2021

Who Owns the Skies? Ad Coelum, Property Rights, and State Sovereignty

Laura K. Donohue
Georgetown University Law Center, lkdonohue@law.georgetown.edu

This paper can be downloaded free of charge from:
https://scholarship.law.georgetown.edu/facpub/2369
https://ssrn.com/abstract=3823362


This open-access article is brought to you by the Georgetown Law Library. Posted with permission of the author. Follow this and additional works at: https://scholarship.law.georgetown.edu/facpub

Part of the Air and Space Law Commons, Legal History Commons, National Security Law Commons, Privacy Law Commons, and the Property Law and Real Estate Commons
WHO OWNS THE SKIES?

AD COELUM, PROPERTY RIGHTS, AND STATE SOVEREIGNTY

Laura K. Donohue

Cuius est solum, eius est usque ad coelum et ad inferos.

Translation: Whoever owns land it is theirs up to the heavens and down to hell.

—Franciscus Accursius

In Glossa Ordinaria (1220–1250 CE), a seminal work that rendered earlier scholarship obsolete and for 500 years served as the authoritative statement of Justinian law, Franciscus Accursius established that whoever owned the land controlled everything from the heavens above to hell below.\(^1\) It was far from a novel concept. For more than a millennium, the concept *ad coelum* had distinguished between the skies aloft and terrestrial matters. In his 54 BCE epic poem embracing Epicurean philosophy, *De Rerum Natura*, Titus Lucretius Carus equated *ad coelum* with the sky, currents of air above the earth, and the heavens themselves.\(^2\) Virgil’s *Aeneid*, written in 19 BCE, treated *ad coelum* in similar fashion.\(^3\) *De caelo servare* came to mean to observe lightning (as an omen) and *de caelo tactus* to be struck by lightning, even as *toto caelo* came to mean something like “utterly”—that is, to the full extent of the heavens.\(^4\) A simple principle applied: land ownership conveyed control of three-dimensional space.

The Justinian concept worked its way into English common law and, thence to the colonies, for incorporation into Anglo-American jurisprudence. It was only in the 20th century, with the advent of air travel, that limits in the form of effective possession began to appear. An uneasy compromise of 500 feet was proposed, with property owners’ rights below that level secured and subject only to state and not federal domain.

---

\(^1\) For further discussion of the several forms that the maxim has taken over time, see D. E. Smith, “The Origins of Trespass to Airspace and the Maxim “Cujus Est Solum Eius Est Usque Ad Coelum,” *Trent Law Journal* 6 (1982): 33, 36.

\(^2\) See Titus Lucretius Carus, *De Rerum Natura*, 1.9 (referring to light in the sky: *placatumque nitet diffuso lumine caelum*); 6.650 (referring to the infinite universe and one sky, *caelum unum*); 6.1119–24 (considering the movement of air as bringing disease and destruction: e.g., *fit quoque ut, in nostrum cum venit denique caelum, / corrumpat reddatque sui simile atque allienum*); 6.8 (*divolgata vetus iam ad caelum gloria fertur*); 6.669 (*flamescere caelum*). Also note that in 350 BCE Greek philosopher Aristotle laid out the locomotion of the heavens and heavenly bodies, in contrast to the movement of terrestrial elements in *De Caelo et Mundo*.

\(^3\) P. Virgilius Maro, *Aeneid*, 4.201–2 (*ipse diem noctemque negat discernere caelillo / nec meminisse viae media Pallinurus in unda*), 4.585–87 (*nam neque erant astrorum ignes nec lucidus aethra / siderea polus, obscuro sed nubila caelo, et lunam in nimbo nos intempesta tenebat*).

In light of the history of the doctrine of \textit{ad coelum}, as well as the states’ preeminent role (secured by the Tenth Amendment) in regulating property and airspace up to the 500-foot level, it is remarkable that the federal government has begun to claim that it controls everything above the blades of grass. In an article aimed at “busting myths about the FAA,” the Federal Aviation Administration (FAA) asserted, “The FAA is responsible for the safety of U.S. airspace from the ground up.”\footnote{FAA, “Busting Myths about the FAA and Unmanned Aircraft,” March 7, 2014.} Jim Williams, the head of the FAA’s unmanned aircraft systems (UAS) Integration Office, baldly asserted, “If you are flying in the national airspace system, FAA regulations apply to you. The definition of the national airspace system is anywhere where aircraft can safely navigate. So by definition then, these quadcopters are what have extended the national airspace down to the ground.”\footnote{Gregory S. McNeal, “The Federal Government Thinks Your Backyard Is National Airspace and Toys Are Subject to FAA Regulations,” \textit{Forbes}, November 18, 2014.} In a response to a motion to dismiss on a case involving a drone operating at altitudes of less than 400 feet above the University of Virginia, the FAA administrator similarly asserted, “the FAA’s mandate to regulate the use of all airspace necessary to ‘ensure the safety’ of aircraft, for ‘protecting and identifying’ those aircraft and for ‘protecting individuals on the ground’ is not confined solely to the ‘Navigable airspace.’”\footnote{Administrator’s Response to Respondent’s Motion to Dismiss at 4–5, \textit{Huerta v. Pirker}, No. CP-217 (NTSB Nov. 1, 2013), at 5, \url{http://www.suasnews.com/wp-content/uploads/2013/11/FAA_Response.pdf}.} This chapter challenges those statements, demonstrating that history and law establish that property owners, and the states, control the airspace adjacent to the land.

\textless a head \textit{Ad Coelum in English Common Law} \textgreater

King Edward I’s invitation to Accursius’s son, Franciscus, to come to England paved the way for the incorporation of \textit{ad coelum} into English common law. In 1274, Franciscus took up the post at Oxford, lecturing on Roman Law.\footnote{C. Lincoln Bouvé, “Private Ownership of Airspace,” \textit{Air Law Review} 1 (1930): 232; Smith, “The Origins of Trespass.”} Courts accredit that moment as the point at which the term entered the legal lexicon.\footnote{Bury v. Pope, (1587) 1 Cro Eliz 118, 78 ER 375, n.8 (“Nota: cuius est solum ejus est summitas usque ad coelum, as it is holden.”)} English treatise writers went on to acknowledge the importance of \textit{ad coeleum}. In his First \textit{Institute of the Laws of England}, the prominent jurist Sir Edward Coke observed in relation to \textit{terra}, “And lastly the hearth hath in law a great extent upward, not only of water as hath been said, but of aire, and all other things even up to heaven, for \textit{cuius est solum ejus est usque ad coelum}, as it is holden.”\footnote{Edward Coke, “Of Real Property, and First or Corporeal Hereditaments of Land,” The \textit{First Part of the Institutes of the Lawes of England} (London: Rawlins, Roycroft, and Sawbridge, 1684).} He cited two cases related to a dispute between a landlord and tenant challenging who, under the lease in question, owned six young goshawks.\footnote{22 Henry VI 59; 10 Edward IV 14.} A third case centered on the rights held by the Bishop of London to herons...
and shovelers nesting in trees that he had leased. The court reasoned that ownership of the land includes the roots of the trees—and the branches in the airspace above. In each situation, the owner maintained an interest in the full use and enjoyment of the property.

At the time that Coke wrote, there was a sharp distinction in the law between the right in land (i.e., arising out of the ownership of the land), and the right of peaceful enjoyment of property. For the former, certain rights attained to the dignity of ownership or possession. Others—such as piscary and turbary, rights of ingress and egress, ancient rights of firebote and fencebote, and the right of escheat (which belonged to the Crown)—did not. Violating the airspace above the land constituted an interference in the enjoyment of the property.

Two cases reported by Coke followed his exposition in the Institutes. In Penruddock’s Case a writ of quod permittat prosternere, commanding that the defendant allow the plaintiff to abate a nuisance or appear in court and show cause why not, attached. Under the writ, plaintiffs were entitled to a judgment for abatement and corresponding damages. In this case, the court determined that rain draining from an overhanging building adjacent to the plaintiff’s land was a nuisance. In 1611, the court again applied the ancient writ of quod permittat in Baten’s Case to find an overhang to be a nuisance and ordered its abatement.

For centuries, the maxim ad coelum stood, recognizing property owners’ rights to the airspace above their land. According to the facts of the case, courts alternately found either that a trespass had occurred or that a nuisance resulted from incursions into the space above the property. In 1753, Sir William Blackstone delivered a series of lectures at Oxford, published in four volumes in 1765–1769. In volume II of the Commentaries on the Law of England, Blackstone explained the importance of ad coelum for understanding the rights conveyed in real property:

Land hath also, in its legal signification, an indefinite extent, upwards as well as downwards. Cuius est solum, eius est usque ad coelum, is the maxim of the law, upwards; therefore no man may erect any building, or the like, to overhang another’s land: and, downwards, whatever is in a

---

12 14 Henry VIII 12.
15 Penruddock’s Case, Trin 40 Eliz 101 [3 Coke 205 (1597)].
17 Baten’s Case, 9 Coke 54 (1611). See also Bury v. Pope, (1587) Cro Eliz 118 [1653], ER 382, (1653) Cro Eliz 118, (1653) 78 ER 375 (B) (citing the maxim).
direct line between the surface of any land, and the center of the earth, belongs to the owner of the surface.\textsuperscript{18}

The control of the land and the air above it meant that adjacent landowners were restricted in what they could do above their neighbor’s property as well as below it. There was no limited right of access conveyed by the neighbor’s interests. This was, for Blackstone, aptly illustrated in mining areas where such rights were well-recognized. He continued, “the word ‘land’ includes not only the face of the earth, but everything under it, or over it.”\textsuperscript{19} So when land was conveyed, everything else—air, water, houses, and mines below the surface—transferred.\textsuperscript{20}

The 17th- and 18th-century cases dealt largely with matters related to hunting, things falling on property from above or outside the boundaries, and stationary structures overhanging adjacent land. But in 1783 an entirely new category emerged: Joseph-Michel and Jacques-Étienne Montgolfier invented the globe aérostatique, raising questions associated with overflight. An 1815 case presaged the legal questions that would later arise: Pickering v. Rudd addressed a landowner’s decision to cut back his neighbor’s Virginia creeper that had grown onto his house and to then hang a board which projected across the property line. Lord Ellenborough in \textit{dicta} infamously posed a \textit{reductio ad absurdum}: if the board be a trespass, might an aeronaut be “liable to an action of trespass \textit{quare clausum fregit} at the suit of the occupier of every field over which his balloon passes in the course of his voyage”?\textsuperscript{21} He compared firing a bullet over land to circumvention of a balloon, proposing that the later might constitute a nuisance, but not a trespass.

English courts flatly rejected Ellenborough’s reasoning and found interference in the airspace above land to be either a nuisance or a trespass (and sometimes both), upholding the rule from antiquity that protected property owners in the use and enjoyment of their property. In 1845, for instance, in Fay v. Prentice, a cornice jutting out over a neighboring garden and funneling rainwater onto the adjacent land constituted a nuisance.\textsuperscript{22} Judge Coltman, citing Baten’s Case, determined that it did not matter whether water had actually caused damage. The mere overhang was sufficient. By it, the plaintiff “had been greatly annoyed and incommoded in the use, possession, and enjoyment of his messuage, garden-ground,

\textsuperscript{21} Pickering v. Rudd, (1815) 4 Camp 219 (writing, “Nay, if this board overhanging the plaintiff’s garden be a trespass, it would follow that the aeronaut is liable to an action of trespass \textit{quare clausum fregit} at the suit of the occupier of every field over which his balloon passes in the course of his voyage.”)
\textsuperscript{22} Fay v. Prentice and Another, [1845] ER 79, (1845) 1 CB 828, (1845) 135 ER 769.
In 1855, the Court of the Exchequer of England determined that wires above property occupied the land beneath. The judge, Sir Charles Edward Pollock, explained, “Land extends upwards as well as downwards, and whether the wires and posts are fixed above or below the surface, they occupy a portion of the land.”

Case after case followed course. In the 1865 case of Kenyon v. Hart, a hunter shot a cock pheasant that was flying over his neighbor’s property and then went to retrieve it. Justice Blackburn took the occasion to remark on Ellenborough’s reasoning, “I understand the good sense of that doubt but not the legal reason of it.” Five years later, in Corbett v. Hill, the court considered a conveyance on sale that established an underground flying freehold—that is, a section of freehold property extending below ground. The plaintiff, who owned two houses next door to each other, sold the adjoining property which supported one of the rooms of the house that he retained. Sir William James Montgomery-Cuninghame determined that the buyer (the owner of the second property) had a property right in the air above his land, making any intrusion in the space a trespass. That same year, three of four judges ruled an equine owner negligent when his horse kicked through a fence and thereby injured a horse on a neighbor’s property. The justices (one citing ad coelum) agreed that by entering the airspace above the ground, the horse had trespassed on the adjoining land.

In 1880, an action was brought to restrain the 12th Middlesex Volunteer Corps from shooting guns on Wimbledon Common to the detriment of an adjacent landowner’s property. According to the suit, “splashes of bullets and flattened bullets fell on the plaintiff’s land, so as to substantially affect the ordinary use and enjoyment of the property.” The defendants in Clifton v. Bury claimed that the Putney and Wimbledon Commons Act, 1871, reserved the land for public use, that even on the admitted facts no trespass had actually occurred, and that only those who actually fired the weapons might be held responsible.

---

23 1 CB 838 (Colman, J.).
24 1 CB 838–41 (Maule, J.); 1 CB 840–41 (Cresswell, J.).
25 Electric Telegraph Co. v. Overseers of the Poor of the Township of Salford, 11 Ex 181 (1855).
26 11 Ex 189.
28 EWHC QB J102.
29 Corbett v. Hill, (1870) LR 9 Eq 671, (1870) 39 CJCh 547, (1870) 2 LT 263, (1870) 7 Digest (Repl) 267.
30 LR 9 Eq 671.
31 Ellis v. Loftus, (1874) LR 10, CP 10.
33 4 TLR 1.
Justice Hawkins, ruling in favor of the plaintiff, noted that the statute in question did nothing to divest property owners of the rights they held in land or the air adjacent: “Nobody,” he concluded, “could suggest seriously that the line of fire over Newlands Farm formed a part of the common.”\textsuperscript{34} The statute had explicitly not deprived landowners of any of their property rights in the fields adjacent to the commons, which meant that they continued to have a right to the airspace. Every bullet that crossed the land and fell, moreover, “materially interfered[d] with the plaintiff’s ordinary use and enjoyment of his farm,” constituting “a series of trespasses of an actionable character.”\textsuperscript{35} Although no bullets had actually been proven to have crossed the land, and while no injury had been occasioned to the plaintiff, the use of the airspace had “rendered the occupation of that part of the farm less enjoyable than the plaintiff was entitled to have it.”\textsuperscript{36}

Using similar logic, the House of Lords in\textit{ Lemmon v. Webb} determined that a landowner was free to cut off his neighbor’s tree as it overhung his property, without first obtaining permission or giving notice of his intent to do so.\textsuperscript{37} The court determined that allowing boughs and roots to extend onto adjacent property was a nuisance and that any person whose land was so affected had the right to abate it.

The law of torts thus consistently recognized the importance of \textit{ad coelum}. Neither entry onto another’s land (trespass \textit{quare clausum fregit}) nor taking someone’s goods (trespass \textit{de bonis asportatis}) required the use of force, the breaking of an enclosure, the transgression of a visible boundary, or even unlawful intent.\textsuperscript{38} Nor did actual damage have to occur. In his authoritative treatise first published in 1887, Sir Frederick Pollock recognized the ancient protections extended by common law to property rights. He quoted \textit{Entick v. Carrington}, “Every invasion of private property, be it ever so minute, is a trespass.”\textsuperscript{39} “There is no doubt,” Pollock wrote, “that if one walks across a stubble field without lawful authority or the occupier’s leave, one is technically a trespasser.”\textsuperscript{40} Even “[l]oitering on a highway . . . for the purpose of annoying the owner of the soil in his lawful use of the adjacent land, or prying into his occupations there, may be a trespass against that owner.”\textsuperscript{41}

Pollock spoke directly to \textit{ad coelum}: “It has been doubted whether it is a trespass to pass over the land without touching the soil, as one may in a balloon, or to cause a material object, as shot fired from a gun,
to pass over it.” Pollock, like the English courts before him, roundly rejected Lord Ellenborough’s ruminating in *dicta* in *Pickering*, stating, “Fifty years later Lord Blackburn inclined to think differently, and his opinion seems the better.” Pollock noted that “wrongful entry on land below the surface, as by mining” was “prominent in our modern books.” *Pari passu,* “[i]t does not seem possible by the principles of the common law to assign any reason why an entry *at any height* above the surface should not also be a trespass.” While it may be improbable for someone crossing over at a great height to cause any actual damage to the land below, the question of damage was utterly “irrelevant”: if mere trespass was sufficient for the surface, so, too, for the air above. For Pollock, “it would be strange if we could object to shots being fired across our land only in the event of actual injury being caused.”

In later editions, Pollock specifically called out navigable aircraft:

Clearly it would be a trespass to sail over another man’s land in a balloon (much more in a controllable air-craft) at a level within the height of ordinary buildings, and it might be a nuisance to keep a balloon hovering over the land even at a greater height.

Pollock acknowledged that “the projectiles of modern artillery, when fired for extreme range, attain in the course of their trajectory an altitude exceeding that of Mont Blanc or even Elbruz.” But while a projectile at such a height might not constitute a trespass, a different situation holds closer to earth. There, undoubtedly, it is a trespass, and not a mere nuisance, that occurs.

*Ad coelum* applied regardless of whether land was held privately or for public use. In 1903, for instance, the question arose of whether a local highway authority could restrain the running of a power cable 34 feet above Regents Park Road in London. The court noted that the council held the right to the property, which included, “All the stratum of air above the surface and all the stratum of soil below the surface which in any reasonable sense can be required for the purposes of the street, as street.”

---

51 1 Ch 437.
The American colonies, and later, states, adopted English common law. Professor James Kent’s *Commentaries on American Law*, adapted from lectures that he presented at Columbia Law School starting in 1794, recognized its importance in early America:

The common law so far as it is applicable to our situation and government has been recognised and adopted as one entire system by the Constitutions of Massachusetts, New York, New Jersey and Maryland. It has been assumed by the courts of justice or declared by statute, with the like modifications, as the law of the land, in every state. It was imported by our colonial ancestors, as far as it was applicable, and was sanctioned by royal charters and colonial statutes. It is also the established doctrine that English statutes passed before the emigration of our ancestors, and applicable to our situation, and in amendment of the law constitute a part of the common law of this country.\(^{52}\)

It was not the entire body of law that transferred, but only those measures that applied to the colonists in their new conditions.\(^{53}\) Upon independence, the new state legislatures and courts explicitly incorporated English common law through their state constitutions, as well as by statute.

In the Commonwealth of Massachusetts, the state constitution declared that all law previously in effect and practiced in a court of law would remain in force.\(^{54}\) In Virginia, statutory provisions explicitly incorporated the common law.\(^{55}\) Upon becoming a state in 1790, Vermont similarly specified, “So much of the common law of England as is applicable to the local situation and circumstances, and is not

---

\(^{52}\) James Kent, *Commentaries on American Law*, vol. 1, (St. Paul, Minnesota, West Publishing Co., 1894), p. 188. See also *State v. Campbell, T.U.P. Charlton (Ga.)* 166 (“When the American Colonies were first settled by our ancestors it was held, as well by the settlers, as by the judges and lawyers of England, that they brought hither as a birthright and inheritance so much of the common law as was applicable to their local situation, and change of circumstances.”); (1722) 2 Peere Wms 75 (“9th August 1722, it was said by the Master of the Rolls to have been determined by the Lords of the Privy Council upon an appeal to the King in council from the foreign plantations, 1st, that if there be a new and uninhabited country found out by English subjects, as the law is the birthright of every subject, so wherever they go they carry their laws with them, and, therefore, such new-found country is to be governed by the laws of England.”).


\(^{54}\) Massachusetts Constitution (1780), ch. VI, art. VI (“All the laws which have heretofore been adopted, used and approved in the Province, Colony or State of Massachusetts Bay, and usually practiced on in the Courts of law, shall still remain and be in full force, until altered or repealed by the Legislature; such parts only excepted as are repugnant to the rights and liberties contained in this Constitution.”).

\(^{55}\) Code of Virginia 1860, ch. 16, § 1 (“The common law of England, so far as it is not repugnant to the principles of the Constitution of this state shall continue in force within the same.”).
repugnant to the constitution or laws of this state, shall be deemed and considered law in this state, and all
courts are to take notice thereof and govern themselves accordingly."56

This practice continued well into the 19th century, as new states were admitted to the union. Although
California did not gain statehood until 1850, it still passed a general law stating, “The common law of
England, so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the
Constitution or laws of the state of California, shall be the rule of decision in all the courts of this state.”57
Similar provisions marked the statute books of Illinois, Indiana, Missouri, Nebraska, Wisconsin, and
other states.58 Writing in Lyman v. Bennet, the Michigan Supreme Court explained:

Practically the common law has prevailed here in ordinary matters since our government took
possession, and the country has grown up under it . . . A custom which is as old as the American
settlements, and has been universally recognized by every department of government, has made it
the law of the land if not made so otherwise. Our statutes, without this substratum, would not only
fail to provide for the great mass of affairs, but would lack the means of safe construction.59

The court, as a result, was “of opinion that questions of property not clearly excepted from it must be
determined by the common law.”60

56 See Vermont ch. 32, General Statutes of 1870. See also North Carolina Code 1855, ch.4, § 1. (“All such parts of the common
law as were heretofore in force and use within this state, or so much of the common law as is not destructive of or repugnant to,
or inconsistent with, the freedom and independence of this state and the form of government therein established, and which has
not been otherwise provided for in the whole or in part, not abrogated, repealed or become obsolete, are hereby declared to be in
full force within the state.”).
58 See Illinois Rev. Stat. 1874, ch. 28, § 1 (“That the common law of England, so far as the same is applicable and of a general
nature, and all statutes or acts of the British Parliament made in aid of or to supply the defects of the common law prior to the
fourth year of James I [with some exceptions] and which are of a general nature and not local to that kingdom, shall be the rule of
decision, and shall be considered as of full force until repealed by legislative authority.”); Indiana Act of May 31, 1852 (same
wording as the Illinois statute); Kansas Rev. Stat. 1868, ch. 119, § 3 (“The common law, as modified by constitutional and
statutory law, judicial decisions and the condition and wants of the people shall remain in force in aid of the general statutes of
prior to the fourth year of the reign of James I, and which are of a general nature and not local to that kingdom, which common
law and statutes are not repugnant to or inconsistent with the Constitution of the United States, the Constitution of this state, or
the statute laws in force for the time being, shall be the rule of action and decision in this state, any law, custom or usage to the
contrary notwithstanding.”); Nebraska Rev. Stat. 1873, § 1 (“So much of the common law of England as is applicable and not
inconsistent with the Constitution of the United States, the constitution of this state or with any law passed or to be passed by the
legislature thereof is adopted and declared to be the law within this state.”); Wisconsin Constitution, § 13 (“Such parts of the
common law as are now in force in the territory of Wisconsin not inconsistent with this Constitution shall be and continue part of
the law of this state until altered or suspended by the legislature.”).
60 8 Mich. 18.
The concept of ad coelum was among the provisions of common law integrated into property law. Thus, in the 19th century, American state courts routinely ruled that overhanging branches constituted both a trespass and a nuisance. Eaves extending over adjacent property were considered a trespass. The same was true of cornices, windows, roofs, walls, or any part of any building: any incursion into the airspace of an adjacent landowner amounted to trespass on the property owner’s land. At other times, the courts considered the overhang to be a nuisance. While there was some conflict over whether or not ejectment was a proper means of redress, trespass and nuisance both tended to result in an injunction as a means of redress.

In the 1897 case, Metropolitan West Side Elevated R.R. Co. v. Springer, the construction of a railway across an alley amounted to a taking of the property by a landowner. Illinois Supreme Court Chief Justice Jesse J. Phillips wrote, “It is a maxim of the law, Cujus est solum ejus est usque ad coelum, and by taking one foot on which the pillars were placed, on the south side of the alley, the rights reserved in the deed were invaded . . . by the projecting super-structure.”

The basic precept in dozens of state cases was that ad coelum granted landowners control above and below the property to which they held title. Thus, the decision to build a structure—or to remove it—lay within the property owner’s domain. The building was inseparable from the underlying land.

---

61 See, e.g., Grandone v. Lovdal, 70 Cal. 161 (1866); Tanner v. Wallbrun, 77 Mo. App. 262 (1898); Countryman v. Lighthill, 24 Hun. (N.Y.) 405 (1881).
64 See, e.g., Meyer v. Metzler, 51 Cal. 142 (1875); Wilmarth v. Woodcock, 58 Mich. 482, 25 N.W. 475 (1885); Norwalk Heating & Lighting Co. v. Vernam, 75 Conn. 662, 55 Atl. 168 (1903); Barnes v. Berendes, 139 Cal. 32, 69 Pac. 491 (1902); Copper v. Dolvin, 68 Ia. 757 (1886); Langfeldt v. McGrath, 33 Ill. App. 158 (1889); Kafka v. Bozio, 191 Cal. 746, 218 Pac. 753 (1923).
65 Edward C. Sweeney, “Adjusting the Conflicting Interests of Landowner and Aviator in Anglo-American Law,” Journal of Air Law and Commerce 3 (1932): 534–35, n.150 (comparing cases where an action of ejectment was permitted as against those where it was denied).
66 Metropolitan West Side Elevated R.R. Co. v. Springer, 171 Ill. 170, 175, 49 N.E. 416 (1897).
67 171 Ill. 175.
68 See Atkins v. Bordman, 2 Met. (43 Mass.) 457, 467 (1841) (noting that according to Cujus est solum, ejus est usque ad coelum, the owner of an estate may make any and all beneficial uses of it as their own pleasure and may alter the mode of using it by erecting or removing building over it or digging into or under it without restraint).
69 See Baldwin v. Breed, 16 Conn. 60, 66 (1843) (applying Cujus est solum, ejus est usque ad coelum, by stating that separating a building from the ground on which it stands cannot be carried into effect without great difficulty); Becket v. Clark, 40 Conn. 485, 488 (1873) (stating that Cujus est solum, ejus est usque ad coelum makes it so that the house and land are understood to be divided based upon the same line); Isham v. Morgan, 9 Conn. 374, 377 (1832) (Consistent with cujus est solum, ejus est usque ad coelum, the delivery of the deed to Lydia conveyed not only the land but the buildings upon the land). Stevenson v. Bachrach, 170 Ill. 253, 48 N.E. 327, 328 (1897) (holding that the building which rests upon the portion of the land owned by appellee.
Landowners had a right to light in the air above it. And they had a right to use of gravel, water, minerals, natural gas, petroleum, and other natural resources below it. The same rights carried with the grant of an easement.

Well into the 20th century, state courts continued to view such invasions of airspace as a trespass, a nuisance, or both. It was not necessary for the item entering the airspace ever to touch the ground. Penetration of the column of air over the property was sufficient. Thus, a cornice, even when it didn’t interfere with the plaintiff’s use of the property, still interfered with the plaintiff’s property rights, which extended upward indefinitely and which could be enforced against invasion to the same extent as surface rights.

Even when the invasion is temporary and does no actual damage, it still violates the property owner’s rights. In *Herrin v. Sutherland*, the Montana Supreme Court determined that shooting at duck flying over

---

70 See *Barnett v. Johnson*, 15 N. J. Eq. 481, 489 (1856-abbreviated) (Defendant proposed to build an arch and a building over the canal that would block the windows of the plaintiff who owned the adjacent property, thus restricting light and air to the property; the court ruled that the plaintiff had the right to light and air.). But see *Mahan v. Brown*, 13 Wend. (N.Y.) 261, 263 (1835) (right to light waived by building too close to the property line).

71 See *Gas Products Co. v. Rankin*, 63 Mont. 372, 389, 207 Pac. 993, 997, 24 A. L. R. 294 (1922-in quotation from Blackstone) (finding chapter 125 of the Laws of 1921, prohibiting “wasteful and extravagant” uses of natural gases, to be unconstitutional as petroleum and gas beneath the surface belong to the landowner); *Chase v. Silverstone*, 62 Me. 175, 183 (1873-abbreviated) (protecting a landowner’s right to dig a well); *Hague v. Wheeler*, 157 Pa. St. 324, 27 At. 714 (1892-Eng. equiv.) (The mere fact that the defendants, by operations upon their land, are taking gas from the earth, and thereby diminishing the quantity of gas which would otherwise come to the plaintiffs’ wells, furnishes no ground for complaint or equitable interference); *Lenfers v. Henke*, 73 Ill. 405, 408 (1874-Eng. equiv.) (property ownership conveying right to lead mines); *Lime Rock R. R. Co. v. Farnsworth*, 86 Me. 127, 29 At. 957, 958 (1893-Eng. equiv.) (property ownership conveying marble and lime rock within the tract); *Louisville & Nashville R. R. Co. v. Boykin*, 76 Ala. 560, 563 (1884-Eng. equiv.) (conveying right to gravel along with purchase of land); *Pence v. Carney*, 58 W. Va. 296, 52 S. E. 702, 6 L.R.A. (n. s.) 266 (1905) (right to percolating water).

72 See *First Baptist Soc. v. Wetherell*, 34 R.I. 155, 82 Atl. 1061, 1063 (1912).

73 See, e.g., *Huber v. Stark*, 124 Wis. 359 (1905) (eaves extending adjacent airspace held to be a trespass); *Crocker v. Manhattan Life Ins. Co.* 61 App. Div. (N.Y.), 226 (1901) (eaves extending over an adjacent owner’s land held to be a trespass); *Ackerman v. Ellis*, 81 N.J.L. 1 (1911) (holding branches extending into a property owner’s airspace to be a nuisance); *Puerto v. Chieppa*, 78 Conn. 401 (1905) (holding that a board attached to building extending to adjacent airspace constituted a trespass); *Norwalk Heating Lighting Co. v. Vernam*, 75 Conn. 662 (1903) (a wooden structure extending over an adjacent property amounted to a trespass); *Whittaker v. Standvick*, 100 Minn. 396 (1907) (shooting over a pass between two navigable lakes ruled both a trespass and a nuisance); *Crocker v. Manhattan Life Ins. Co.*, 61 App. Div. 226, 70 N.Y.S. 492 (1901) (cornice projecting into adjacent property considered a trespass); *Barnes v. Berendes*, 139 Cal. 32, 69 P. 491, 72 P. 406 (1902) (wall extending into neighbor’s property considered a trespass); *Barnes v. Berendes*, 139 Cal. 32 (1903) (leaning walls considered a trespass); *Herrin v. Sutherland*, 241 P. 328 (Mont. 1925) (shooting of wild ducks above a navigable stream); *Portsmouth Co. v. United States*, 260 U.S. 327 (1922) (on appeal from the Court of Claims) (firing of guns over private property); *Milton v. Puffers*, 207 Mass. 416, 93 N. E. 634 (1911) (protruding foundation stones considered both a trespass and a nuisance).

someone’s property constituted trespass.\textsuperscript{75} Chief Justice Llewellyn Callaway observed, “[I]t seems to be the consensus of the holdings of the courts in this country that air space, at least near the ground, is almost as inviolable as the soil itself.”\textsuperscript{76} There did not have to be any threat occasioned by the invasion of airspace to be considered a trespass: merely extending an arm over a neighbor’s land to retrieve a ladder was considered sufficient.\textsuperscript{77} In almost all of these cases, the courts looked to \textit{ad coelum} to guide their thinking.\textsuperscript{78}

The Supreme Court shared the states’ approach, considering the firing of a gun across an individual’s property to be a trespass. The routine discharge of a battery amounted to a taking.\textsuperscript{79} In \textit{Portsmouth Harbor Land & Hotel Company}, Justice Holmes, writing for the Court, noted, “If the United States, with the admitted intent to fire across the claimants’ land at will, should fire a single shot or put a fire control upon the land, it well might be that the taking of a right would be complete. But even when the intent thus to make use of the claimants’ property is not admitted, while a single act may not be enough, a continuance of them in sufficient number and for a sufficient time may prove it. Every successive trespass adds to the force of the evidence.”\textsuperscript{80}

The decision was not unique to weapons. Any extended use of property owners’ airspace by the government constituted takings. When telephone wires became standard for carrying communications, for instance, cases routinely recognized the importance of \textit{ad coelum}. In the 1906 case of \textit{Butler v. Frontier Telephone Company}, the New York Supreme Court explained:

What is “real property”? What does the term include so far as the action of ejectment is concerned? The answer to these questions is found in the ancient principle of law: “\textit{cujus est solum, ejus est usque ad coelum et ad inferos}.” The surface of the ground is a guide, but not the full measure. “\textit{Usque ad coelum}” is the upper boundary, and while this may not be taken too literally, there is no limitation within the bounds of any structure yet erected by man. So far as the case before us is concerned, the plaintiff as the owner of the soil owned upward to an indefinite extent. … According to fundamental principles and within the limitations mentioned, space above

\textsuperscript{75} \textit{Herrin v. Sutherland}, 74 Mont. 587, 241 Pac. 328 (1925) (confirming that airspace over one’s property is subject to protection against trespass).
\textsuperscript{76} 204 Pac. 328.
\textsuperscript{77} \textit{Hannaballson v. Session}, 116 Iowa, 457 (1902).
\textsuperscript{79} \textit{Portsmouth Harbor Land & Hotel Co. v. United States}, 260 U.S. 327 (1922).
\textsuperscript{80} 260 U.S. 329–30. For two prior cases finding insufficient sustained engagement to constitute a taking, see \textit{Peabody v. United States}, 231 U.S. 530 (1913), and \textit{Portsmouth Harbor Land & Hotel Co. v. United States}, 250 U.S. 1 (1919).
land is real estate the same as the land itself. The law regards the empty space as if it were a solid, inseparable from the soil, and protects it from hostile occupation accordingly. 81

The court went on to underscore the point: “Unless the principle of “usque ad coelum” is abandoned, any physical, exclusive, and permanent occupation of space above land is an occupation of the land itself and a disseisin of the owner to the extent.” 82 Land ownership extended downward as well. Thus, in 1878, the Pennsylvania Coal Company conveyed the surface of a plot of land but explicitly retained the right to mine underneath it. 83

Efforts by the government to overregulate mineral extraction similarly reflected ad coelum, triggering protections against takings. In 1921, the Commonwealth of Pennsylvania enacted a statute preventing coal mining that could possibly affect the integrity of any surface land. The Supreme Court determined that while a state may pass laws in the valid exercise of its police powers that have an incidental impact on property values, when they causes sufficient diminution in property value, the state must take the land by eminent domain and provide compensation. 84 So, too, was the construction of an underground sewer considered a taking—merely on the grounds that the property owners were deprived of potentially using the space occupied by the pipes. 85

A similar approach to ad coelum held in regard to land held by public authorities. As explained in Professor Eugene McQuillin’s The Law of Municipal Corporations,

The public right to the use of streets goes to the full width of the street, and extends, indefinitely upward and downward. On the ground, therefore, of failure to exercise ordinary care to keep public ways in a reasonably safe condition for travel, municipal negligence may be established, on the theory of a defect in the street, in action for damages due to injuries to travelers from awnings, signs, billboards, poles, electric wires, or other objects suspended over, or near thereto, or falling into a street or sidewalk. 86

81 Butler v. Frontier Telephone Co., 186 N.Y. 486, 491 (1906) (Vann, J.).
82 186 N.Y. 492.
84 260 U.S. 393, 419.
85 See Smith v. City of Atlanta, 92 Ga. 119, 17 S. E, 981 (1893).
Courts considered any invasion of the airspace above a public right of way to constitute a nuisance.\textsuperscript{87} Even a bay window on a second story, 16 feet above the ground, which extended approximately three feet into the line of the street was held a public nuisance.\textsuperscript{88} So, too, a wire temporarily erected as part of a Fourth of July celebration was considered an obstruction of the street below.\textsuperscript{89} Awnings, bridges, trees, bay windows—anything projecting into the space above public land, without the explicit approval of the municipality, constituted a de facto nuisance.\textsuperscript{90}

Public right of way similarly extended downward, into the earth.\textsuperscript{91} While certainly a duty to keep the streets safe was operable (thus implicating nuisance), state courts routinely looked to the city or town \textit{qua} property owner also to consider such invasions of airspace a trespass. The Supreme Court of Iowa, for example, noted in relation to a wire mounted by an electric company above the road:

The city being the owner in fee simple of the streets, of necessity its rights extend above the surface thereof. How far, we need not determine in this case; but, since it is entitled to the absolute control and occupancy of the space above these streets, any invasion thereof by stretching wires thereon at this height of necessity is an infraction of the rights of the city, and amounts to a trespass.\textsuperscript{92}

\textless \textbf{State Control of Property Rights} \textgreater

The Articles of Confederation acknowledged that each state retained “its sovereignty, freedom, and independence, and every Power, Jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled.”\textsuperscript{93} Over the next decade, the lack of a sufficiently


\textsuperscript{88} Elliott and Elliott, \textit{Law of Roads and Streets}, p. 257.

\textsuperscript{89} Wheeler v. \textit{City of Ft. Dodge}, 131 Iowa 566 (1906) (“The fact that the wire in most of its course passed through the air above the heads of the people using the walks and carriageway below does not remove its character as an obstruction of the street. The public right goes to the full width of the street, and extends indefinitely upward and downward, so far at least as to prohibit encroachment upon said limits by any person by any means by which the enjoyment of said public right is or may be in any manner hindered or obstructed or made inconvenient or dangerous.”)

\textsuperscript{90} See, e.g., Bohen v. \textit{Waseca}, 32 Minn. 176 (19 N.W. 730, 50 Am. Rep. 564) (1884) (awning); Hume v. Mayor, 74 N.Y. 264 (1878), and Drake v. Lowell, 13 Met. (Mass.) 292 (1847) (awning); Bybee v. \textit{State}, 94 Ind. 443 (48 Am. Rep. 175) (1905) (bridge or covered viaduct); Jones v. \textit{City of New Haven}, 34 Conn. 1 (1887) (tree); Reimer’s Appeal, 100 Pa. 182 (45 Am. Rep. 373) (1882) (bay window).


\textsuperscript{92} Incorporated Town v. \textit{Cent. States El. Co.}, 214 N.W. 879 (Iowa 1927).

\textsuperscript{93} Articles of Confederation, art. II.
robust national government forced a renegotiation of the terms of the union. Yet even as delegates drafted the Constitution, they preserved state sovereignty to ensure a check on federal power.

For some, the document did not go far enough—a concern that the Federalist Papers addressed. In them, James Madison argued that states retained their powers. Each branch of the national government would “owe its existence more or less to the favor of the State governments, and must consequently feel a dependence, which is much more likely to beget a disposition too obsequious than too overbearing towards them.”

Alexander Hamilton scoffed at the idea that states would become subservient to federal regulation, calling such speculation “idle and visionary.” The Constitution would guard against federal overreach by limiting the national government to the enumerated authorities, in sharp contrast to the status of states as governments of general jurisdiction. Madison explained:

The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce. . . . The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.

Congress could not act outside of the powers specified in Article I, § 8. Even within the enumerated powers, the capital could not be established without the states affirmatively agreeing to cede territory. The Constitution forbade federal acquisition of state territory, or the partitioning of existing states, without their legislature’s consent. The Constitution established—and explicitly recognized—dual sovereignty. States, consistent with the Guarantee Clause, constituted republics in their own right. Their citizens were to enjoy the privileges and immunities of their sister states.

---

96 Federalist No. 45 (Madison), pp. 292–93.
97 U.S. Const. art. I, § 8, cl. 17. See also Federalist No. 43 (James Madison), 1788, reprinted in Alexander Hamilton, James Madison, John Jay, Clinton Rossiter, The Federalist Papers, (New York, Penguin, 1961), pp. 272–73 ([The federal district is] to be appropriated to this use with the consent of the State ceding it; as the State will no doubt provide in the compact for the rights and the consent of the citizens inhabiting it; . . . as they will have had their voice in the election of the government which is to exercise authority over them; . . . as the authority of the legislature of the State, and of the inhabitants of the ceded part of it, to concur in the cession will be derived from the whole people of the State in their adoption of the Constitution, every imaginable objection seems to be obviated.”).
98 U.S. Const. art. IV, § 3.
100 U.S. Const. art. IV, § 2.
States retained all powers neither delegated to the federal government nor prohibited to them.\textsuperscript{101} The powers to which the Tenth Amendment referred were extensive. Police powers (relating to health, welfare, and morals), criminal law, and corporate charters fell within the state domain. States had authority over education, manufacturing, and agriculture. They were responsible for regulating, controlling, and governing real and personal property, as well as individuals within state borders. As the Supreme Court explained in 1905:

Although this court has refrained from any attempt to define the limits of [state police powers], yet it has distinctly recognized the authority of a state to enact quarantine laws and health laws of every description; indeed, all laws that relate to matters completely within its territory and which do not by their necessary operation affect the people of other states.\textsuperscript{102}

A dozen years later, the Court again acknowledged that while it had not tried to define police powers, “its disposition is to favor the validity of laws relating to matters completely within the territory of the state enacting them.”\textsuperscript{103}

What this meant was that, as a practical matter, control of real property and associated questions fell to state and local governments. State sovereignty was so strong that federal power only extended to property exclusively in federal control. Thus, one of the first efforts by Congress to outlaw murder or robbery in any river, basin, or bay, fell outside constitutional bounds. As the U.S. Supreme Court explained in 1818, the effort by the government to prosecute a murder in Boston harbor on board the ship \textit{Independence} under federal law ran afoul of the powers retained by the states.\textsuperscript{104}

State cases followed course. In \textit{Commonwealth v. Young}, also decided in 1818, the Pennsylvania Supreme Court explained, “The legislative power and exclusive jurisdiction remained in the several states, of all territory within their limits, not ceded to, or purchased by, congress, with the assent of the state legislature, to prevent the collision of legislation and authority between the United States and the several states.”\textsuperscript{105} Any real property not owned by the federal government was under state jurisdiction.

\begin{flushleft}
\textsuperscript{101} U.S. Const. amend. X.  \\
\textsuperscript{102} \textit{Jacobson v. Massachusetts}, 197 U.S. 11, 25 (1905) (internal quotations omitted).  \\
\textsuperscript{103} \textit{Thomas Cusack Co. v. City of Chicago}, 242 U.S. 526, 531 (1917).  \\
\textsuperscript{104} \textit{United States v. Bevans}, 16 U.S. 336, 389 (1818).  \\
\textsuperscript{105} \textit{Commonwealth v. Young}, Brightly N.P., 302, 309 (Pa. 1818).
\end{flushleft}
The position of a state was the same as that of a sovereign nation, which owed a duty to its citizens to act in the manner that best advanced their interests. In 1837, the U.S. Supreme Court acknowledged,

[A] State has the same undeniable and unlimited jurisdiction over all persons and things, within its territorial limits, as any foreign nation; where that jurisdiction is not surrendered or restrained by the Constitution of the United States. . . . [B]y virtue of this, it is not only the right, but the bounden and solemn duty of a State, to advance the safety, happiness and prosperity of its people, and to provide for its general welfare. . . [A]ll those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called internal police, are not thus surrendered or restrained; and that, consequently, in relation to these, the authority of a State is complete, unqualified and exclusive.106

When Alabama joined the union in 1819, the federal government premised its admission on the condition that its navigable waters would remain public highways.107 The Supreme Court circumscribed the requirement, noting that it did not deprive the state of its rights over navigable waters; nor did it affect state control over the shores or the soil under the navigable waterways. “[T]he United States never held any municipal sovereignty, jurisdiction, or right of soil in and to the territory, of which Alabama or any of the new States were formed,” the Court observed.108 The state therefore was “entitled to the sovereignty and jurisdiction over all the territory within her limits, subject to the common law.”109 The national government could not demand that the state cede its authority. Such a power would run rampant over the very concept of federalism.

The national government’s authority undergirding the Alabama provision was rooted in Congress’s Commerce Clause powers, which were initially narrowly interpreted.110 In Gibbons v. Ogden, the Court made it clear that while the navigation of waterways impacted interstate commerce, interior state traffic lay outside its remit:

The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect

---

109 44 U.S. 222.
110 U.S. Const. art. I, § 8, cl. 3.
other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. The completely internal commerce of a State, then may be considered as reserved for the State itself.111

Expressio unius exclusio alterius, by demarcating among the states, what lay within them was beyond Congress’s purview.112 Inspection laws, too, lay outside federal control, as they fell within “that immense mass of legislation which embraces everything within the territory of a State, not surrendered to the general government: all which can be most advantageously exercised by the States themselves.”113 Chief Justice John Marshall explained:

Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, &c., are component parts of this mass. No direct general power over these objects is granted to Congress; and, consequently, they remain subject to State legislation.114

While the federal government might control navigable waterways insofar as interstate commerce went, it operated within the strict limits long recognized as part of common law. For centuries riparian water rights lay with those landowners whose property abutted navigable waterways. Common law recognized their right to access water for transportation, building, and hunting or fishing. Congress has acknowledged states’ title to submerged navigable lands.115

At the Founding, the authority for regulating property rights transferred to the states. Landowners’ title to the water extended to the low-water mark, while the ground beneath was held by the state, not the federal government. This principle is well recognized by the courts.116 States own the beds under navigable waters, while adjacent landowners, absent other legal arrangements, own the water above. States—not the federal government—control and place any applicable restrictions on the landowners in their use and enjoyment of the property. Thus, an ordinance limiting the height of buildings in Baltimore and requiring that property owners obtain a permit before building, altering, or repairing any structure

111 Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 195 (1824).
112 22 U.S. at 195.
113 22 U.S. at 203.
114 22 U.S. at 203.
within city limits, fell within state police powers.\(^{117}\) In New Hampshire, a statute forbidding the erection of fences higher than five feet when the purpose was to annoy adjoining owners or occupants similarly fell within the general powers of the state.\(^{118}\)

Real estate law is governed by the general principles of contract law and individual state law. Deeds are executed and delivered to state entities. Building regulations, placement of billboards and advertising, zoning, and other matters impacting real property are handled by states and, in many cases, local municipalities. The Supreme Court has regularly upheld state and local authority in these areas.\(^{119}\) Courts only subject municipal zoning ordinances to rational basis review.\(^{120}\) They give deference to the states for the rules regulating things that extend upward into the air, such as billboards.\(^{121}\) In considering the constitutionality of one such ordinance, the Court noted that while it had thus far refrained, “from any attempt to define with precision the limits of the police power . . . its disposition is to favor the validity of laws relating to matters completely within the territory of the state enacting them.”\(^{122}\)

Outside of property actually held by the federal government, it is the states who control property rights from the ground up—not the federal government. And states, as well as landowners, are limited by *ad coelum* in what they can do in regard to real property.

**Aviation Law**

By the time Pollock’s 11th edition of the *Law of Torts* was published in 1920, aircraft were becoming ever more widespread. According to the *New York Times*, 2,200 airplanes were in commercial use at that time and around 500 more were owned privately, with 92 companies operating planes and nearly twice as many manufacturing aircraft.\(^{123}\) Numerous calls were being made, on behalf of industry, to adopt federal laws to support the nascent industry.\(^{124}\) The American Bar Association and the National Conference of

---

\(^{117}\) See *Cochran v. Preston*, 108 Md. 220, 70 Atd. 113 (1908-Eng. equiv.).

\(^{118}\) See *Horan v. Byrnes*, 72 N.H. 93, 54 Atl. 945, 62 L.R.A. 602 (1903).

\(^{119}\) See, e.g., *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926) (recognizing that zoning ordinances can only be declared unconstitutional where they are “clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare”).


\(^{121}\) See *Thomas Cusack Co. v. Chicago*, 242 U.S. 526 (1917).

\(^{122}\) 242 U.S. at 530–31.


Commissioners on Uniform State Laws put committees together that year to determine what laws should govern airspace.\textsuperscript{125}

Early commentators on how the law should evolve all questioned whether the federal government had the constitutional authority to pass any measures regulating aviation. The ancient recognition of \textit{ad coelum} appeared to foreclose federal jurisdiction.\textsuperscript{126} As a judicial matter, consistent with \textit{ad coelum}, cases dealing with air travel had come down clearly on the side of the property owner. Thus, in 1822, when an aeronaut landed a balloon and damaged property, the aeronaut was held liable.\textsuperscript{127} In 1912, an aviator flying 100 feet off the ground who did not cause any damage to property was likewise liable for trespass.\textsuperscript{128} Common law applied. The theory underlying these and other cases was that title carried with it the right to occupy, use, and possess the airspace above the ground.

To address the constitutional concerns that dogged federal initiatives, it was initially proposed that the admiralty clause conferred the necessary authority.\textsuperscript{129} Courts, however, rejected this reasoning, as air flight was more akin to the land than the sea.\textsuperscript{130} Others invoked the war power clause, which was roundly rejected on the grounds that adopting this approach would create limitless federal power.\textsuperscript{131} Nor could the constitutional authority to make treaties provide the grounds for federal measures. The United States had not actually ratified the International Air Navigation Convention of 1919 (see discussion below), and it was questionable whether an agreement dealing exclusively with international travel had any bearing on interstate matters.\textsuperscript{132} In the interim, the powers conveyed by the commerce clause, as discussed above, were narrowly defined.

\textsuperscript{127} \textit{Guille v. Swan}, 19 Johns. 381 (N.Y.) (1822).
\textsuperscript{128} \textit{Bank of Monongahela Valley v. Weston}, 159 N.Y. 201, 54 N.E. 40, 45 L.R.A. 547 (1912), in 19 Case and Comment 681 (1913), 42 A.L.R. 951.
\textsuperscript{130} See, e.g., \textit{The Crawford Bros. No. 2}, 215 Fed. 269 (W.D. Wash. 1914) (jurisdiction declined for repairs against an airplane which had fallen into navigable waters under federal maritime jurisdiction); \textit{The Steamer St. Lawrence}, 1 U.S. 522, 527 (1861) (“[N]o State law can enlarge [admiralty jurisdiction] nor can an act of Congress or rule of court make it broader than the judicial power may determine to be its true limits.”).
The constitutional concerns prompted the American Bar Association committee that had been formed to look into the matter to call for a formal amendment to bring air travel within federal control.\footnote{American Bar Association, Report of the Forty-Fourth Annual Meeting of the American Bar Association held at Cincinnati, Ohio, Aug. 31, Sept. 1 and 2, 1921 (Cincinnati, Ohio, Lord Baltimore Press, 1921): 81 ("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.")} This perspective was shared by the Federal Air Service, whose legal adviser proposed either a constitutional amendment or the purchase of air avenues (on account of such travel amounting to a taking) to make it legal.\footnote{Rowan A. Greer, “International Aerial Regulations,” Air Service Information Circular (Washington: Chief of the Air Service, 1926), p. 29.}

**Uniform Aeronautics Act**

Absent a constitutional amendment, as air travel proliferated and safety concerns mounted, the National Conference of Commissioners on Uniform State Laws prepared and, with the American Bar Association’s approval, recommended that states adopt the Uniform Aeronautics Act.\footnote{William A. Schnader, “Uniform Aviation Liability Act,” *Journal of Air Law and Commerce* 9 (1938): 664. For discussion of the evolution of the model statute, see George Gleason Bogert, “Recent Developments in the Law of Aeronautics,” *Cornell Law Quarterly* 8 (1923): 26. See also Herzel H. E. Plaine, “State Aviation Legislation,” *Journal of Air Law and Commerce* 14 (1947): 333, 334 (referring to the Uniform Aeronautics Act of 1922 as “[p]erhaps the most influential of the uniform acts.”).} The model statute focused on state sovereignty over airspace, landowners’ rights over the air above their property, the lawfulness of flight, damage and collision, jurisdiction, and the use of aircraft. In so doing, the model statute clearly established state dominion.\footnote{Uniform State Law for Aeronautics, National Conference of Commissioners on Uniform State Laws, conference, San Francisco, August 1922, 11 Uniform Laws Anno. 159, § 3 (“The ownership of the space above the lands and waters of this state is declared to be vested in the several owners of the surface beneath, subject to the right of flight described in Sec. 4.”). Hereinafter “Uniform Aeronautics Act of 1922”.} The act provided that the ownership of the air above the land and waters of a state is vested in the several owners of the surface beneath, subject to certain overflight rights.\footnote{Uniform Aeronautics Act of 1922, §§ 4, 5.} It recognized state contract, tort, and criminal jurisdiction over pilots, passengers, and aircraft when in flight over the state.\footnote{Uniform Aeronautics Act of 1922, § 4.} The model statute imposed absolute liability on the owner of every aircraft for injuries to persons or property on land or the water beneath, caused by an aircraft or any object falling from it.\footnote{Uniform Aeronautics Act of 1922, 11 Uniform Laws Anno. 159.} Except for contributory negligence of the property owner or the person harmed, liability lay with the owner of the aircraft regardless of whether the owner was negligent.\footnote{Uniform Aeronautics Act of 1922, § 5.}
Twenty-two states adopted the Uniform Aeronautics Act in some form.\textsuperscript{141} In Massachusetts, for instance, General Law 534 of 1922 established a licensing and registration system for flight.\textsuperscript{142} The law established control over private and commercial aircraft takeoff, landing, and flight.\textsuperscript{143} State law also provided that aircraft should not be operated “over any thickly settled or business district at an altitude of less than 3,000 feet, or over any building or person at an altitude of less than 500 feet, except when necessary for the purpose of embarking or landing.” This law was tested in the 1930 case of \textit{Smith v. New England Aircraft Co.}\textsuperscript{144} The Supreme Court of Massachusetts, in an opinion issued by Chief Justice Arthur Rugg, considered the question of whether overflight constituted a trespass to be well within the state domain:

> 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-protection. 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.\textsuperscript{145}

At the Founding, common law conveyed control over the air to the states as an aspect of their sovereignty. Subsequent statutes regulating the operation of aircraft were “enacted under the police power.”\textsuperscript{146} That authority can be used to regulate private rights. The court explained, “There are numerous statutes upheld as an exercise of the police power interfering with, narrowing and regulating, private rights of landowners in the use of their estates.”\textsuperscript{147} Fishery rights, building regulations, the setback for homes, the installation of sprinklers, prohibitions on building heights, and zoning districts, \textit{inter alia}, fall into this category.

State law, “by plain implication, if not by express terms,” recognized and authorized “the flying of aircraft over privately owned land.” Air travel had become an important part of life. Nevertheless, even

\textsuperscript{141} Schnader, “Uniform Aviation Liability Act.”
\textsuperscript{142} Mass. Gen. Laws ch. 534 (1922) (“An Act Regulating the Operation of Aircraft”).
\textsuperscript{143} Mass. Gen. Laws ch. 534.
\textsuperscript{145} 170 N.E. 385.
\textsuperscript{146} 170 N.E. 385.
\textsuperscript{147} 170 N.E. 385.
“after making every reasonable legal concession to air navigation as commonly understood and as established under the statutes,” the facts of the case, “under settled principles of law” (i.e., *ad coelum*) constituted “trespass to the land of the plaintiffs so far as concerns the take-offs and landings at low altitudes and flights.”\(^{148}\) For the court, “ownership of airspace extends to reasonable heights above land.” Thus, “Air navigation, important as it is, cannot rightly levy toll upon the legal rights of others for its successful prosecution.”\(^{149}\) At higher levels, unoccupied air space could be used, but under a certain level, the ancient rights of property owners prevailed, making any interference in the airspace a trespass.

In *Smith v. New England Aircraft Co.*, a 92-acre airport abutted the plaintiff’s land, which was a mostly wooded country estate of some 270 acres. Flights taking off from the airport traversed the property less than 100 feet off the ground, but not less than 500 feet over any buildings. Pilots leaving the airport followed the statutory provisions laid out by the state. For Chief Justice Rugg, the noise did not appear to materially interfere with the plaintiff’s physical comfort; nor did the flights subject any member of the household to fear. There had been no damage of any sort. “I find,” the chief justice wrote, “the plaintiffs are persons accustomed to a rather luxurious habit of living, and while the noise from the airplanes in flight over their premises has caused them irritation and annoyance . . . gauged by the standards of ordinary people this noise is no of sufficient frequency, duration or intensity to constitute a nuisance.”\(^{150}\)

**The Air Commerce Act of 1926**

In 1922, the first bill proposed in Congress to govern civil air navigation failed to pass.\(^{151}\) Four years later, the 1926 Air Commerce Act became law.\(^{152}\) Its purpose was to encourage and to support interstate and international commerce by supporting the nascent air industry.\(^{153}\) Accordingly, it directed the secretary of commerce to ensure that new restrictions or regulations did not unduly hamper innovation.\(^{154}\) The law charged the secretary with figuring out how to capitalize on aeronautics, to issue and enforce rules to make flight possible, to provide a licensing regime for airmen, to certify aircraft, and to establish

---

\(^{148}\) 170 N.E. 385.
\(^{149}\) 170 N.E. 385.
\(^{150}\) 170 N.E. 385.
\(^{151}\) Civil Aviation, H.R. Rep. No. 69-572, at 7 (1926).
The statute made bureaucratic changes to support its edict, establishing a new aeronautics branch at the Commerce Department, headed by an assistant secretary.\footnote{155}{44 Stat. 568, 569–70.}

The Air Commerce Act of 1926 acknowledged dual sovereignty and the rights of state governments. It was careful to distinguish between interstate and international travel, which fell within Congress’s Commerce Clause authorities, and intrastate activities, which fell outside congressional reach. It thus authorized the secretary of commerce to establish the requisite navigation facilities and airways, but not airports, which firmly fall within state and local control.\footnote{156}{44 Stat. 572-573, § 7.} Only aircraft in navigable airspace, and therefore in interstate lanes, would be subject to regulation. The statute defined navigable airspace as “airspace above the minimum safe altitudes of flight prescribed by the Secretary of Commerce,” which would be “subject to a public right of freedom of interstate and foreign air navigation.”\footnote{157}{44 Stat. 571, § 5(b).} This distinction preserved for the states (and via them, landowners) control over the ground and the air above it.

The House report accompanying the bill drew parallels with marine navigation.\footnote{159}{H.R. Rep. No. 69-572, at 9 (“Air space, with its absence of fixed roads and tracks and aircraft with their ease of maneuver, present as to transportation practical and legal problems similar to those presented by transportation by vessels upon the high seas.”).} It noted that Congress had drawn directly from the registration and inspection laws introduced in 1789 and 1838 for vessel registration and inspection.\footnote{160}{H.R. Rep. No. 69-572, at 10.} The aids to navigation supplied by the federal government, moreover, would align with the documents issued by the Department of Commerce’s Bureau of Lighthouses and U.S. Coast and Geodetic Survey, providing for fluidity in interstate and international navigation.\footnote{161}{In 1910 Congress created the Bureau of Lighthouses in the Department of Commerce. 36 Stat. 537 (1910). On July 1, 1939, the president’s Reorganization Plan No. 2 transferred the agency to the Coast Guard. 4 F.R. 2731, 53 Stat. 1431. The U.S. Coast and Geodetic Survey was first established in 1878 as part of the Department of the Treasury. Act of June 20, 1878 (20 Stat. 215). In 1903, it was transferred to the Department of Commerce and Labor by the act creating that department, and a decade later to the Department of Commerce. 32 Stat. 825 (1903); 37 Stat. 736 (1913). In 1965, it became folded into the Environmental Science Services Administration (ESSA), Department of Commerce. Reorganization Plan No. 2 of 1965, effective July 13, 1965. The organization was abolished by Reorganization Plan No. 4 of 1970, effective October 3, 1970, which transferred personnel and functions of ESSA to the newly established National Oceanic and Atmospheric Administration, Department of Commerce.} In sum, “The whole framework and, in many cases, the very language of the bill may fairly be said to be merely the application to air transportation of provisions of statutes and principles of law long established as to water transportation.”\footnote{162}{H.R. Rep. No. 69-572, at 9.} As with navigable waterways, the Commerce Clause...
provided the constitutional hook.\textsuperscript{163} Only public flight in the navigable air space would be subject to federal control.\textsuperscript{164}

The Commerce Clause claim reflected the position of the United States in the international system. As an aspect of sovereignty, each country had the right to complete and exclusive control over the airspace above its territory—a right recognized in the 1919 International Convention Relating to the Regulation of Aerial Navigation.\textsuperscript{165} The United States never ratified the convention, which was later superseded.\textsuperscript{166} Nevertheless, Congress cited it in support of the 1926 act. Under the convention, sovereign control included not just the national territory of the mother country and colonies, but also the adjacent territorial waters.\textsuperscript{167}

Just two years after Congress passed the Air Commerce Act, the Inter-American Commercial Aviation Convention reiterated the importance of protecting the sovereignty of each country over its airspace.\textsuperscript{168} Sovereign control explicitly included the “right to prohibit, for reasons which it deems convenient in the public interest, the flight over fixed zones of its territory by the aircraft of the other contracting states and privately owned . . . aircraft.”\textsuperscript{169} International air travel was organized along national lines: like ships, aircraft carried the nationality of the country in which they were registered, which had to be conveyed through special markings.\textsuperscript{170}

The right to self-defense underlay sovereign control. Accordingly, in 1929 the Protocol to the International Convention Relating to the Regulation of Aerial Navigation established:

Each contracting State is entitled for military reasons or in the interest of public safety to prohibit the aircraft of the other contracting States, under the penalties provided by its legislation and

\textsuperscript{163} H.R. Rep. No. 69-572, at 9 (“The declaration of what constitutes navigable air space is an exercise of the same source of power, the interstate commerce clause, as that under which Congress has long declared in many acts what constitutes navigable or nonnavigable waters.”).

\textsuperscript{164} H.R. Rep. No. 69-572, at 9 (“The public right of flight in the navigable air space owes its source to the same constitutional basis which, under decisions of the Supreme Court, has given rise to a public easement of navigation in the navigable waters of the United States, regardless of the ownership of the adjacent or subjacent soil.”).

\textsuperscript{165} Convention Relating to the Regulation of Aerial Navigation, Oct. 13, 1919, art. I. (“The High contracting Parties recognize that every Power has complete and exclusive sovereignty over the air space above its territory.”). Hereinafter “1919 International Convention”. See also H.R. Rep. No. 69-572, at 10 (citing the 1919 convention).

\textsuperscript{166} 1944 Chicago Convention on International Civil Aviation, ratified by the United States February 20, 1946.

\textsuperscript{167} 1919 International Convention, ch. 1.

\textsuperscript{168} Inter-American Commercial Aviation Convention (February 20, 1928), art. I (“The high contracting parties recognize that every state has complete and exclusive sovereignty over the air space above its territory and territorial waters.”). Senate advice and consent to ratification February 20, 1931; ratified by the president March 6, 1931; terminated as to the United States November 29, 1947, 47 Stat. 1901.

\textsuperscript{169} Inter-American Commercial Aviation Convention, art. 5.

\textsuperscript{170} Inter-American Commercial Aviation Convention, arts. 7, 9.
subject to no distinction being made in this respect between its private aircraft and those of the
other contracting States, from flying over certain areas of its territory. 171

Under the protocol, states could prohibit other countries’ aircraft from flying over their territory during
peacetime as well. 172 Presaging technologies that have only come to fruition with the advent of drones in
the 21st century, the protocol had a special provision applicable to unmanned aircraft: “No aircraft of a
contracting State capable of being flown without a pilot shall, except by special authorization, fly without
a pilot over the territory of another contracting State.” 173

Following passage of the 1926 Air Commerce Act, the secretary of commerce promulgated new
regulations that established an absolute floor of 1,000 feet over cities, towns, and settlements, and 500
feet over all other land “except where indispensable to an industrial flying operation” as a basis for
determining navigable airspace. 174 These regulations acknowledged state and landowner control beneath
that height.

A number of states adopted parallel provisions. In 1927, for instance, Wyoming defined navigable
airspace as “the airspace above the minimum altitudes of flight which are hereby defined to be not less
than 1,000 feet over any city, town, or settlement, and not less than 500 feet over any other portion of the
state of Wyoming except in case of landing, taking off, or emergencies necessitating lower flight, and
excepting lower flight when necessary for industrial operations.” 175 In Ohio, the General Act Relative to
Aeronautics similarly brought state law into line with the contours of the federal regulations, even as it
recognized that it was within the state’s purview whether or not to do so. 176 The statute made clear that for
policy reasons (uniform regulations and public safety), the state was choosing to align its measures with
those of the federal government.

In 1930, Ohio’s provisions were challenged. 177 The case was brought by R. H. Swetland, who in 1905
had bought 135 acres in a rural area to be used as a country estate. The area was still sparsely settled

---

172 1929 Protocol, art. 3.
173 1929 Protocol, ch. IV.
174 Air Commerce Regulations (Dec. 1926), Chapter 7, § 74(G).
175 Regulation of Air Craft, Session Laws of Wyoming, 1927, ch. 72, sec. 2, j.
176 General Act Relative to Aeronautics, June 26, 1929, 113 Ohio Laws, p. 28.
177 Early 20th century Ohio history is interwoven with the Wright brothers and the growth of modern aviation. Orville Wright
was born in Dayton in 1871, where both he and his older brother Wilbur attended school. In 1889 they became local business
owners, opening a print shop and publishing a local newspaper using a printing press that they designed and built. A few years
later, they opened a bike shop and began manufacturing bicycles. The brothers went on to test planes at Huffman Field near
Dayton and in 1909 founded the Wright Company there. Although Wilbur died, Orville carried on and became a leading national
farmland when in 1929, a Curtiss-Wright subsidiary bought 272 acres directly across the road from Swetland’s property to operate an airport and flying school. Swetland immediately responded: the deed ceding the property to Ohio Air Terminals was dated May 23, 1929, and recorded five days later. Swetland sent a letter protesting the purchase on May 29, with legal action commencing June 1. Undeterred, Curtiss Airports built a 20-plane hangar and planned a parking lot for 460 cars.

The question before the court in *Swetland v. Curtiss Airports Corporation* was whether the Ohio state law in question was a reasonable exercise of the police power, as well as whether *ad coelum* established such property rights in a landowner as to make overflight either a nuisance or a trespass. Looking to the state laws facilitating the growth of air travel, the court took judicial notice of the fact that “although aviation is still to some extent in the experimental stage, it is of great utility in times of peace, and will be a great protection to the nation in times of war. In fact, it is indispensable to the safety of the nation that airports and flying schools such as contemplated by the defendants be encouraged in every reasonable respect.”

With state measures regulating it, the only way the airport could be a nuisance was if it was “located in an unsuitable location” or was “operated so as to interfere unreasonably with the comfort of adjoining property owners.” While the warm-up of airplanes and their flight over the neighbors’ property might be noisy, it was not to “such a degree as to annoy persons of ordinary sensibilities.” Nor was dust an issue, because the airport could simply install concrete runways or use runways with a sufficient amount of grass. Crowds did not present a concern. The court had refused to enjoin amusement parks, for instance, merely on those grounds. Once the novelty had worn off, moreover, fewer people would come. Dropping leaflets or putting up lights might be a nuisance, but such actions could be enjoined as necessary.

Having rejected the airport as constituting a nuisance, the court turned to allegations of trespass. “An owner’s rights in land in this state are amply protected by constitutional guaranties,” the court wrote, “but what those rights are, so far as air space above the land is concerned, has not been declared by legislation,

---

178 41 F.2d 929.
179 41 F.2d at 932.
180 41 F.2d at 932.
181 41 F.2d at 932.
182 41 F.2d at 933.
183 41 F.2d at 933.
184 41 F.2d at 933.
nor have such rights been fixed by the courts. That the landowner’s rights are not limited to the surface of the earth, but extend into the space above it, is settled by many well-considered cases.”

The court addressed *ad coelum*: “The venerability of this maxim, its frequent repetition, and the high standing of many of those who have relied upon it, not only warrant, but call for, a careful consideration of its origin and application in adjudicated cases.” In none of the cases, though, had the maxim been applied explicitly to air travel. The salient question was at what point the *coelum* was reached. According to Professor Hiram Jome, the clause, as employed by Latin writers meant the lower airspace, where birds fly and clouds drift, rain falls and lightning strikes. “Occasionally,” Jome wrote, “it meant God, ‘heaven the home of the happy dead,’ and the resting place of the stars.” Consulting treatise writers on torts law, the court noted that a number of them recognized ownership in airspace appurtenant to land, up to a reasonable height. The court could not find any constitutional or legislative provisions or statutes that had established the exclusive proprietary right “in a landowner to the superincumbent air space normally traversed by the aviator.”

Because the establishment of a 500-foot minimum altitude rule seemed to be a reasonable exercise of federal power—and one with which the Ohio legislature appeared to agree, flight at that height was legal. Below that, however, it was “conceivable and very probable” that pilots could not interfere with the landowner’s “effective possession” of the airspace.

On appeal, the Sixth Circuit observed that “the law reports of practically every state” refer to *ad coelum*; however, the right was not absolute: “we cannot hold that in every case,” the court wrote, “it is a trespass against the owner of the soil to fly an aeroplane through the air space overlying the surface.” Nevertheless, “[t]his does not mean that the owner of the surface has no right at all in the air space above his land. He has a dominant right of occupancy for purposes incident to his use and enjoyment of the surface, and there may be such a continuous and permanent use of the lower stratum which he may reasonably expect to use or occupy himself as to impose a servitude upon his use and enjoyment of the

---

185 41 F.2d at 935.
186 41 F.2d at 935.
188 41 F.2d at 937.
189 41 F.2d at 937.
190 41 F.2d at 938.
191 41 F.2d at 943.
192 Swetland v. Curtiss Airports Corporation, 55 F.2d 201, 203 (6th Cir. 1932).
The landowner could not “reasonably expect to occupy” the upper stratum. Here, the only right of the landowner was “to prevent the use of it by others to the extent of an unreasonable interference with his complete enjoyment of the surface.” While interference amounted to a trespass in the lower strata, in the upper strata, only an action for nuisance could lay. The court was unable to “fix a definite and unvarying height below which the surface owner may reasonably expect to occupy the air space for himself.” Such a designation would be fact-dependent. For this case, it was sufficient to say that the defendants were in the upper strata, above the 500-foot floor. No trespass therefore had occurred. As a matter of nuisance, however, the airport had already interfered with the family’s enjoyment of the property and depreciated its value.

In his concurrence, Judge Smith Hickenlooper, a Calvin Coolidge appointee, rejected the idea that trespass could only occur at the lower strata. Higher up, “although a single flight over the plaintiff’s land may not constitute a trespass, such flights may be so continuous as in the aggregate to do so.” As a logical matter, for the aggregate of a large number of flights to constitute a trespass, “it must be because each of the said flights is itself a trespass.”

With property rights firmly in the hands of the states, a Uniform Licensing Act was proposed in 1930. The National Conference of Commissioners on Uniform State Laws supplemented the statute in 1935 with a Uniform Aeronautical Regulatory Act. The model law made it mandatory for all pilots to hold federal licenses and added state supervisory authority to license airports, educational institutions, clubs, and other associated areas. It further provided for municipalities and counties to acquire, construct, and regulate airports. While not adopted in toto by all states, many of the provisions of these acts found their way into state law.

States had the lead. Cujus est solum, ejus est usque ad coelum et ad inferos was considered by scholars “one of the most firmly and permanently established rules of our common law.” Nevertheless, the federal government continued to push for control of airspace. As a consequence, the early 1930s saw a

---

193 55 F.2d at 203.
194 55 F.2d at 203.
195 55 F.2d at 203.
196 55 F.2d at 204–5.
197 55 F.2d at 205.
198 Uniform Licensing Act of 1930, 11 Uniform Laws Anno. 185.
200 11 Uniform Laws Anno. 193.
sudden spate of scholarship on the implications of air travel for the historical protection of property owners over the airspace adjacent to their land, as well as for the federalism divide. It also prompted the creation of a new journal, the *Journal of Air Law and Commerce*, whose editorial stance rather weighted the deck in favor of the feds.

**Civil Aeronautics Act of 1938**

The Civil Aeronautics Act of 1938 marked a significant shift in federal control. The statute was largely driven by safety concerns. At that point, some 17,681 licensed civil pilots were flying 7,300 licensed civil airplanes between 2,327 airports. The commercial aspects of flight were beginning to take off: 1,250,000 passengers per year and over 1.25 billion pound-miles of mail per month were being transported by air. Simultaneously, in what appeared to be a race to the bottom, as competition increased, carriers tried to cut costs, potentially undermining passenger safety. Following a series of harrowing air incidents, the Senate directed the Committee on Commerce to investigate and to report on how best to improve air safety. In debating the resolution, on Senator explained, “[T]his bill will not only promote an orderly development of our Nation’s civil aeronautics, but by its immediate enactment prevent the spread of bad practices and of destructive and wasteful tactics resulting from the intense competition now existing within the air-carrier industry.” Regulating the air industry appeared, from a federal perspective, to be no different than regulating other public utilities.

Congress proclaimed in the 1938 statute,

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

---


207 S. Rep. No. 75-1661, at 2 (Senator Royal Copeland)
lakes, over which by international law or treaty or convention the United States exercises national jurisdiction.\footnote{209}{Civil Aeronautics Act of 1938, § 1107(i)(3).}

This statement went considerably beyond the 1926 act, which had claimed sovereignty vis-à-vis other countries, but not as against the states.\footnote{210}{See Air Commerce Act of 1926, Pub. L. 69-254, § 6 (stating “that the Government of the United States has, to the exclusion of all foreign nations, complete sovereignty of the airspace over the lands and waters of the United States.”).}


To the extent that Congress was laying claim to matters within state jurisdiction, it was intruding on a constitutionally protected area. States retained control over the airspace immediately above state land and waters. No less than three provisions of the uniform act adopted by the states had asserted this authority.\footnote{212}{See Uniform Aeronautics Act § 4 (Uniform Law Commission 1922), § 2 (“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.”), § 3 (“The ownership of the space above the lands and waters of this State is declared to be vested in the several owners of the surface beneath, subject to the right of flight described in Section 4.”), § 4 (“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. The landing of an aircraft on the lands or waters of another, without his consent, is unlawful, except in the case of a forced landing. For damages caused by a forced landing, however, the owner or lessee of the aircraft or the aeronaut shall be liable. . . .”)).}

The Civil Aeronautics Act laid out a complex structure to ensure air safety. It established regulations for licensing pilots, aircraft, and air carriers and for maintaining equipment.\footnote{213}{Civil Aeronautics Act of 1938, 52 Stat. 973, §§ 601–10.}

It created an Air Safety Board and incorporated civil and criminal penalties for failing to meet the requirements laid out in the act.\footnote{214}{52 Stat. 973, §§ 701–2 (air safety board); §§ 901–3 (civil penalties, criminal penalties, and venue for prosecution).}

It introduced a range of regulations applicable to both domestic and foreign air carriers and the transportation of mail.\footnote{215}{52 Stat. 973, §§ 401–16.}

The act transferred responsibility from the Bureau of Air Commerce to a new, independent agency, the Civil Aeronautics Authority (CAA), which was tasked with regulating air transportation, encouraging foreign and domestic commerce, improving the mail service, and providing for matters related to national defense.\footnote{216}{52 Stat. 973, §§ 201–6.}

From 1938 to 1939, the CAA examined 2,668 accidents and made recommendations.\footnote{217}{First Annual Report of the Civil Aeronautics Authority: Fiscal Year Ended June 30, 1939, with Additional Activities to November 1939 (Washington: Government Printing Office, 1940), pp. 39–41.}

The agency went on to analyze passenger flow and the need for new routes, airmail pricing, and transatlantic trade, and to participate in international discussions about aviation regulation.\footnote{218}{Second Annual Report of the Civil Aeronautics Authority: Fiscal Year Ended June 30, 1940 (Washington: Government Printing Office, 1940), pp. 1–14.}
certification, aircraft inspection, and other matters.\textsuperscript{219} It further ran a training program, coordinating with 435 colleges and 528 flight schools to train and certify some 8,313 new pilots.\textsuperscript{220} Over the course of fiscal year 1940, there were zero aviation-related fatalities across the United States.\textsuperscript{221}

States continued to serve as the lead for control of the land. Accordingly, in 1939 the CAA, together with the National Institute of Municipal Law Officers, wrote a Model Airport Zoning Act for the states.\textsuperscript{222} It underwent several revisions, with the aim, as one scholar explains, of empowering states to promulgate, administer and enforce under the state police power, airport zoning regulations limiting the height of structures and objects of natural growth and otherwise regulating the use of property in the vicinity of public airports, and to acquire by purchase, grant or condemnation, air rights and other interests in land, for the purpose of preventing obstruction of the airports’ approaches.\textsuperscript{223}

By 1947, most states had adopted the measures. The partnership between states and the federal government took further form with the 1946 Federal Airport Act, which provided a $500 million grant over a seven-year period to states and municipalities interested in building airports.\textsuperscript{224} In 1950, the act was extended to 1958, with funding provided for runways and taxiways.\textsuperscript{225} Further laws extended funding until the act was finally repealed and replaced by the Airport and Airway Development Act of 1970.\textsuperscript{226} In 1958 the CAA became the Federal Aviation Agency (later the Federal Aviation Administration).\textsuperscript{227}

\textbf{Of Nuisance and Trespass}<\textbf{b>}

Aircraft traveling over farmland presented a particular risk of stress on livestock. This issue came to the fore in Nebraska fairly early on in \textit{Glatt v. Page}.\textsuperscript{228} The court prohibited any flights under 500 feet over the plaintiff’s house and under 250 feet over adjoining fields outside of takeoff and landing. The court was careful to note the special risks at that time, as “flying . . . at an altitude of less than 100 feet will

\begin{flushleft}
\textsuperscript{219} Second Annual Report of the Civil Aeronautics Authority, pp. 14–22.  
\textsuperscript{220} Second Annual Report of the Civil Aeronautics Authority, pp. 22–23.  
\textsuperscript{221} Second Annual Report of the Civil Aeronautics Authority, p. 5.  
\textsuperscript{222} Plaine, “State Aviation Legislation,” p. 336.  
\textsuperscript{225} Federal Airport Act Extension, Pub. L. No. 81-846, 64 Stat. 1071.  
\textsuperscript{228} Glatt v. Page, District Court, 3d Jud. Dist. of Neb., Docket 93-115 (1928).
\end{flushleft}
ordinarily frighten teams at work . . . and thereby render cultivation of plaintiff’s land in that vicinity
difficult and hazardous.” Frequent flight at this level, “constitutes a damage to the plaintiffs and an
impairment of the use and enjoyment of said premises which goes with the land and belongs to plaintiffs
as well as the soil thereof.”229

In 1946, the Supreme Court came to a similar conclusion, recognizing that as a corollary to land
owner rights *ad coelum*, repeated use of the airspace above a farmer’s property for takeoff and landing
constituted a Fifth Amendment taking. In *United States v. Causby*, despite the federal government’s bald
assertion of “exclusive national sovereignty” and the right of freedom in air transit, the Court came down
on the side of the landowner’s property rights.230 A chicken farm, located near an airport routinely used
by the military, essentially had been subjected to a servitude. While *cujus est solum ejus est usque ad
coelum* recognized ownership to the periphery of the universe, it proved ill-fitting in the modern world.231
Air above the minimum safe altitude of flight, like a public highway, amounted to the public domain.
However, anything below the navigable air space was not. It was in the full control of the owner: “The
landowner owns at least as much of the space above the ground as he can occupy or use in connection
with the land. The fact that he does not occupy it in a physical sense—by the erection of buildings and the
like—is not material.”232 The Court explained, “The superadjacent airspace at [a] low altitude is so close
to the land that continuous invasions of it affect the use of the surface of the land itself. We think that the
landowner, as an incident to his ownership, has a claim to it and that invasions of it are in the same
category as invasions of the surface.”233 The immediate reach of adjacent airspace thus belonged to the
landowner.

The Court recognized that the problem of granting the federal government control over the lower
airspace would give them “complete dominion and control over the surface of the land.”234 This would
eviscerate federalism as well as property rights.

Following *Causby*, Congress redefined “navigable airspace” to mean “airspace above the minimum
altitudes of flight prescribed by regulations issued under this chapter,” including “airspace needed to
insure [sic] safety in take-off and landing of aircraft.”235

229 Glatt v. Page, Decree of District Court, par. 5.
231 *Causby*, 328 U.S. at 260–61.
232 328 U.S. at 264.
233 328 U.S. at 265.
234 328 U.S. at 262.
In 1962, the Supreme Court had to ascertain whether, under new definition, takeoff and landing areas abrogated property rights. In *Griggs v. Allegheny*, the Supreme Court again recognized that landowners own the airspace above their property: “[T]he use of land presupposes the use of some of the airspace above it. Otherwise, no home could be built, no tree planted, no fence constructed, no chimney erected. An invasion of the superadjacent airspace will often affect the use of the surface of the land itself.” The imposition of a glide path above someone’s property amounted to a taking. Any exercise of dominion over adjacent airspace would have to be compensated.

**Concluding Remarks**

With the history of *ad coelum* and state police powers in mind, one could be forgiven for being surprised by contemporary federal claims to airspace related to the proliferation of UAS technologies. Navigable airspace, as an anchor for expanded federal control, cannot extend to the ground without violating property rights and state sovereignty.

This does not mean that Congress has no role to play. To the extent that unmanned aircraft of any sort travel 500 feet above the ground, they would be subject to the provisions governing other aircraft. So, too, would federal control extend to the safety of aircraft ascending and descending from airports. In 2012, for instance, the FAA Modernization and Reform Act prohibited the FAA from regulating model aircraft weighing less than 55 pounds, unless they were flown within five miles of an airport.

But the federal government is now attempting to bring the floor of navigable airspace ever lower: under the FAA Reauthorization Act of 2018, the hobbyist carve-out is limited to 400 feet above ground level. The FAA is placing restrictions on flying drones at night and requiring users to register their drones and fly within visual line of sight. In addition, the FAA now imposes flight restrictions on recreational drone operators—such as when Pope Francis visited Philadelphia in 2015.

To the extent that the FAA is attempting to cast its net more widely, property rights and state authority present an important limitation. Numerous states already have asserted their constitutional

---

237 369 U.S. at 89.
238 FAA Modernization and Reform Act of 2012, § 336(a).
power to regulate drones. Some states, such as California and Louisiana, do not put any ceiling on the air above private property. Any entry is considered a trespass. Where ceilings have been set, they range from 250 feet above the ground (Nevada) up to 500 feet above property (Tennessee)—a number reflecting the navigable airspace, as established in the Code of Federal Regulations. (Tennessee code defines criminal trespass to include an unmanned aircraft entering the portion of airspace above an owner’s land not regulated by the FAA as navigable airspace. In Nevada, the state legislature has prohibited flying a drone within 500 feet of any critical infrastructure. A small unmanned aircraft flying lower than 500 feet does not expand the federal government’s jurisdiction.

The FAA is now contemplating regulation of commercial drones that may fly over public roads—property held by the state. In 1959 the Supreme Court recognized the importance of state sovereignty, even in the face of Commerce Clause claims:

The power of the State to regulate the use of its highways is broad and pervasive. We have recognized the peculiarly local nature of this subject of safety, and have upheld state statutes applicable alike to interstate and intrastate commerce, despite the fact that they may have an impact on interstate commerce.

The Court had long recognized state power over public highways. In 1938, the Supreme Court considered a South Carolina statute regulating the size of vehicles that could use its roads. The trial court had determined that the statute unreasonably burdened interstate commerce. The Supreme Court saw it rather differently: “South Carolina has built its highways and owns and maintains them. While the constitutional grant to Congress of power to regulate interstate commerce has been held to operate of its own force to curtail state power in some measure” it does not so impact all actions affecting interstate commerce. The Court noted that since 1829:

---

247 303 U.S. at 182.
248 303 U.S. at 184–85.
[I]t has been recognized that there are matters of local concern, the regulation of which
unavoidably involves some regulation of interstate commerce but which, because of their local
character and their number and diversity, may never be fully dealt with by Congress.
Notwithstanding the commerce clause, such regulation in the absence of congressional action
has for the most part been left to the states by the decisions of this Court.\(^\text{249}\)

In the context of regulating vehicles traveling along the ground, there was nothing to indicate that the
states would have to “curtail[] their power to take measures to insure the safety and conservation of their
highways which may be applied to like traffic moving intrastate.”\(^\text{250}\)

Presumably, the Court will take the same view of drones. Like sUAS, vehicles, and the routes they
traveled, mattered: “[f]ew subjects of state regulation are so peculiarly of local concern as is the use of
state highways.”\(^\text{251}\) States play the primary role in building them. They own them. They maintain them.
“The state,” moreover, “has a primary and immediate concern in their safe and economical
administration.”\(^\text{252}\) States have an even greater interest in things that travel through the air and impact the
people and vehicles below. Virtually any regulation of the roads (or the air) could affect interstate
commerce—but this did not, in any way, diminish the strong state interest in regulating its own highways.
For the Court, South Carolina was well within its Constitutional power to act.\(^\text{253}\)

The Court came to the same conclusion about a Pennsylvania statute that prohibited any cars carrying
other vehicles over the head of the vehicle operator.\(^\text{254}\) The Court explained that highways “are state
owned, and, in general, are open in each state to use by privately owned and controlled motor vehicles of
widely different character.”\(^\text{255}\) More sensitive than the federal government to local needs and conditions,
states had long had been in charge of the safety of their roads.\(^\text{256}\) The effort by the federal government to
assert national control raised “problems of peculiar difficulty and delicacy.”\(^\text{257}\) Ensuring road safety
constituted a legitimate exercise of state police power.\(^\text{258}\)

\(^{249}\) 303 U.S. at 185.
\(^{250}\) 303 U.S. at 187.
\(^{251}\) 303 U.S. at 187.
\(^{252}\) 303 U.S. at 196.
\(^{253}\) 303 U.S. at 196.
\(^{254}\) 303 U.S. at 196.
\(^{255}\) 309 U.S. at 589 (1940). Under the 1935 Motor Carrier Act, the Interstate Commerce Commission
promulgated regulations to govern the “safety of operation and equipment” of cars in interstate commerce. The regulations failed
to address trucks carrying cars over the cab.
\(^{256}\) 309 U.S. at 604–5.
\(^{257}\) 309 U.S. at 605.
\(^{258}\) 309 U.S. at 598.
Just because the federal government has acted does not divest states of their core authority. As the Supreme Court explained in yet another case dealing with a state motor vehicle provision:

An examination of the acts of Congress discloses no provision, express or implied, by which there is withheld from the state its ordinary police power to conserve the highways in the interest of the public and to prescribe such reasonable regulations for their use as may be wise to prevent injury and damage to them.259

For the Supreme Court, the regulation of state highways was “akin to quarantine measures, game laws, and like local regulations of rivers, harbors, piers, and docks, with respect to which the state has exceptional scope for the exercise of its regulatory power, and which, Congress not acting, have been sustained even though they materially interfere with interstate commerce.”260

For cases coming to the Court, state control over use of land within its bounds is presumed to be constitutionally valid—even if it interferes with interstate commerce, unless there is an excessive burden placed on it.261 In 2002, a parallel effort to establish federal preeminence over states in regard to aerial advertising failed. Skysign International, which was operating under an FAA certificate of waiver, flew over densely populated areas in violation of a municipal ordinance.262 Prior to introducing the ordinance, Honolulu had twice asked the FAA whether the federal measure preempted its ability to regulate the airspace and had been informed, on both occasions, that it did. The FAA, however, had been mistaken. The Ninth Circuit, ruling for Honolulu, observed that advertising is one of those areas that traditionally falls within the state domain. The federal government could not displace that authority without a clear statement that it intended to do so—which could itself be challenged.

Congress, in claiming sovereignty over U.S. airspace as an exercise of international control did not eviscerate domestic divisions. Instead, as the Court in Braniff noted, it was merely “an assertion of exclusive national sovereignty that did not expressly exclude the sovereign powers of the states.”263 States and, through them, property owners, control the airspace above the land. Should federal power be understood as extending to all airspace above land and roads, it would so eviscerate state police powers

263 276 F.3d at 1116 (internal quotations and citations omitted).
over property as to render them virtually nonexistent. This approach would fly in the face of *ad coelum*
and state sovereignty, long considered at the very core of U.S. law.