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Introduction

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Introduction

*Timothy M. Ravich**

Florida has long played a prominent role in global aviation and aerospace activities. Today, approximately one in four of the million jobs in Miami-Dade County are directly related to aviation operations¹ while Brevard County (with its “3-2-1” area code reflecting a launch countdown) and Cape Canaveral form the nation’s “Space Coast” for government, and increasingly, private space launches. The many general and commercial airports and “spaceports” throughout the state generate a large number of transactions and disputes that require aviation counsel.² To this end, the Florida Bar has recognized aviation law as a specialty since 1995 and Florida is one of the few states in the nation that specially credential lawyers as experts in the area as “Board Certified Aviation Lawyers.” That Florida specially distinguishes aviation lawyers is unsurprising given that the state’s modern platform for aviation and aerospace operations would have been all but impossible without perceptive and farseeing lawmakers and jurists.

Consider a case from the early part of the last century, *Dysart v. City of St. Louis*,³ a suit in which a Missouri taxpayer attempted to restrain the development of an airport with public funds. In expressive language, the petitioner rejected the idea that airports could serve any general or societal good:

It will afford a starting and landing place for a few wealthy, ultra-reckless persons, who own planes and who are engaged in private pleasure flying. They may pay somewhat for the privilege.

It will afford a starting and landing place for pleasure tourists from other cities, alighting in St. Louis while flitting here and yon. It will offer a passenger station for the very few persons who are able to afford, and who desire to experience, the thrill of a novel and expensive mode of luxurious transportation.

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¹ The Beacon Council, *Aviation*, <http://www.beaconcouncil.com/target-industries/aviation>.

² See generally TIMOTHY M. RAVICH, FLORIDA AVIATION AND SPACE LAW REPORT (2014), <http://www.ravichlawfirm.com/resources.html>.

³ *Dysart v. City of St. Louis*, 11 S.W. 2d 1045 (Mo. 1928).

The number of persons using the airport will be about equal to the total number of persons who engage in big-game hunting, trips to the African wilderness, and voyages of North Pole exploration.

In the very nature of things, the vast majority of the inhabitants of the city, a 99 per cent majority, cannot now and never can, reap any benefit from the existence of an airport.

True it may be permitted to the ordinary common garden variety of citizen to enter the airport free of charge, so that he may press his face against some restricting barrier, and sunburn his throat gazing at his more fortunate compatriots as they sportingly navigate the empyrean blue.

But beyond that, beyond the right to hungrily look on, the ordinary citizen gets no benefit from the taxes he is forced to pay.⁴

The Supreme Court of Missouri, sitting *en banc*, rejected this view and recognized that, as of 1928, “[it was] unquestionably true that the airplane [was] not in general use as a means of travel or transportation, either in the city of St. Louis or elsewhere; [but] *it never will be unless properly equipped landing fields are established.*”⁵

In the same year, in a case factually similar to *Dysart*, Judge Benjamin N. Cardozo, then a New York appellate judge, announced that “[a]viation today is an established method of transportation.”⁶ The eventual U.S. Supreme Court Justice also accepted the inevitability of airports and air transportation and cautioned against impulses to resist the new realities:

The city that is without the foresight to build the ports for the new traffic may soon be left behind in the race of competition. Chalcedon was called the city of the blind, because its founders rejected the nobler site of Byzantium lying at their feet. The need for vision of the future in the governance of cities has not lessened with the years. The dweller within the gates, even more than the stranger from afar, will pay the price of blindness.⁷

While courts in Missouri and New York and elsewhere around the nation litigated the question of whether the development of an airport constituted a valid municipal purpose, Florida lawmakers proactively

⁴ *Id.* at 1047.

⁵ *Id.* (emphasis added).

⁶ *Hesse v. Rath*, 164 N.E. 342 (N.Y. App. 1928).

⁷ *Id.*

advanced aviation activities. For example, it enacted Chapter 13569, General Acts of 1929, authorizing municipal corporations to purchase (including by way of a right of condemnation), establish, construct and operate airports and landing fields.⁸ This and similar other laws were regularly upheld on constitutional grounds, including in *State v. Dade County*,⁹ in which the Supreme Court of Florida, *en banc*, stated:

[T]his Court knows that air transportation is one of the great innovations of the age, that Miami is potentially one of the greatest air distribution points in the World, and that Florida is the port of entry for air transportation from South and Central America, the West Indies, and Africa.

It is quite true that there were no Jules Verns or Wright Brothers in the Constitutional Convention to portend the marvelous changes the future had in store, but it was not intended by those present that the dead hand of the past should shape the destiny of the future. Constitutional mandates are wise in proportion to the manner in which they respond to the public welfare and should be construed to effectuate that purpose when possible. The law does not look with favor on social or progressive stalemates.

As we said in *City of Coral Gables v. Crandon*[,] extension of political controls should keep pace with physical changes, and collective ingenuity should not be hobbled by the Constitution in a way to be outclassed by collective design to overreach and serve a selfish purpose.¹⁰

By the end of World War II, private, public, and commercial aviation was routine, so much so that in *Brooks v. Patterson*,¹¹ the Supreme Court of Florida rejected claims sounding in nuisance and trespass in connection with airplane operations, writing:

The City should be mindful at all times of the admonition which comes to us from the days of the Roman Empire, “sicutere tuo ut alienum non laedas”—so use your own property as not to injure another’s.

⁸ Richard H. Hunt, *Aviation and Airports in Florida*, FLA. L.J. 72, 73 (1948) (“We have little doubt that the excellent weather and airports which are among Florida’s finest properties, will continue to keep her in the forefront of the national and international air commerce and all its branches.”); *see also* *Central Hanover Bank and Trust Co. v. Pan American Airways*, 188 So. 820 (Fla. 1939); *Stengel v. Crandon*, 23 So. 2d 835 (Fla. 1945).

⁹ *State v. Dade County*, 27 So. 2d 283 (Fla. 1946).

¹⁰ *Id.* at 284-85.

¹¹ *Brooks v. Patterson*, 31 So. 2d 472 (1947); *see generally* *Airplane Noise: Problem in Tort and Federalism*, 74 HARV. L. REV. 1581 (1961).

That aviation is as much a part of modern civilization as the railroad, steamship and automobile as a means of transportation of both freight and passengers is too obvious for serious discussion.

The place which aviation now occupies was envisaged, probably initially, by Alfred Lord Tennyson in his prophetic dream which we find recorded in his frequently quoted poem, “Locksley Hall,” when he wrote:

For I dipt into the future, far as human eye could see;
Saw the vision of the world, and all the wonder that would be;
Saw the heavens fill with commerce, argosies of magic sails;
Pilots of the purple twilight, dropping down with costly bales.¹²

The reality that was emerging in the post-war 1940s has become an unchallenged truth today, in 2015. A world without airports and airplanes, and yes, spaceships and space stations, is unimaginable. From commerce to national security, aviation and space operations are fundamentally integrated into and important for almost every form of government and social organization on the planet, be it communist-controlled states, non-state actors, terrorist organizations, and democracies. Indeed, aviation and space operations facilitate social transactions and serve important private, public, and military objectives worldwide. In this context, the study of aviation and space law is the study of the law itself and the authors who contributed to this symposium ably illuminate the many areas in which aviation and space activities intersect with domestic and international law.

In *Commercial Purposes, Governmental Functions, and the FAA’s Regulatory Authority over Unmanned Public Aircraft Operations in U.S. National Airspace*,¹³ Douglas M. Marshall and Ernest E. Anderson show us that the future—from a legal standpoint, at least—looks a lot like the past. Regulators have been slow to adapt to the latest aviation innovation—unmanned aerial vehicles, more commonly referred to as “drones.” Professors Anderson and Marshall of the University of North Dakota John D. Odegard School of Aerospace Sciences demonstrate that conflicting interpretations of the law exist with respect to unmanned aerial systems and they offer recommendations for regulatory clarification.

Where Professors Anderson and Marshall overview the emerging regulatory landscape for drones, *Unmanned Aircraft Systems and Technologies: Challenges and Opportunities for States and Local*

¹² Brooks, 31 So. 2d at 474.

¹³ Douglas M. Marshall & Ernest E. Anderson, *Commercial Purposes, Governmental Functions, and the FAA’s Regulatory Authority over Unmanned Public Aircraft Operations in U.S. National Airspace*, 10 FIU L. REV. 371 (2015).

Governments,¹⁴ by Professor Daniel Friedenzohn of Embry-Riddle Aeronautical University and Mike Braun of the North Central Texas Council of Governments, addresses legal and planning issues related to drones at the local, state, and federal levels. In doing so, they give specific examples of how certain states have responded (or reacted) to privacy concerns arising from drone operations. The importance of this issue cannot be understated as the balance between privacy rights and commerce has frequently paralyzed U.S. regulators with respect to drone operations.

In the last of three articles about drones, Professor David Goldberg, an author of the Oxford Reuters Institute for the Study of Journalism's influential report on drone journalism, approaches unmanned aviation not from a strictly regulatory perspective, but by way of speech rights. Indeed, drones are information systems as much as they are airplanes. In this context, Professor Goldberg's article, *Dronalism: Journalism, Remotely Piloted Aircraft, Law and Regulation*,¹⁵ acknowledges reports about invasive uses of drones by private citizens and law enforcement. But, he argues that the public's right to receive information from journalists and the free exercise of speech rights involved in carrying out the reporting profession mitigates in favor of use of remotely piloted aircraft systems (RPAS) in principle and should trump absolutist counterclaims, not least of those advanced by the pro-privacy lobby.

Turning from the unmanned to the manned (perhaps over manned), Paul Stephen Dempsey, the Tomlinson Professor of Global Governance in Air & Space Law and Director of the Institute of Air & Space Law at McGill University, offers an important primer in *Federal Preemption of State Regulation of Airline Pricing, Routes, and Services: The Airline Deregulation Act*.¹⁶ In 1978, Congress deregulated economic aspects of commercial U.S. airline operations. The result has been a democratization of air travel and prevalence of cheap fares. But, passenger dissatisfaction with airlines also has risen. Professor Dempsey provides legal context for the mixed legacy of deregulation policy. He specifically describes the complex issue of federalism as applied to the subject of airline passengers' rights. With delays, lost baggage, overbooking, and passenger misconduct the apparent norm, the importance of preemption in the airline business is as important as it is misunderstood.

Just as the drawbacks of airline deregulation were not fully anticipated,

¹⁴ Daniel Friedenzohn & Mike Branum, *Unmanned Aircraft Systems and Technologies: Challenges and Opportunities for States and Local Governments*, 10 FIU L. REV. 389 (2015).

¹⁵ David Goldberg, *Dronalism: Journalism, Remotely Piloted Aircraft, Law and Regulation*, 10 FIU L. REV. 405 (2015).

¹⁶ Paul Stephen Dempsey, *Federal Preemption of State Regulation of Airline Pricing, Routes, and Services: The Airline Deregulation Act*, 10 FIU L. REV. 435 (2015).

so too has extensive industry consolidation been an unexpected consequence of the Airline Deregulation Act of 1978. US Airways is now American Airlines. Northwest Airlines is now Delta. United Airlines absorbed Continental Airlines. Even “low cost carriers” have acquired other carriers, as when Southwest Airlines purchased AirTran. Theoretically, a deregulated airline marketplace was to be perfectly contestable. *Airline Consolidations and Competition Law—What Next?* is Roger W. Fones’s approach to antitrust issues in today’s deregulated airline marketplace.¹⁷ Mr. Fones offers a particularly significant voice in these matters. Prior to joining Morrison Foerster in Washington, D.C., he spent almost 30 years at the Antitrust Division of the U.S. Department of Justice. His expertise in such matters is rivaled only by his ability to explain the complex issue of airline antitrust law in an easy manner.

Uwe M. Erling, LL.M., of Noer LLP in Munich, Germany, also brings an important practitioner’s voice to the issue of commercial airline operations. In *The German Air Transport Tax: A Treaty Override of International Law*,¹⁸ Mr. Erling broadly highlights the international character of aviation law by analyzing a transnational tax issue. In particular, Mr. Erling addresses an air transport tax that increases the ticket prices of international and domestic flights in Germany. After providing an overview of the key features of the tax, he discusses why the tax is violating international air transport law—not from the perspective of European carriers so much as from the perspective of American carriers. In doing so, Mr. Erling tracks an important theme in aviation law—the vast skies are not unregulated, but instead subject to numerous traditional legal concepts such as taxes and treaties that restrict totally free movement in the sky.

*Open Skies*¹⁹ is my written contribution to this symposium issue. Having represented carriers as a practitioner and having studied the airline marketplace as an academic, I imagined that this article would fit well with the international focus that was impressed upon me during my six years teaching at the FIU College of Law. The article overviews the seminal issues of “Open Skies” policy, including antique laws of ownership and control. Also presented is a review of airline deregulation policy in the United States, argument in favor of the expansion of so-called cabotage rights allowing foreign carriers to fly domestic routes, and discussion of the emergence of strategic airline alliances. Finally, the article concludes with coverage of an intense and brewing controversy between major U.S.

¹⁷ Roger W. Fones, *Airline Consolidations and Competition Law—What Next?* 10 FIU L. REV. 447 (2015).

¹⁸ Uwe M. Erling, *The German Air Transport Tax: A Treaty Override of International Law*, 10 FIU L. REV. 467 (2015).

¹⁹ Timothy M. Ravich, *Open Skies*, 10 FIU L. REV. 493 (2015).

airlines, on the one hand, and Persian Gulf carriers, on the other hand, that risks open skies policies in the Middle East. In presenting these issues, the article aims to introduce the reader to the unusual and historically significant ways in which aviation laws are derived in the United States and abroad, and in doing so, raise a general question about the welfare of aviation consumers overall.

Whereas the articles by Messrs. Dempsey, Fones, Erling, and myself focus on the service aspects of aviation, Professor Robert Jarvis of the Shepard Broad Law Center at Nova Southeastern University School of Law addresses an issue without which any discussion of aviation law would be incomplete—accidents. After an extended period of safety, the last few years have seen several commercial airline accidents—strange ones, at that, including the disappearance of Malaysia 370. In *Vanished Planes*,²⁰ Professor Jarvis explores special legal issues attendant to airplanes that disappear without a trace. His article addresses six overriding legal issues: causation, forum choice, statutes of limitations, claims, judgments, and taxes.

Meanwhile, Steven C. Marks of Podhurst Orseck explains the plaintiffs' path to resolution in foreign aviation disasters. In *Sifting through the Theories: Uncovering the Truth in Foreign Aviation Disasters and Evaluating the Case*,²¹ Mr. Marks offers a practitioners viewpoint; but, to be clear, his experience is not of a plaintiff-side lawyer who has dabbled in aviation law. His résumé identifies some of the most significant aviation disasters (and judicial awards) that ever occurred. With this background, he creditably explains how to successfully litigate foreign aviation cases with determination, specialized know-how, and diligent preparation. Because of the extraordinary expense involved in financing an aviation case, his article explains the imperative to analyze cases from a bird's-eye view to anticipate challenges and avoid all-too-common pitfalls on the road to a verdict.

Professor James A. Beckman furthers the discussion of air disasters in *Nation-State Culpability and Liability for Catastrophic Air Disasters: Reforming Public International Law to Allow for Liability for Nation-States and the Application of Punitive Damages*.²² A former active duty military lawyer and inaugural chair of the Department of Legal Studies at the University of Central Florida, Professor Beckman has identified a policy

²⁰ Robert Jarvis, *Vanished Planes*, 10 FIU L. REV. 519 (2015).

²¹ Steven C. Marks, *Sifting through the Theories: Uncovering the Truth in Foreign Aviation Disasters and Evaluating the Case*, 10 FIU L. REV. 571 (2015).

²² James A. Beckman, *Nation-State Culpability and Liability for Catastrophic Air Disasters: Reforming Public International Law to Allow for Liability for Nation-States and the Application of Punitive Damages*, 10 FIU L. REV. 585 (2015).

issue that needs attention. He notes that, with only a few exceptions, nations generally have been able to avoid significant legal liability for their roles in using military force in downing civilian passenger aircraft. After extensively providing background for this topic, Professor Beckman offers solutions. He argues for certain “reforms,” specifically revisions to existing international law where a nation-state has direct or indirect involvement in sponsoring or supporting the private actors contributing to a catastrophic airline disaster. As if the downing of Malaysia Airlines Flight 17 over Ukraine was not evidence enough, the import of this article adds another dimension to the manner in which international law can or should respond to a world increasingly marked by asymmetrical threats posed to commercial airline operations by armed conflicts or via state-sponsored proxy terrorists.

Professor Scott J. Shackelford of Indiana University and Scott Russell of the Center for Applied Security furthers discussion of asymmetrical threats by making the case for a proactive approach to identifying and instilling the best cybersecurity practices throughout the aerospace sector. More specifically, their article, *Above the Cloud: Enhancing Cybersecurity in the Aerospace Sector*,²³ surveys the multifaceted cyber threat facing the private sector and argues for the necessity of a polycentric response recognizing in particular the vital role of information sharing and implementation of the National Institute for Standards Technology Cybersecurity Framework to help stem the theft of valuable trade secrets. The authors also suggest that the aerospace sector is in some ways unique in that it is dominated by relatively few actors, which in some ways makes the task of information sharing easier if economic, political, and security concerns may be overcome. The article’s significance lies in the reality that so much of aviation—general, commercial, military—manned and unmanned—rely on digital networks that could be hacked, degraded, or corrupted through cybercrimes.

Finally, this symposium edition features three articles on space law. Not that long ago, space law was viewed as eccentric and out of the mainstream. However, as demonstrated by Professor Steven A. Mirmina, who teaches space law at Georgetown University Law Center and works as a lawyer for NASA, space law is not science fiction, but an emerging area of law centered on a growing commercial sector. In *Astronaut Redefined: The Commercial Carriage of Humans to Space and the Changing Concepts of Astronauts under International and U.S. Law*,²⁴ Professor Mirmina first

²³ Scott J. Shackelford & Scott Russell, *Above the Cloud: Enhancing Cybersecurity in the Aerospace Sector*, 10 FIU L. REV. 635 (2015).

²⁴ Steven A. Mirmina, *Astronaut Redefined: The Commercial Carriage of Humans to Space and the Changing Concepts of Astronauts under International and U.S. Law*, 10 FIU L. REV. 669 (2015).

evaluates several issues raised by commercial crew and suborbital space tourism under international space law and then addresses legal complications raised by commercial crew and suborbital space tourism under U.S. law. Finally, Professor Mirmina makes recommendations for future legal responses to evolving challenges under the heading of commercial space law, including revisions to the Commercial Space Launch Act.

Next, Head of Legal Affairs for Austria's Orspace, Rafael Moro-Aguilar, writes about existing U.S. suborbital flight regulations and describes a 2008 European regulatory proposal in *National Regulation of Private Suborbital Flights: A Fresh View*.²⁵ With this background, Mr. Moro-Aguilar introduces the latest developments identified in the national regulation of human spaceflight, in particular the United Kingdom's Government review of commercial spaceplane certification and operations and Spain's draft bill on Outer Space Activities, which includes the domestic regulation of private human suborbital flight. Noting that safety is and remains the biggest challenge faced by the emerging suborbital flight industry, Mr. Moro-Aguilar brings his practitioners perspective to bear, noting that as long as there are no international rules on manned suborbital flight, national law will regulate this activity. And, given the current lack of specific national legislation in any country, except the United States, nations that are interested in this activity should enact domestic laws regulating private human suborbital flight, according to Mr. Moro-Aguilar.

Finally, safety is the topic of Professor Diane Howard's article, entitled *Safety as a Synergistic Principle in Space Activities*.²⁶ Professor Howard overviews the legal underpinnings of space safety and some of the implications arising from current space policy. She also addresses the relevant historical context and proceeds to describe the current international and domestic legal and policy environment, identifying some key emerging issues and concluding with several recommendations. In doing so, Professor Howard reveals safety as significant both as an element of domestic space law and as a policy driver underpinning those laws. That said, disagreement about methods of assessing risk prevail and disparate approaches in assessment indicate difference in social values—factors that may challenge interoperability of regulatory systems, and in turn, true international cooperation in future space faring missions.

Taken together, the articles described above and published herein touch on virtually every legal issue under the heading of aviation and space

²⁵ Rafael Moro-Aguilar, *National Regulation of Private Suborbital Flights: A Fresh View*, 10 FIU L. REV. 679 (2015).

²⁶ Diane Howard, *Safety as a Synergistic Principle in Space Activities*, 10 FIU L. Rev. 713 (2015).

law. In doing so, the *FIU Law Review* has produced a quality, first-of-its-kind symposium issue that is both deep and broad in its coverage. As important, the university's students—indeed students and scholars anywhere—now have at their ready an excellent and expert resource that will spark interest and raise further questions about the many dimensions of aviation and space law.

In closing, this symposium publication spotlights the excitement and energy that aviation lawyers and subject matter experts bring to the topic. Each of the authors is extraordinarily busy, serving clients, students, and government organizations, in addition to managing other personal and professional demands. Yes, February in Florida was a good selling point for this program, but none of the authors needed to publish or participate to bolster their already expert reputations in the field. What drove each of them to contribute to the FIU Law community was a passion for the subject and a giving nature to share knowledge—they *made* time to research, write, re-write, edit, and polish their articles, and for that, I express sincere gratitude to each of the writers here for their great work.