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Constitutional Law - Interstate Commerce - Power of States to Recalculate Aircraft Operating in Interstate Commerce

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CONSTITUTIONAL LAW—INTERSTATE COMMERCE—POWER OF STATES TO REGULATE AIRCRAFT OPERATING IN INTERSTATE COMMERCE—Defendant village, located one mile from Idlewild Airport, passed an ordinance prohibiting air flight over the town at less than 1,000 feet. Plaintiffs brought suit to enjoin enforcement of the ordinance, with Civil Aeronautics Board intervening as plaintiff. The Civil Aeronautics Act of 1938 gives the CAB the authority to regulate aircraft in navigable air space, and the authority to define navigable airspace by setting minimum altitudes for flight.¹ The CAB minimum altitude rules provide that aircraft flying over congested areas shall not be operated below 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet, except when it is necessary to take off or land.² The CAB has issued landing regulations which occasionally require aircraft to fly over the village of Cedarhurst at altitudes as low as 450 feet. *Held*, any airspace defined by the CAB as necessary for the takeoff or landing of aircraft is navigable airspace subject to federal regulation. By adopting a comprehensive system of regulation within this airspace the federal government has

¹ 52 Stat. L. 1028 (1938), 49 U.S.C. (1952) §180.

² 14 C.F.R. 60.17 (1952).

pre-empted the field, thus superseding conflicting local regulations. *Allegheny Airlines v. Village of Cedarhurst*, (D.C. N. Y. 1955) 132 F. Supp. 871.

A large issue in the field of aeronautical law has been the division of regulatory power between the federal government and the states.³ One of the primary problems is the extent of a state's power to promulgate minimum altitude regulations for the protection of its citizens and property.⁴ The supremacy of federal power over interstate commerce has not been seriously questioned of late,⁵ and federal control may extend into the realm of intrastate commerce whenever an effect upon interstate commerce can be shown.⁶ Support for the extensive scope of federal regulations around airports is furnished by analogy to the Federal Safety Appliance Acts,⁷ which apply to all traffic on any railway which is deemed a highway of interstate commerce.⁸ Considering the large number of interstate air carriers that operate around most airports, it is not hard to consider this airspace an interstate highway.⁹ It is clear that state regulations which conflict with valid federal regulations are ineffective.¹⁰ However, early cases indicated that state laws conflicting with CAB takeoff and landing regulations might not be rendered invalid.¹¹ The rationale of these

³ The courts have been willing to recognize that states have an extensive interest in the regulation of aircraft. *Smith v. New England Aircraft Co.*, 270 Mass. 511, 170 N.E. 385 (1930); *Parker v. Granger, Inc.*, 4 Cal. (2d) 668, 52 P. (2d) 226 (1935), cert. den. 298 U.S. 644, 56 S.Ct. 958 (1936); *Erickson v. King*, 218 Minn. 98, 15 N.W. (2d) 201 (1944).

⁴ States are not precluded from regulating the economic operations of airlines, or from taxing interstate aircraft doing business within a state. *People v. Western Airlines*, 42 Cal. (2d) 621, 268 P. (2d) 723 (1954), cert. den. 348 U.S. 859, 75 S.Ct. 87 (1954); *Northwest Airlines v. Minnesota*, 322 U.S. 292, 64 S.Ct. 950 (1944). But states cannot set up safety regulations for aircraft. *Rosenahan v. United States*, (10th Cir. 1942) 131 F. (2d) 932, cert. den. 318 U.S. 790, 63 S.Ct. 993 (1943).

⁵ The federal power to regulate aircraft rests upon the commerce power, rather than on national ownership of the airspace. *Braniff Airways v. Neb. Board of Equalization and Assessment*, 347 U.S. 590, 74 S.Ct. 757 (1954).

⁶ *Railroad Commission v. Chicago B. & Q. Ry. Co.*, 257 U.S. 563, 42 S.Ct. 232 (1922); *New York v. United States*, 257 U.S. 591, 42 S.Ct. 239 (1922).

⁷ 27 Stat. L. 531 (1893), 45 U.S.C. (1952) §§1-7; 32 Stat. L. 943 (1903), 45 U.S.C. (1952) §§8-10; 36 Stat. L. 298 (1910), 45 U.S.C. (1952) §§11-16.

⁸ *Southern Ry. Co. v. United States*, 222 U.S. 20, 32 S.Ct. 2 (1911).

⁹ It is doubtful if this analogy can be applied to airspace outside of the major interstate air lanes. See *Neiswonger v. Goodyear Tire and Rubber Co.*, (D.C. Ohio 1929) 35 F. (2d) 761 at 763. *Contra, United States v. Drumm*, (D.C. Nev. 1944) 55 F. Supp. 151.

¹⁰ *Gibbons v. Ogden*, 9 Wheat. (22 U.S.) 1 (1824). Some Supreme Court decisions indicate that even consistent legislation will be invalid after Congress has occupied the field. *Charleston & W.C.R. Co. v. Varnville Furniture Co.*, 237 U.S. 597, 35 S.Ct. 715 (1915). But the Court has also said that Congress must expressly exclude all state action in order to make consistent state legislation ineffective. *California v. Zook*, 336 U.S. 725, 69 S.Ct. 841 (1949). The danger that state rules could not be made to conform speedily to changing CAB rulings indicates that even consistent rules might be invalid. See Black, "Uniformity in Air Safety Regulation: Cooperative Federalism Applied," 15 J. AIR L. & C. 181 (1948).

¹¹ Cf. *Sweetland v. Curtiss Airports Corp.*, (D.C. Ohio 1930) 41 F. (2d) 929; *Smith v. New England Aircraft Co.*, note 1 supra; *United States v. Causby*, 328 U.S. 256, 66 S.Ct. 1062 (1946).

decisions was that the federal board had not declared the airspace necessary for takeoffs and landings to be navigable airspace, since they had set the minimum safe altitude of flight as being 1,000 feet in congested areas. Following this view, state courts enjoined takeoff and landing operations when it appeared that these flights were frequent enough to interfere with the landowner's use of his property.¹² The ruling in the principal case probably marks an end to state power to enjoin such operations, when the operations themselves conform to CAB regulations. This result is justified by the confusion and danger to interstate commerce that would result from conflicting state and federal rules for takeoffs and landings. Further support for the court's decision can be found in Supreme Court decisions which indicate that the need for uniform regulations in any field will limit the area of state power.¹³ Unfortunately, this decision reduces the power of the states to protect the interests of landowners from continuous invasion by low flying aircraft.¹⁴ A fair solution to this problem would require the CAB to acquire by condemnation any land the utility of which is destroyed by repeated flights of aircraft using takeoff and landing patterns approved by CAB regulations.¹⁵

Robert W. Steele

¹² *Delta Air Corp. v. Kersey*, 193 Ga. 862, 20 S.E. (2d) 245 (1942); *Burnham v. Beverly Airways*, 311 Del. Ch. 225, 27 A. (2d) 87 (1942).

¹³ An intent to exclude state regulation has been found in various fields. E.g.: *Southern R. Co. v. Railroad Commission*, 236 U.S. 439, 35 S.Ct. 304 (1915) (railroads); *International Shoe Co. v. Pinkus*, 278 U.S. 261, 49 S.Ct. 108 (1929) (bankruptcy); *Hines v. Davidowitz*, 312 U.S. 52, 61 S.Ct. 399 (1941) (aliens); *Commonwealth v. Nelson*, (U.S. 1956) 76 S.Ct. 477 (anti-subversive legislation). But states can regulate the weight and size of interstate carriers using state roads, possibly because this is in the field of traditional state police power. *South Carolina State Highway Dept. v. Barnwell Bros.*, 303 U.S. 177, 58 S.Ct. 510 (1938). Other decisions hold that when a comprehensive program of regulation is set down in some phases of the subject matter, the field is closed to state regulation while later cases indicate that congressional action raises a presumption that Congress has extended its power as far as possible. *Napier v. Atlantic Coast Line R.*, 272 U.S. 605, 47 S.Ct. 207 (1926); *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148, 62 S.Ct. 491 (1942).

¹⁴ The decision in the principal case probably will not affect the power of the states to enjoin flights below the airspace designated by the CAB as necessary for takeoffs and landings. See *Gardner v. Allegheny County*, 382 Pa. 88, 114 A. (2d) 491 (1955).

¹⁵ However, the Supreme Court has said that a landowner cannot demand compensation from the government for the injury to the land caused by planes operating in navigable airspace and following government directions. *United States v. Causby*, note 11 *supra*.