy deliberately, arguing that just about every flight is likely either to affect directly or endanger safety in interstate, overseas, or foreign air commerce. This is clearly a dangerous oversimplification of the facts, and a threat of future federal intervention in intrastate aeronautics, and the right of the states to protect their citizens under their police power from

30 39 P. (2d) 833 (1935).
31 52 P. (2) 228 (1935).
32 298 U.S. 644 (1936).
33 15 N.W. (2d) 201 (1944).
dangerous use of the air by anyone. It is another manifestation of the continuing invasion of state responsibility and power. Can it be said that the states have no right to regulate and police the airports used by aircraft which are constructed upon land located within their jurisdiction? Can it be said that if a felon has committed a bank robbery and a murder in the course of it, and uses a plane for his getaway, while in flight he traverses a federal airway on which interstate scheduled airlines may have a route, his flight so affects interstate commerce as to make him immune to the state’s police powers?

A Look into the Causby and California “Tidelands” Cases

Before the decisions in the Causby and California “Tidelands” litigation, proponents of exclusive federal control over navigable airspace relied principally upon the power of Congress to regulate interstate commerce,35 provide for the common defense and the general welfare,36 and to establish post roads37 for constitutional support. A newer theory as to the constitutional basis for exclusive federal control over navigable airspace has been evolving from those two cases. It holds that, as in the case of the tidelands, the federal government has a proprietary interest in navigable airspace over land within its boundaries and thereby exclusive power to regulate the use thereof. Federal power would be absolute and exclusive, as in the case of other property owned by the national government,38 and would not be dependent upon the above mentioned constitutional clauses. This is the newest brain child proposed to usurp still further the power of the states to protect its citizens from malignant uses of the air.

Careful consideration of this theory is essential. So far as the private property owner is concerned, the superadjacent non-navigable airspace below safe altitudes of flight prescribed by the CAA is so close to the land, that continuous invasions of it affect the use of the surface of the land itself. Therefore, such non-navigable airspace has the quality of property, and as an incident to his ownership of the land, the landowner has a claim to such non-navigable airspace. Invasions of it are like trespass on the surface, and the rights of the private property-owner are paramount in such non-navigable airspace. The Supreme Court has held, however,39 that he has no rights in the navigable airspace,—for it is in the “public domain.”

Should the Supreme Court later conclude that the navigable airspace has the qualities of property, also, it might apply the tests utilized in the California “Tidelands” case to find no valid State claim. It might find that problems of national and international use of such airspace are such as to require exclusive federal control. But while one

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35 U.S. Constitution, Art. 1, Sec. 8, clause 3.
36 Id. clause 1.
37 Id., clause 7.
may comprehend how non-navigable airspace may be so intimately connected with the use of the land as to be substantially a part of the surface itself and have qualities of property, it is difficult to visualize how the navigable airspace may possess such qualities. The former is relatively confined in area,—that is patterned after the area on the ground and upward for a relatively short distance,—and control thereover may be asserted and made reasonably effective. But the latter begins where the limits of effective control substantially end, and extends outward to infinity.\(^{40}\) For all practical purposes, it is beyond control at the present time, unless a modern Magi can conjure a magic carpet to suspend at various levels in the air for purposes of federal determination of its proprietary rights in that domain!

It is interesting to observe that in the *Causby* case the Supreme Court attributed qualities of property only to the non-navigable airspace, and stated that the navigable airspace was in the public domain. The Court cited with approval \(^{41}\) the opinion of the Court of Appeals of the Ninth Circuit in *Hinman v. Pacific Air Transport*,\(^ {42}\) which held that the navigable airspace “belongs to the world.” The rationale leading to this is founded on the premise that “the air, like the sea, is by its nature incapable of private ownership, except insofar as one may actually use it.” If applied by analogy, the *California “Tidelands”* decision would affect only the non-navigable airspace, and the tenor of the opinion is such as to favor a belief that the Supreme Court would resolve any conflict of jurisdiction over non-navigable airspace with a ruling for the States.

Not only are fundamental principles of constitutional law involved here, but the practical aspects of self-government of local affairs by the people take on greater importance. It is of no difference to the victim on the ground whether the object is dropped on him from the air below or within the navigable airspace. His private rights are invaded just as forcibly and damagingly, and the citizen looks to his state government to protect such rights through the police power which the people have delegated to it.

**Conclusions**

1. The United States Supreme Court’s decisions in the *Causby* and the *California “Tidelands”* cases have brought about an untenable position for the states, as those decisions may affect their rights in the navigable airspace over their respective territorial jurisdictions.

2. Sovereignty, as defined for federal powers delegated to the central government in the Constitution, is for national and external concerns, and not as justification for encroachment on the


\(^{41}\) *U.S. vs. Causby*, 328 U.S. 256 at 264.

\(^{42}\) 84 F.(2d) 755, at 758 (9th CCA, 1938).
sovereignty of the states in matters of outright local internal concerns.

3. National or external concerns affecting use of the air remain as they have been since the adoption of the Constitution in the federal government, and their purposes are in protection of this Nation viz-a-viz other Nations, the international use of the airspace over the United States and its territories, and over commerce among the states.

4. Federal usurpation of state sovereignty by steadily growing expanding interpretations of the "commerce clause" and now "proprietary interest" of the federal government, either through direct legislation, interpretations of law by means of regulations and procedures of federal bureaus, and by use of medium of federal grants-in-aid, has reached proportions entirely foreign to the form of government intended by the original drafters of the Constitution and the spirit of the form of self-government the people still believe in.

5. The police powers of a state in protection of the public welfare within its territorial jurisdiction is inherent with its sovereignty.

6. The United States Supreme Court in interpreting federal powers of acquisition of so-called new territory "without the consent of the people" has gone beyond historic principles of constitutional delegation of powers, and brings about a fallacious premise upon which advocates of federal sovereignty in the navigable airspace predicate their arguments.

7. Legislation by Congress clearly defining areas of federal-state jurisdictions in the navigable airspace, bearing in mind the dual sovereign character of our system of government, is one of the needed solutions. In the alternative, only a constitutional amendment can resolve the problem, if the Congress fails to act.

It is hoped that something less drastic than a Constitutional Amendment may suffice to protect the interest of the States in the navigable airspace. The legitimacy of this concern has been well established by competent legal authorities, and the time is at hand for some form of courageous action.

43 See the article on The Air Domain of the United States by Frederic P. Lee, then legislative counsel for the United States Senate, in the LEGISLATIVE HISTORY OF THE AIR COMMERCE ACT OF 1926 issued by the Government Printing Office in 1928 and reprinted in 1943; also Bouv., State Sovereignty or International Sovereignty over Navigable Airspace, 3 J.D.C. Bar Ass'n. 5(1936) and Bouv., The Development of International Rules of Conduct in Air Navigation, 1 Air L. Rev. 1 (1930).