AVIATION LAW AND THE CONSTITUTION

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The constitutional aspects of aviation present many problems of grave concern to those interested in aeronautical legislation. Here, as in many other fields, the chief issues involve the division of powers between the Federal Government and the states. The recognized social desirability of uniform regulation of aircraft has influenced Congress to enact legislation covering a wide field of control. Much of this, however, will undoubtedly be attacked by those adherents of states' rights who believe that under our form of government the principle embodied in an act is of greater importance than its effects.

Federal control of aircraft had been urged for many years, but doubts as to the power of Congress to enact suitable legislation for a long time delayed any action. At one period it was suggested that a constitutional amendment giving Congress power to control aeronautics be adopted. This solution, which is still occasionally advanced, failed to find support mainly because of the delay necessarily involved in securing the amendment. Moreover, it was believed by many that Congress already had ample authority to enact adequate legislation, particularly

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1 The reports of the Committee on Aviation of the American Bar Association, which has had considerable influence on the development of aviation legislation, supply evidence of the important part that constitutional questions have occupied in its deliberations. See 46 A. B. A. REP. 77, 498 (1921). The Commissioners on Uniform State Laws have also taken an active part in this development. Likewise the report of the House Committee on the Air Commerce Act of 1926 deals largely with the constitutionality of the proposed statute. See REPORT OF THE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE, March 17, 1926.


3 In 1921, the tentative judgment of the Bar Association Committee was that "the best ultimate solution of this question is one that will put the United States on a par with other nations, and that is a constitutional amendment, which will extend the power of Congress to legislate on flight through the air." See 46 A. B. A. REP., supra note 1, at 81.

4 See Cuthell, Development of Aviation Laws in the United States (1930) 1 AIR L. REV. 86.

5 Many theories were advanced, upon which, it was believed, federal control over aeronautics could be sustained. For discussions of these theories,
Consequently, after several bills see Bogert, Problems in Aviation Law (1921) 6 CORN. L. Q. 271, 303; LEGISLATIVE HISTORY OF THE AIR COMMERCE ACT OF 1926, supra note 2; note (1922) 10 CALIF. L. REV. 252. The contention that the ratification of the International Air Convention would, under the treaty power, put the regulation of aeronautics in the hands of Congress received much attention. This position rested on State v. Holland, 252 U. S. 416, 40 Sup. Ct. 382 (1920) (federal control over migratory birds). The view that such legislation would be sustained under the commerce clause, however, finally prevailed. See infra note 15.

It was also urged that Congress could legislate on this subject by virtue of its powers over navigable waters. The House Committee in charge of the bill which became the Air Commerce Act of 1926, found its authority for various parts of the Act by analogy to the maritime power of the Federal Government. Especially important is the proposition reached thereby that Congress has the power to grant a public right of flight. See infra at note 66. In respect to control of intrastate commerce in navigable waters, Congress derives its power from two sources: (1) the provision vesting admiralty and maritime jurisdiction in the Federal Government, U. S. CONSTITUTION, Art. III § 2; the “commerce clause.” It is often difficult to determine from the cases under which section a particular act is sustained. See 2 WILLOUGHBY, THE CONSTITUTION OF THE UNITED STATES (2d ed. 1929) § 571. Even conceding that the analogy is sound in respect to subject matter, i.e. that, like navigable waters, the air space forms a continued highway over which commerce may be carried on with other states or foreign countries, the problem is in no measure solved. The question remains whether the specific regulation attempted by Congress is necessary or appropriate, because in its control over navigable waters under the “commerce clause” “its sovereignty [does not] extend over them to the exclusion of that of the States in which they may be situated.” WILLOUGHBY, op. cit. supra. Under the provision conferring admiralty jurisdiction upon the federal courts, Congress may pass regulatory acts to some extent. It has been argued that such authority would not justify the regulation of aeronautics. 46 A. B. A. REP., supra note 1, at 504: “It appears to us that it would be undesirable for the art of civil flight through the air to assume that jurisdiction over it rests within the constitutional extension of the judicial power of the United States admiralty and maritime jurisdiction, with the constitutional general grant of power to Congress to make laws for carrying into execution the powers vested by the Constitution in the government of the United States or any of its departments or officers.” The soundness of the analogy must now be considered extremely doubtful in view of the decision that airplanes are not subject to maritime jurisdiction. Crawford Bros., No. 2, 215 Fed. 269 (W. D. Wash. 1914); note (1914) 28 HARV. L. REV. 200; (1914) 3 CALIF. L. REV. 143. For an adverse criticism see (1915) 49 AM. L. REV. 599. But cf. Reinhardt v. Newport Flying Service Corp., 232 N. Y. 115, 133 N. E. 371 (1921).

6 See HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, infra note 28; Bogert, supra note 5, at 308. See also MacCracken, in an address reprinted in LEGISLATIVE HISTORY OF THE AIR COMMERCE ACT OF 1926, at 65: “Uniform regulation of aeronautics is admittedly not only desirable, but absolutely indispensable to the effective development of aerial transportation as an instrumentality of interstate commerce. It therefore seems reasonable to believe that the legislation for the regulation of aeronautics by the Federal Government would be sus-
had been defeated, the Air Commerce Act was passed in 1926. By this Act, and by the Air Commerce Regulations promulgated thereunder by the Secretary of Commerce, Congress has attempted to provide for the regulation, in certain instances, of all aircraft. That it was the intention of Congress to subject the whole field of aeronautics to federal control is evident from a perusal of the important provisions of the Act and of the Regulations. The extent to which these provisions appear to conflict with constitutional limitations upon the powers of Congress will first be discussed.

From the point of view of social desirability, it would seem that the most important provisions of the Air Commerce Regulations are the Air Traffic Rules, which are specifically stated to apply to all aircraft whether engaged in commercial or non-commercial, interstate or intrastate, flight. These rules cover generally such traffic problems as the passing and approaching of aircraft, minimum heights at which machines may be flown in regular and acrobatic flying, taking off and landing, lighting equipment and practice, and other similar matters. They are authorized by the Air Commerce Act which provides:

“The Secretary of Commerce shall by regulation: Establish air traffic rules for the navigation, protection, and identification of aircraft, including rules as to safe altitudes of flight, and rules for the prevention of collisions between vessels and aircraft.”

It is not clear that all of the rules are authorized by this section;

7 See Lee, op. cit. supra note 2.
9 See MacCracken, Air Regulations (1927) 131 ANN. AM. ACAD. POL. & SOC. SCI. 118. The Regulations have been amended slightly since first published.
10 The statement of the managers in charge of drafting the Air Commerce Act is part of the Regulations. § 73 reads: “In order to protect and prevent undue burdens upon interstate and foreign air commerce, the air traffic rules are to apply whether the aircraft is engaged in commercial or non-commercial, or in foreign, interstate or intrastate navigation in the United States, and whether or not the aircraft is registered or is navigating in a civil airway.”
11 See supra note 10.
12 AIR COMMERCE REGULATIONS §§ 70-79.
13 AIR COMMERCE REGULATIONS §§ 70-79.
14 44 STAT. 2119 § 3e (1925), 49 U. S. C. § 173(e) (1926).
any not so authorized are, of course, invalid. And if authority for all of them can be found in the section, and any one of them is invalid because unconstitutional, the Act is unconstitutional in so far as it authorizes the Secretary of Commerce to make such a rule. These rules will undoubtedly prove the cause of more litigation than any of the other Air Commerce Regulations.

In enacting the Air Commerce Act, Congress proceeded under the “commerce clause.” Consequently, various dicta of the Supreme Court defining the powers of Congress under that clause were strongly relied upon in making the Air Traffic Rules specifically applicable to all aircraft. For example, in *Houston & Texas Ry. v. United States,* it was said:

> “Congress [does not] possess the authority to regulate the internal commerce of a State, as such, but . . . it does possess the power to foster and protect interstate commerce, and to take all measures necessary and appropriate to that end . . . .”

And in the *Wisconsin Rate Case,* the Supreme Court defined the powers of Congress to include anything “it deems necessary or desirable” for the development of interstate commerce agencies. It is not at all certain, however, that each of the Air Traffic Rules is “necessary or desirable” or “necessary and appropriate” for the development of interstate commerce by aircraft. Those who object to the encroachment of federal upon state sovereignty will therefore find adequate grounds for opposing this interference by the national government with intrastate flight. The extent to which such opposition will succeed in the courts must be considered in the light of present views as to the power of Congress under the “commerce clause.”

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15 See *Legislative History of the Air Commerce Act of 1926,* supra note 2.
17 Ibid. 353, 34 Sup. Ct. at 837.
19 Ibid. 590, 42 Sup. Ct. at 238; see also *New York v. United States,* 257 U. S. 591, 42 Sup. Ct. 239 (1922).
20 In *Neiswonger v. Goodyear Tire & Rubber Co.,* 35 F. (2d) 761, 763 (N. D. Ohio 1929), the court expresses a doubt as to whether “. . . all of these rules must be applied to both intrastate and interstate craft in order to secure the safety of the latter.” And see Lee, *op. cit. supra* note 2, at 375: “The dividing line as to Congressional power is not interstate and foreign commerce on the one hand and intrastate commerce on the other, but between intrastate commerce which it is necessary for the Federal Government to regulate in order adequately to protect and prevent burdens upon and discriminations against interstate and foreign commerce and intrastate commerce which it is not so necessary for the Federal Government to regulate in order to afford such protection and prevent such burdens and discriminations.”
The constitutionality of the Air Traffic Rule providing that 500 feet shall be a minimum altitude for flight was involved in a recent decision in a United States District Court in Ohio. In that case, a farmer in the fields with his horses was injured when the horses were frightened by the passage overhead of a dirigible carrying a supply of newspapers from one town in Ohio to another. The plaintiff sought damages on the ground of negligence, alleging among other things, a violation of the 500-foot altitude rule contained in the Air Commerce Regulations. The Court, on a demurrer attacking its jurisdiction, refused to pass upon the constitutionality of the rule, but expressed the opinion that:

"If the circumstances and conditions under which air commerce is carried on are such that it is necessary for the altitude rule to apply to and regulate intrastate flights in order to protect interstate movements, then it will so apply, the same as to an interstate flight."  

This approach, based upon the theory recited in the Wisconsin Rate Case, appears to be sound. It tests the validity of each rule by ascertaining whether it is necessary or appropriate for the effective regulation and control of interstate air commerce. The question thus becomes purely one of fact.  

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21 AIR COMMERCE REGULATIONS § 74 (g): “Exclusive of taking off from or landing on an established landing field, airport, or on property designated for that purpose by the owner... aircraft shall not be flown:

(1) Over congested parts of cities, towns or settlements, except at a height sufficient to permit of a reasonably safe emergency landing, which in no case shall be less than 1,000 feet.

(2) Elsewhere at height less than 500 feet, except where indispensable to an industrial flying operation.”


24 Supra note 18.

25 Although a question of fact exists, this question is for the court and not for a jury. 5 WIGMORE EVIDENCE (2d ed. 1923) § 2555d. For a discussion of the method by which the court receives information of the alleged facts, see Biliké, Questions of Fact Affecting Constitutionality (1924) 38 HARV. L. REV. 6; Barnett, External Evidence of the Constitutionality of Statutes (1924) 58 AM. L. REV. 88; WIGMORE, op. cit. supra. In Chicago, R. I. & Pac. Ry. v. Arkansas, 86 Ark. 412, 111 S. W. 456, aff'd, 219 U. S. 453, 31 Sup. Ct. 275 (1911), and in Atlantic Coast Line v. Georgia, 234 U. S. 280, 24 Sup. Ct. 829 (1914), testimony of those engaged in the business involved and familiar with the exigencies of its operation was received by the courts in order to determine whether certain state regulation was an unreasonable burden on interstate commerce.
Upon this basis the Air Traffic Rules are generally considered to be constitutional; but there has been some dissent. In an effort to discover the trend of available opinion upon this question of fact, the writer prepared and distributed a questionnaire among transport pilots actively engaged in commercial

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26 See HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, 320 (1922); MacCracken, op. cit. supra note 6; Williams, Law of the Air (1911) 18 CASE AND COMMENT 131; Zollmann, Governmental Control of Aircraft (1919) 53 AM. L. REV. 897; Bogert, op. cit. supra note 11.

27 See HOTCHKISS, AVIATION LAW (1928) c. IX; and two inadequate notes (1924) 27 LAW NOTES (N. Y.) 182; (1923) 46 N. J. L. J. 291. HOTCHKISS, op. cit. supra, at 70, after a consideration of the statement of managers in charge of the bill (Regulations § 79), goes on to say, "... it is believed that the provision in its broadest terms is unconstitutional."

28 One hundred and seventy-one answers were received from transport pilots associated with flying schools, transport companies, taxi companies, and major aircraft manufacturers.

QUESTIONNAIRE

Bear in mind that no question is raised as to the power of Congress to regulate aircraft engaged in interstate commerce. The issue is solely as to the power of Congress to regulate all aircraft (including those engaged in non-commercial flight, and in commercial flight solely within the boundaries of one state) for the purpose of preventing interference with interstate commercial flight.

In your opinion, is it necessary or appropriate for the effective regulation and development of interstate commercial flight that Congress regulate all flight by:

Doubt- Yes No ful

1. Requiring all aircraft flying in established civil airways to keep to the right side? .......................... 163 6 2
2. Fixing the order and manner in which all aircraft shall give way to each other? ....................... 164 6 1
3. Fixing the manner in which all engine-driven aircraft shall cross each other? ....................... 164 7 0
4. Fixing the manner in which all approaching engine-driven aircraft shall pass each other? ............... 164 7 0
5a. Imposing upon all overtaking aircraft the duty of keeping clear of the overtaken craft? ................ 164 6 1
5b. Fixing the manner in which all overtaking craft shall keep clear of the overtaken craft? ............... 158 10 3
6. Fixing the minimum altitudes at which all aircraft may be flown? ...................................... 124 32 15
7. Prohibiting all acrobatic flying except in conformity to the Air Commerce Regulations pertaining thereto? .......... 142 26 3
8. Prohibiting dropping from all aircraft in flight any object or thing which may endanger life or injure property, except when necessary to the personal safety of pilot, passengers or crew? .......................... 160 10 1
9a. Prohibiting the navigation of all aircraft by any person under the influence of, using, or having personal posses-
aviation, both interstate and intrastate, throughout the United States. It would seem that the opinions of such pilots, being based upon actual experience, are valuable indications of the necessity and propriety of Federal control over the flight of all aircraft. Answers were received from pilots all over the country; the results may thus be considered fairly representative. They indicate decisively that the general feeling is that the adequate protection of interstate commercial flight requires all flight to be similarly regulated. There are a few rules, however, concerning which there is a marked difference of opinion. It is these which are likely to be the ones most frequently before the courts.

The question whether it is necessary or appropriate for Congress to impose rules and regulations upon those engaged in gliding and soaring in aircraft without power was answered in the negative by about 34%. Comments attached to some of the answers disclosed the opinion that Federal regulation of such aircraft would be proper only if this mode of flight were to develop a wider range of utility. At first blush, it is difficult to conceive of the necessity for such regulation. So-called gliders, at least at present, are primarily instruments of sport. They

<table>
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<tr>
<td>9b. Prohibiting the navigation of all aircraft carrying passengers who are obviously under the influence of intoxicating liquor, cocaine, or other habit-forming drugs?</td>
<td>148 17 5</td>
</tr>
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<td>10. Fixing take-off and landing rules which all aircraft must observe?</td>
<td>137 12 2</td>
</tr>
<tr>
<td>11a. Fixing the types of lights to be shown by all aircraft in flight between one-half hour after sunset and one-half hour before sunrise?</td>
<td>165 6 0</td>
</tr>
<tr>
<td>11b. Fixing the manner of showing such lights on all aircraft?</td>
<td>165 5 1</td>
</tr>
<tr>
<td>12. Requiring all unlicensed aircraft to display an identification mark assigned by the Secretary of Commerce?</td>
<td>155 12 4</td>
</tr>
<tr>
<td>13. Requiring the seller of all unlicensed aircraft to report certain information (name of buyer, etc.) to the Secretary of Commerce?</td>
<td>152 14 5</td>
</tr>
<tr>
<td>14. Requiring all aircraft flying over large bodies of water to carry certain life-saving supplies and devices?</td>
<td>157 9 5</td>
</tr>
<tr>
<td>15. Prohibiting licensed pilots from piloting unlicensed aircraft carrying persons or property for hire?</td>
<td>136 22 13</td>
</tr>
<tr>
<td>16. Imposing rules and regulations upon those engaged in gliding and soaring in aircraft without power plants?</td>
<td>112 43 16</td>
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30 See supra note 28.
are not, and very likely cannot be, operated in established air-
ways. There is the possibility, however, that interstate air-
craft may be operated in proximity to a place where gliders
are used. Whether the courts will consider such a possibility
sufficient justification for the subjection of this type of aircraft
to Federal regulation is difficult to predict, although the negative
view of most answers is some indication of the course which
may be adopted when the question arises.

Concerning the necessity for the other rules regulating intra-
state flight there was less dissent. It seems arguable that, in
most situations covered by the rules, the possibility of inter-
ference with interstate commerce exists if intrastate flight be
not subjected to like regulation. But, in a few instances, this
possibility appears so remote as to lead to the conclusion that
Congress is regulating intrastate flight primarily for police pur-
poses, and incidentally, if at all, to protect interstate commerce.
Examples may be found in the rules aimed solely at aircraft
carrying passengers for hire. It might be contended that acci-
dents to passengers engaged in intrastate flight would have such
an untoward effect on the business of interstate carriers, that
Congress is justified in imposing safety regulations on such airc-
fleet to foster the development of interstate commerce. This
argument, however, is obviously a tenuous support for these
rules.

A recent amendment to the Regulations, published after the
preparation of the questionnaire, provides that aircraft carrying
passengers for hire shall not fly lower than the minimum altitude
under any circumstances whatsoever.31 Prior to this amend-
ment, deviation from the minimum altitude rule was proper when
it was required "because of stress of weather conditions or other
unavoidable cause." 32 Now a pilot of an airplane carrying pas-
sengers for hire must descend if weather conditions make it un-
safe or impossible to maintain the required minimum altitude.
While the rule may be salutary as an attempt to protect pas-
sengers, as well as persons and property on the ground, this
offers no basis for sustaining its constitutionality. There does
not seem to be even a remote connection between the regulation
of intrastate and interstate flight in this respect. As the rule
is thus primarily a police measure, its constitutionality in so
far as intrastate flight is concerned is dubious.

There is some disagreement, too, as to whether the minimum
altitude rule itself is valid in its application to intrastate flight.33
This also appears to be largely a police regulation. A few

31 AIR COMMERCE REGULATIONS § 79 as amended.
32 AIR COMMERCE REGULATIONS § 79.
33 See answers to Question 6, supra note 28.
answers to the questionnaire expressed the belief that fixing the minimum altitude at which intrastate aircraft may fly is neither necessary nor appropriate for the regulation and protection of interstate flight; some doubted its validity. This doubt was likewise shared by a Federal District Court to which the question was presented. The answer will likely be given by the appellate courts in the near future.

Another rule which seems to be largely a matter of police protection is that which prohibits the navigation of all aircraft carrying passengers who are obviously under the influence of intoxicants. While there is a possibility of danger to interstate flyers from an airplane carrying such passengers it seems quite negligible, and it may well be doubted that the prevention of such danger was the purpose for which the rule was made. If here also the measure is in fact designed only for the protection of persons and property, the mere possibility of protection to interstate commerce would seem to afford little basis for the contention that Congress is acting upon matters within its constitutional powers.

In addition to the use of the “commerce clause,” a more novel theory has recently been advanced upon which such regulation could be sustained. It is contended that the states do not have sovereignty over the upper air space and accordingly do not have the power to enact legislation affecting it. This theory is based upon the premise that air space is a domain separate and distinct from the land beneath it. Reasoning from this premise, it is argued that the states could have acquired sovereignty thereof only before statehood, which was not done; and, therefore, that Congress alone could have acquired such sovereignty. The theory would make the position of Congress paramount,

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35 Air Commerce Regulations § 74 (L).
36 See F. P. Lee, Air Domain of the United States, reprinted in Legislative History of the Air Commerce Act of 1926, supra note 2, at 104.
37 Although there is no express provision in the Constitution authorizing the acquisition of new domains by the United States, authority and power to do so arises from its inherent powers as a sovereign nation. The subject of sovereignty in air space in international law is outside the scope of this article. It has received a great deal of attention, and excellent discussions will be found by: Bouvé, The Development of International Rules of Conduct in Air Navigation (1930) 1 Air L. Rev. 1; Fagg, The International Air Navigation Conventions and Commercial Air Navigation Treaties (1929) 2 S. Calif. L. Rev. 430; F. P. Lee, op. cit. supra note 37; Bogert, op. cit. supra note 5, at 273-270; B. Lee, The International Flying Convention and The Freedom of the Air (1919) 23 Harv. L. Rev. 23; Zollmann, op. cit. supra note 23, at 1-5; Fixel, The Law of Aviation (1927) c. IV; Myers, The Sovereignty of the Air (1912) 24 Green Bag 223, 430; Valentine, The Air—A Realm of Law (1910) 22 Jur. Rev. 16.
although it recognizes in some measure the sovereignty of the states. Thus state sovereignty would exist as to the surface air space, which has been defined as that measured by the reasonable height of user of which its citizens can avail themselves.\textsuperscript{39} Congress also would have power to legislate in respect to surface air space in so far as it is necessary in the exercise of its powers under the Constitution.\textsuperscript{40} Difficulties in the application of this theory, however, while perhaps not affecting its merit, will likely cause it to be disregarded.\textsuperscript{41} Furthermore, it is not at all clear that the premise on which it rests is sound. It would be difficult indeed to convince a layman that the air is a domain in the sense that land is, and it is probable that it would be equally as difficult to convince a court.

Section 47 of the Air Commerce Regulations, defining the privileges of, and restrictions upon, licensed aircraft pilots, presents an interesting problem under the “due process” clause. Among other things, the Section provides that a licensed pilot shall not operate unlicensed aircraft carrying persons or property for hire and that a private pilot may operate licensed

\textsuperscript{39} Although the state's powers would be limited, it could make compliance with “state registration and certification laws a condition to navigation in its surface air space.” F. P. Lee, \textit{op. cit. supra} note 37. But even this power would be limited by the power of Congress over interstate commerce: \textit{Ibid.} A potent argument has been made to the effect that the sovereignty over the air is in the states, except as limited by the Constitution. See Bogert, \textit{op. cit. supra} note 5, at 293: “There can, however, be no effective argument against State sovereignty over the space above the land within its borders. Such space is, under modern conditions, actually within the control of the subjacent State by police aircraft and by guns. And acts within such space, of course, vitally affect the subjacent State with respect to the safety of its inhabitants and their property.” This view is incorporated in § 2 of the \textit{UNIFORM STATE LAW FOR AERONAUTICS}: “Sovereignty in the space above the lands and waters of this State is declared to rest in the State, except where granted to and assumed by the United States pursuant to a constitutional grant from the people of this State.” See \textit{Smith v. New England Aircraft Company, Inc.}, 170 N. E. 385, 389 (Mass. 1930).

\textsuperscript{40} See F. P. Lee, \textit{supra} note 37, at 130.

\textsuperscript{41} It is fairly obvious that the precise boundary between the surface air space and the upper air strata will be difficult to determine.

The “zone theory” of the air was considered at one time in the international law aspect of the problem of sovereignty, and resembles the theory under discussion. See Myers, \textit{op. cit. supra} note 38, at 430-1. One of the chief criticisms of the “zone theory” was the extreme difficulty of fixing the zones satisfactorily. As pointed out by Valentine, \textit{op. cit. supra} note 38, at 20: “A practical objection to the delimitation of a territorial zone may be mentioned—the extreme difficulty of determining the height of an aerial object from below . . . even roughly to estimate the height from time to time of a moving vessel seems almost out of the question. To make the legal position of an aeronaut depend on whether he is or is not 1500 metres above the earth is therefore impractical as it is illogical.” See also \textit{Zollmann, op. cit. supra} note 23, at 2.
aircraft only. There is a well recognized rule that one who applies for and obtains a government license thereby subjects himself to the rules and regulations imposed in connection there-
with. This rule, however, under the doctrine of unconstitutional conditions, is subject to the limitation that the regulations im-
posed must be constitutional.\textsuperscript{42}

The question arising here is whether forbidding a licensed pilot from earning money by piloting unlicensed aircraft de-
prives him of his life, liberty, or property without due process of law. Unquestionably, this provision deprives the commercial pilot of an opportunity to obtain a lucrative return for his services in piloting such an airplane. It also prevents a private pilot from gaining the flight hours necessary for a higher grade license by flying an unlicensed airplane which can be purchased or rented for substantially less than a licensed one. If the doctrine of unconstitutional conditions applies,\textsuperscript{43} the provision would appear to be invalid. The Supreme Court has not yet gone so far as to hold a condition imposed by federal authority unconstitutional; \textsuperscript{44} whether the doctrine will be so extended as to afford protection from federal regulations alleged to deprive an individual of “life, liberty, or property” without due process of law is the issue involved. Its determination will doubtless be influenced by the desirability of dissuading pilots from operating aircraft which are not sufficiently airworthy to qualify for a federal license.

The Air Commerce Regulations\textsuperscript{45} and some state statutes\textsuperscript{46} require that persons involved in aircraft accidents shall file written reports. In many states similar provisions with respect to automobile accidents may be found. Whether one of these latter provisions constituted a violation of constitutional guar-
antees against self-crimination was considered in a recent

\textsuperscript{42} See infra note 48. For example, where a foreign corporation receives a license to do business within the state, subject to the condition that it shall not sue in the federal courts, the condition is unconstitutional and the license cannot be revoked if the foreign corporation sues in the federal courts. Terral v. Burke Construction Co., 257 U. S. 529, 42 Sup. Ct. 188 (1922).

\textsuperscript{43} Perhaps the strongest case for the application of the doctrine is one where the condition results in the deprivation of life, liberty, or property without due process of law.

\textsuperscript{44} While no case has arisen in which a federal statute has been held invalid under the doctrine of unconstitutional conditions, “there is no reason to anticipate that federal immunity therefrom will continue if its wider application becomes established.” Merrill, op. cit. infra note 48, n. 42.

\textsuperscript{45} § 29.

The statute was held invalid. The question has never been raised in the federal courts; the specific problem is whether the privilege of engaging in aeronautics may be withheld unless the privilege against self-crimination is waived. If the doctrine of unconstitutional conditions is applicable, failure to file a report could not be made a crime.48

A correlative phase of the constitutional problems of aeronautical legislation involves the validity of numerous state laws. While the movement for federal legislation was in progress, the state legislatures were busy enacting a variety of statutes respecting aviation until at present forty-seven states have such laws;49 not all, however, are regulatory. In some instances,

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47 Rembrandt v. City of Cleveland, 28 Ohio App. 4, 161 N. E. 364 (1927) ; commented on (1928) 28 Col. L. Rev. 971. In this case, a city ordinance required a complete written report of the accident to be submitted to the proper officials, as do the statutes cited supra notes 45 and 46. Statutes requiring a driver involved in an accident merely to identify himself have been held constitutional in the few cases which have arisen. People v. Rosenheimer, 209 N. Y. 115, 102 N. E. 580 (1913); Ex parte Kneedler, 243 Mo. 692, 147 S. W. 983 (1912); People v. Diller, 24 Cal. App. 799, 142 Pac. 797 (1914). For discussions see 4 Wigmore, EVIDENCE (2d ed. 1923) § 2259 (d); (1913) 13 Col. L. Rev. 745; (1912) 12 Col. L. Rev. 731; cf. 5 Wigmore, op. cit. supra at § 2377.

48 If a grant or license is given subject to a condition which is unconstitutional, it is as if no condition had been attached. See Merrill, Unconstitutional Conditions (1929) 77 U. of Pa. L. Rev. 879; Oppenheim, Unconstitutional Conditions and State Power (1927) 26 Mich. L. Rev. 176.

Such statutes might be upheld despite the doctrine of unconstitutional conditions, on the grounds that they do not operate to protect a personal privilege, such as the privilege against self-crimination, Merrill, op. cit. supra, at 893, nor as against those conditions which are imposed for the public protection. Oppenheim, op. cit. supra, at 188. And see Wigmore, op. cit. supra note 47.

these state laws impose air traffic rules. In so far as the federal Air Traffic Rules are valid, the state regulations must conform; for even though the states have concurrent jurisdiction with Congress, when the latter acts, the former may do nothing inconsistent. Some states require the local registration of airplanes and the licensing of airmen. In such a case, the

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These statutes enact air traffic rules inconsistent with those issued by the Secretary of Commerce.


In those states in which no Air Traffic Rules are provided, but which require pilots to hold a federal license, the federal Air Traffic Rules apply ipso facto.

51 Where Congress may regulate intrastate commerce as an incident to its regulation of interstate commerce, the States have concurrent jurisdiction to regulate, which, however, must not be inconsistent with the federal regulations. See 1 Wilgoughy, op. cit. supra note 5, at 115, 1007.


State or Federal licenses are required for all aircraft and airmen: Me. Laws 1929, c. 265; Md. Laws 1929, c. 318; Minn. Laws 1929, c. 290; N. H. Laws 1929, c. 182; Ore. Laws 1929, c. 352; Va. Laws 1928, c. 463.
issue is whether the condition imposed unreasonably interferes with interstate commerce. For instance, an aircraft carrier, engaged in both interstate and intrastate business, may use the same airplane first for one schedule and then for the other. Because it engages in intrastate flight must that airplane be registered under the state law as well as under the federal law? Must the pilot hold a state as well as a federal license? Under these circumstances there is no reason why the state law should not be upheld. Where, however, both pilot and airplane are engaged solely in interstate commerce and have the required federal license, may the states also demand licenses? If they may, interstate pilots could be compelled to obtain a series of licenses from many states as conditions precedent to flight over their respective territories. This would indeed be a serious interference with interstate commerce by airplane and any such state requirements would very likely be held unconstitutional.

In a few states, the permissible height of flight differs from the minimum altitude fixed by the federal Air Traffic Rules. The latter provide that aircraft shall not be flown over cities "except at a height sufficient to permit of a reasonably safe emergency landing, which in no case shall be less than 1,000 feet." Suppose an aviator flying from Maine to New York is travelling over a city in Connecticut at a height of 1200 feet. That state fixes the minimum altitude at 2,000 feet. A crash occurs and it is discovered that the flyer had not complied with the state requirements as to altitude. Is he subject to penalty under the state law? In fixing the minimum altitude, the state is exercising its police power for the protection of its citizens. The question then arises whether such police regulation, even though it affects interstate commerce, is such an undue burden

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53 A similar problem arises where, for example, a state law requires safety devices on interstate carriers. Here also the question seems to be one of fact—whether the regulation attempted is a reasonable means of securing a valid end. See 2 Willoughby, op. cit. supra note 5, at 1004 et seq.

54 In Smith v. Alabama, 124 U. S. 465 (1888), a statute requiring locomotive engineers operating trains in the state to be licensed was held valid as applied to engineers engaged in operating interstate trains exclusively. Cf. Smith v. Alabama, supra note 54.


56 AIR COMMERCE REGULATIONS § 74 G(1).

upon it as to be invalid. A possible answer is that the height specified as a minimum by state law or municipal ordinance should be considered as the “height sufficient to permit of a reasonably safe emergency landing” for that particular locality; local authorities, with their intimate knowledge of prevailing conditions, should be best qualified to prescribe such minimum requirements. Such a rule would seem desirable and it seems likely that where the state regulations do not appear unduly to restrict interstate commerce, they will be upheld. As a practical matter, at the present time most state laws and municipal ordinances of this character are satisfied by compliance with federal regulations.

Another situation in which the question of state interference with interstate commerce arises is where common carriers by airplane, engaging in interstate and intrastate business, are required to obtain a certificate of public necessity in order to act as common carriers in intrastate commerce. In an excellent treatment of this question, the conclusion was reached that “an interstate carrier by aircraft is not required to apply to the public service commission of a state for a certificate of public convenience covering its operations in interstate traffic, and a state commission can exercise authority over such a carrier only insofar as the carrier engages in intrastate commerce within that state.”

Statutes setting forth the existence of a right of flight raise an interesting point which may often be litigated. While an owner of property over which an airplane occasionally passes will hardly undertake to sue for trespass, those living in the neighborhood of a flying field will often do so. In such an action the pilot’s defense that he has a right to fly under the local or

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59 Every state statute which imposes a burden on interstate commerce is not condemned. Those which are for a valid police purpose, and whose effect on interstate commerce is only incidental, are constitutional. See supra note 53.

60 See Williams, State Certification of Aerial Carriers (1928) 76 U. of Pa. L. Rev. 585. But see Davis, State Regulation of Aircraft Common Carriers (1930) 1 Air L. Rev. 47.

61 Williams, op. cit. supra note 60, at 589.

62 § 4 of the Uniform State Law for Aeronautics provides: “Flight in aircraft over the lands and waters of this State is lawful, unless at such a low altitude as to interfere with the then existing use to which the land or water or the space over the land or water is put by the owner, or unless so conducted as to be imminently dangerous to persons or property lawfully on the land or water beneath.”

§ 10 of the Air Commerce Act of 1926 provides: “As used in this Act, the term ‘navigable airspace’ means airspace above the minimum safe altitudes of flight prescribed by the Secretary of Commerce under section 3, and such navigable airspace shall be subject to a public right of freedom of inter-state and foreign air navigation . . .”
federal statute will be assailed on the ground that such statute
is a violation of the due process clause. The validity of this as-
sertion will probably be made to depend upon the existence of
property rights in air space in accordance with the maxim cuius
est solum ejus est usque ad coelum. The soundness of this
maxim, however, has been the subject of much discussion and
several lower federal courts have intimated that there are no
property rights in air space above a reasonable height of user. Likewise in the recent case of Smith v. New England Airport Co., the Massachusetts Supreme Court adopted the same view. There the plaintiff owned a large tract adjoining the defendant's airport, from which airplanes often took off over the plaintiff's property. It appeared that except in one or two instances, these airplanes flew over the plaintiff's property at a height exceeding 500 feet. The plaintiff sought an injunction restraining the defendants from flying or causing airplanes to be flown over his property. One of his contentions was that flight over the property constituted a trespass, and that the state and federal statutes, in so far as they sanctioned such flight over 500 feet were unconstitutional. In holding for the defendants, the court concluded that flight at an altitude of 500 feet did not constitute a trespass, and that, accordingly, the statute did not result in a deprivation of property without due process of law.

It is apparent that if private ownership of air space were upheld, the development of aeronautics would face a serious ob-

63 For excellent treatments of the problems see SALMOND, JURISPRUDENCE (7th ed. 1924) 449; POLLOCK, TORTS (13th ed. 1929) 361; ZOLLMANN, op. cit. supra note 23, at 5-29; Bell, Air Rights (1928) 23 ILL. L. REV. 230; Bogert, op. cit. supra note 5, at 294; Eubank, Ownership of Airspace (1930) 34 DICK. L. REV. 75; Spurr, Let The Air Remain Free (1911) 18 CASE AND COMMENT 119; Ball, The Vertical Extent of Ownership in Land (1928) 76 U. OF PA. L. REV. 631; Valentine, The Air—A Realm of Law (1910) 22 JUR. REV. 85; note (1919) 32 HARV. L. REV. 569. It is significant that these

writers take the position that flight above a reasonable height of user does not constitute a trespass. Cf. Portsmouth Harbor Land & Hotel Co. v. United States, 260 U. S. 327, 43 Sup. Ct. 135 (1922). And see F. P. Lee, op. cit. supra note 37.

64 In Johnson v. Curtiss Airplane Co., [1928] U. S. Av. Rep. 42 (D. Minn. 1923), a temporary injunction was granted to a landowner restraining flight by defendants over plaintiff's land at an altitude less than 2000 feet, the minimum altitude fixed by statute for acrobatic flying. But the court said: “The upper air is a natural heritage common to all the people, and its reasonable use ought not to be hampered by an ancient artificial maxim of law such as is here invoked.” See also Commonwealth v. Nevin and Smith, [1928] U. S. Av. Rep. 39 (Pa. Ct. of Quarter Sess. 1922).

65 170 N. E. 385 (1930); commented on in (1930) 30 COL. L. REV. 579; (1930) 78 U. OF PA. L. REV. 802; (1930) 1 AIR L. REV. 272.
clause” by imposing an “easement,” such as in the case of navigable waters.66 The soundness of this analogy does not warrant serious consideration, for as it is generally conceded that flight at a reasonable height does not constitute a trespass there would seem to be little reason for becoming involved with the superfluous concept of “easement.” The social desirability of recognizing no individual property rights in air space above the altitude of user seems clear. Adequate protection to the land owner might well be afforded under the doctrines of nuisance.67

66 See LEGISLATIVE HISTORY OF THE AIR COMMERCE ACT, supra note 2, at 42-45.
67 In New England Airport v. Smith, supra note 65, the plaintiff attempted to sustain his case for an injunction upon the theory of nuisance but the point was decided against him.