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AIRCRAFT NOISE: A TAKING OF PRIVATE PROPERTY WITHOUT JUST COMPENSATION

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Little did Orville and Wilbur Wright realize when they made their 1903 flight at Kitty Hawk that they were not only making history with their airplane but were also adding another dimension to the ever increasing problem of the use of airspace above one's property. The problem, commonly referred to today as one of aircraft noise, entered its latest stage in 1958 with the introduction of the jetliner into widespread commercial use. The next stage is fast approaching with the development of a supersonic transport for commercial use.

No one will doubt that the introduction of flight into our society has caused rapid and radical changes in the modern world, from concepts of distance, time and speed, to advanced methods of warfare. Particular attention is called to its impact on the traditional legal concepts governing the use of airspace with emphasis being placed on the Roman law maxim *cujus est solum, ejus esque ad coelum.*[1] The rapid development in this century of the air age necessarily has brought about the eradication of the traditional concept that ownership of real property includes control of the airspace above it to the ultimate limits of the sky. If there had been any doubt that the place of the *ad coelum*[2] doctrine today is in the archives of legal history, this should have been put to rest finally by the Supreme Court case of *United States v. Causby*[3] in which Mr. Justice Douglas stated that the doctrine has no place in the modern world and that Congress in effect has declared the air to be a public highway. If the law was otherwise, he reasoned, then "every transcontinental flight would subject the operator to countless trespass suits."[4]

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1. "He who owns the land owns the airspace above it to the heavens." BLACK, LAW DICTIONARY 453 (4th ed. 1957).

2. *Ibid.*

3. 328 U.S. 256 (1946).

4 *Id.* at 261. Mr. Justice Douglas went further in *Causby* to say that "to recognize such private claims to the airspace would clog their highways, seriously interfere with their control and development in the public interest, and transfer into private ownership that to which only the public has a just claim." *Id.* at 261.

The erosion of the *ad coelum* doctrine is not something new to this century. Its decline was observed as early as 1815 by Lord Ellenborough:

> But I am by no means prepared to say that firing across a field *in vacuo*, no part of the contents touching it, amounts to a *clausum fregit*. Nay, if this board overhanging the plaintiff's garden be a trespass, it would follow then an aeronaut is liable to an action of trespass *quare clausum fregit* at the suit of the occupier of every field over which his balloon passes in the course of his voyage.[5]

On the other hand, Sir Frederick Pollock was of the opinion that an entry above an occupier's land would constitute a trespass even where the entry was made without touching the property "unless indeed it can be said that the scope of the possible trespass is limited to that of possible effective possession, which might be the most reasonable rule."[6] Two years before the landmark *Causby* case the Supreme Court decided *Northwest Airlines v. Minnesota*,[7] where in a concurring opinion Mr. Justice Jackson stated that "aviation has added a new dimension to travel and to our ideas. The ancient idea that landlordism and sovereignty extend from the center of the world to the periphery of the universe has been modified."[8]

The magnitude of the problem of aircraft noise, particularly since the introduction of commercial jetliners, is not only one of national concern but also of international significance. Of particular note in this area are two European developments. Recently the British government has instituted what it calls "Operation Shoo," whereby the government has agreed to pay one-half of the cost of soundproofing three rooms of each affected house. This project has been instituted on a trial basis and is restricted to the residential area immediately surrounding the London airport. Also, recent developments in France illustrate the perils that face the airlines there. A builder in Nice, France,

5. Pickering v. Rudd, 4 Camp. 219, 220-21, 171 Eng. Rep. 70, 71-72 (N.P. 1815).

6. POLLOCK, TORTS 362 (13th ed. 1929).

7. 322 U.S. 292 (1944).

8. *Id.* at 302-03. Mr. Justice Jackson added that "today the landowner no more possesses a vertical control of all the air above him than a shore owner possesses a horizontal control of all the sea before him. The air is too precious as an open highway to permit it to be 'owned' to the exclusion or embarrassment of air navigation by surface landlords who could put it to little real use." *Id.* at 303.

assumed a deliberate risk by placing an apartment building within eighty yards of the airport runway. Subsequently, the builder found that the aircraft noise from more than fifty jets a day at the Nice Airport discouraged prospective tenants and sued Air France, the major contributor to the noise. The airline argued that it was not the correct defendant and that the Nice Chamber of Commerce, the airport operator, should be sued. To the consternation of the government-controlled airline, the French court awarded four hundred thousand dollars in damages to the builder.[9]

In 1926 Congress enacted the Air Commerce Act,[10] which defined the phrase "navigable airspace" to mean airspace above the minimum safe altitudes of flight set by the Secretary of Commerce and established the minimum navigable airspace at one thousand feet over congested areas, including cities and towns, and five hundred feet elsewhere.[11] The Civil Aeronautics Act of 1938 replaced the 1926 act, and this was followed by the Federal Aviation Act of 1958. The 1938 amendment was designed to cover all air commerce.[12] The courts construed "air commerce" to include purely intra-state flights on the theory that such flights penetrate federal airspace or endanger interstate flights.[13] The major importance of the 1958 act was to broaden the definition of the term "navigable airspace" to include "airspace needed to insure safety in takeoff and landing of aircraft."[14]

With this as a background it is appropriate to examine some of the legal problems created by this rapidly advancing air age.

A. Legal Theories of Landowner Relief

While there are several approaches that the landowner can and has used to protect his property rights, two of the most commonly used have been trespass and nuisance. The older approach revolved around nuisance but this provides only injunctive relief, which has become impractical in view of the need for develop-

9. See Time, p. 67 (March 18, 1966).

10. 44 Stat. 568, 574 (1926), as amended, 52 Stat. 1028 (1938), now Federal Aviation Act § 1(3), 49 U.S.C. § 1301(4) (1958).

11. See Federal Air Regulations § 91.79, 28 F.R. 6702 (1963) for current regulations.

12. Civil Aeronautics Act § 1(3), 52 Stat. 977 (1938), now Federal Aviation Act § 1(3), 49 U.S.C. § 1301(4) (1958).

13. *E.g.*, Rosenhan v. United States, 131 F.2d 932 (10th Cir. 1942), *cert. denied*, 318 U.S. 790 (1943).

14. Federal Aviation Act, 72 Stat. 739, 49 U.S.C. § 1301(24) (1958).

ment of a modern air transportation system.[15] The landowner's rights in a trespass action are spoken of in terms of possession, occupancy and control,[16] and this approach has not proved very successful especially when coupled with the restrictive test of reasonable use and enjoyment of the land. Therefore, the Restatement of Torts has moved toward a more fluid approach using many of the concepts found in nuisance actions.[17] A movement toward the nuisance theory, combining the elements of nuisance with remedies available at law, would be an improvement because the court could find an interference with one's land without the actual physical invasion normally required under a trespass theory. Furthermore and probably of more direct importance, the nuisance theory seems to more nearly parallel the balancing of interest test whereby the court weighs the relative interests of the public and private individuals.

Some courts have gone so far as to completely reject the theory of trespass. The Oregon Supreme Court has determined that "whenever the aid of equity is sought to enjoin all or part of the operations of a private airport, including flights over the land of the plaintiff, the suit is for the abatement of a nuisance, and the law of nuisance rather than that of trespass applies."[18] The court went further to say that "the Restatement rule which attempts to pour new wine into the old bottle of trespass appears to be losing adherents, and does not commend itself to this court. . . ."[19] As a capstone to its approval of the nuisance approach, the Oregon court stated that "reasonableness is so inherent in the judicial balancing of interest in the airport cases that most of the decisions . . . simply proceed to investigate the facts and then grant or deny relief upon the basis of the reasonableness of one interest yielding to another in a given case."[20] The balancing of interest test is used, and the vehicle employed is the nuisance concept with only a passing gesture being directed toward the law of trespass.[21]

15. *E.g.*, Burnham v. Beverly Airways, Inc., 311 Mass. 628, 42 N.E.2d 575 (1942) (dictum).

16. RESTATEMENT, TORTS §§ 157-58 (1934).

17. RESTATEMENT, TORTS, Explanatory Note § 194 at 36-38 (Tent. Draft No. 2, 1958).

18. Atkinson v. Bernard, Inc., 223 Ore. 624, 633, 355 P.2d 229, 233 (1960).

19. *Ibid.*

20. *Id.* at 632, 355 P.2d at 232.

21. It should be noted that the 1958 Federal Aviation Act, 72 Stat. 739, 49 U.S.C. § 1301(24) (1958), created a privilege for low level flights, and it has been suggested that this privilege effectively bars injunctive relief. See Hill, *Liability for Aircraft Noise-The Aftermath of Causby and Griggs*, 19 U. MIAMI L. REV. 1, 8 (1964).

In actions against the federal government landowners who suffer injury from overflights have had to rely on the basic constitutional law theories providing for compensation under the power of eminent domain.[22] One of the problems in this area is that tort actions on the theories of trespass and/or nuisance, the traditional grounds for recovery from private individuals,[23] are not available against a governmental body. The barriers here are the doctrine of sovereign immunity and the Tucker Act.[24] Further, the Federal Tort Claims Act offers no remedy for the non-negligent or discretionary acts of federal employees.[25] Under the constitutional approach the landowner must first establish that there has been a "taking." This requires examination of the fifth amendment and its application to the states through the fourteenth amendment.[26] Under these constitutional provisions the courts have traditionally required a physical invasion of the property before they can find a constitutional taking.[27] Fortunately, there appears to be more flexibility in determining compensation in air easements.[28] A point of saving grace is that even if the federal courts follow the strict trespass theory, as evidenced by *Batten v. United States*,[29] the distraught property owner might very well have an action in a state court on a theory of nuisance which would not require a direct overflight.[30] Many state constitutions have broader language permitting a wider coverage than the fifth amendment of the Federal Constitution.[31]

The final problem in this area is that most of the cases mix the elements of trespass and nuisance in attempting to determine whether there has been an interference with the use of land by

22. See 24 U. PITT. L. REV. 603, 606 (1963); 63 COLUM. L. REV. 755, 756 (1963).

23. PROSSER, TORTS §§ 13-14, 70-74 (2d ed. 1955).

24. 28 U.S.C. § 1346(a)(2) (1958).

25. 28 U.S.C. § 1346(b); 28 U.S.C. § 2680(a); Dalehite v. United States, 346 U.S. 15 (1953).

26. Chicago, B.&Q. R.R. v. Chicago, 166 U.S. 226 (1897).

27. See, *e.g.*, Batten v. United States, 306 F.2d 580 (10th Cir. 1962).

28. Note, 74 HARV. L. REV. 1581, 1582-85 (1961).

29. 306 F.2d 580 (10th Cir. 1962).

30. Ackerman v. Port of Seattle, 55 Wash.2d 400, 348 P.2d 664 (1958).

31. See 2 NICHOLS, EMINENT DOMAIN § 6.44 (3d ed. 1963, Cum. Supp. 1966). Twenty-six states are listed as having constitutional provisions that private property should neither be taken for public use nor damaged without just compensation. South Carolina is not within this group. The South Carolina Constitution only provides that "property shall not be taken for private use without the consent of the owner, nor for public use without just compensation being first made therefor." S.C. CONST. art. 1, § 17.

low-flying aircraft sufficient to constitute a taking.[32] This mixture of theories results in confusion when trying to decide which route to follow.

B. The Approach Under the Federal Cases

The approach to the problem by the federal law finds its birth in the concept of a constitutional taking of a proprietary interest in land by inverse condemnation caused by frequent flights at low levels over private property.[33] The landmark case in this area is the 1946 Supreme Court decision of *Causby v. United States*.[34] The original action was instituted in the Court of Claims under the Tucker Act[35] in an attempt to recover just compensation for the alleged taking of an interest in a home and chicken farm. This property was located in the airport approach zone approximately 2,200 feet from the end of the main runway. The federal government leased the airport, and there were frequent low level flights by military aircraft over the land in question. The alleged result was destruction of the use of the property as a chicken farm combined with the loss of sleep, nervousness and fright on the part of the petitioning party. The holding of the Court of Claims was to the effect that over-flights in this particular case constituted a "taking" of an easement of flight for which the petitioner was entitled to just and reasonable compensation.[36] Mr. Justice Douglas, speaking for a majority of the Court, noted that the landowner has a claim to the airspace as an incident of his ownership, and invasions of it are in the same category as invasions of the surface.[37] He further concluded that "flights over private land are not a taking unless they are so low

32. See Griggs v. Allegheny County, 369 U.S. 84 (1962); United States v. Causby, 328 U.S. 256 (1946); Batten v. United States, 306 F.2d 580, 585-87 (10th Cir. 1962) (dissent); Note, 74 HARV. L. REV. 1581, 1583-85 (1961).

33. Inverse condemnation is a phrase used to describe a cause of action against a government defendant to recover the value of property which has been taken in fact by the government defendant without the normal formal procedure of eminent domain. See Thornburg v. Port of Portland, 233 Ore. 178, 376 P.2d 100 (1962).

34. 328 U.S. 256 (1946). (The *Causby* case was decided on May 27, 1946. The Federal Tort Claims Act did not become law until August 2, 1946.)

35. 24 Stat. 505 (1887), 28 U.S.C. § 1491 (1941). This act states that "the Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded upon the Constitution or founded upon any express or implied contract with the United States." In 1946 when the *Causby* case was decided, the pertinent statute was 36 Stat. 1136, 28 U.S.C. § 250(1) (1940) in which the language was almost identical to that stated above.

36. 60 F. Supp. 751 (Ct. Cl. 1945).

37. Causby v United States, 328 U.S. 256, 265 (1946).

and so frequent as to be a direct and immediate interference with the enjoyment and use of the land."[38] The standard established under *Causby* was that "the landowner, as an incident of his ownership, has a claim to [airspace] and that invasions of it are in the same category as invasions of the surface."[39] The Supreme Court held there had been a taking in this situation.[40] One of the unfortunate results of this decision was that the Court spoke in terms of both a trespass and a nuisance which created confusion in determining the underlying theory of the case. Since both *Causby* and *Griggs v. County of Allegheny*[41] involved direct overflights at tree-top level, it has been suggested that both decisions could be supported exclusively on trespass theories.[42]

Batten v. United States[43] illustrates the unfortunate interpretation that the lower federal courts are giving to the *Causby* decision. This case also was an action by the property owners for a taking of property. There was, however, "no physical invasion" of the affected property by the operation and maintenance of the military jet aircraft which produced the noise, vibration and smoke of which the landowner complained. This action was maintained under the Tucker Act,[44] and the Tenth Circuit, citing *Causby*, rested its decision on the need for a direct overflight.[45] The court noted that ear plugs are recommended for Air Force personnel when the sound pressure level reaches eighty-five decibels and ear plugs are required at or above ninety-five decibels.[46] On the plaintiff's property the noise level varied from ninety to one hundred seventeen decibels. Further, the diminution in value of homes ran from a high of 55.3 per cent to a low of 40.8 per cent. As if to pour salt in the plaintiff's wounds, the court recognized that disturbances to property owners may be just as great to those living outside the traffic patterns as to those suffering the burden of a direct overflight, but no amount of sympathy for the plaintiff's plight could change the nature of their claim which was neither trespass nor nuisance.[47] The often

38. *Id.* at 266.
39. *Id.* at 265.
40. *Id.* at 268.
41. 369 U.S. 84 (1962). See *infra,* note 64 and accompanying text.
42. Thornburg v. Port of Portland, 233 Ore. 178, 181, 376 P.2d 100, 103 (1962).
43. 306 F.2d 580 (10th Cir. 1962).
44. 24 Stat. 505 (1887), 28 U.S.C. § 1346(a)(2).
45. Batten v. United States, 306 F.2d 580, 583 (10th Cir. 1962).
46. *Id.* at 582.
47. *Id.* at 583.

quoted phrase from *United States v. Willow River Power Co.*,[48] that "damage alone gives courts no power to require compensation,"[49] was relied on, as was the distinction between consequential damages and a taking.[50] The majority also cited an earlier case which stated that in an action by the government not amounting to an occupancy, there would be a taking "if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter. . . ."[51] The court's quick answer to this was that there had been no deprivation of "all or most" of the plaintiff's interest.[52] Finally in what appears to be an indication of disapproval of their decision, a majority of the court stated that any solution must come through legislative action, and no recovery is available through the Constitution alone.[53]

The dissenting opinion of Chief Judge Murrah in *Batten* appears to be the more logical and just approach to the problem. He did not feel that *Causby* and *Griggs* turned solely on the trespass theory.[54] He stated that "a constitutional taking does not necessarily depend on whether the Government physically invaded the property damaged";[55] rather the government may accomplish by indirect interference the equivalent of an outright physical invasion.[56] Judge Murrah proposed the following constitutional test:

> [F]irst, whether the asserted interest is one which the law will protect; if so, whether the interference is sufficiently direct, sufficiently peculiar, and of sufficient magnitude to cause us to conclude that fairness and justice, as between the State and the citizen requires the burden imposed to be borne by the public and not by the individual alone.[57]

The other major federal case is *Griggs v. County of Allegheny*[58] wherein the proposition advanced in *Causby* was reaf-

48. 324 U.S. 499 (1945).
49. *Id.* at 510.
50. See Transportation Co. v. Chicago, 99 U.S. 635, 642 (1879).
51. United States v. General Motors Corp., 323 U.S. 373, 378 (1945).
52. Batten v. United States, 306 F.2d 580, 585 (10th Cir. 1962).
53. *Ibid.*
54. *Id.* at 587.
55. *Id.* at 586.
56. *Ibid.*
57. *Id.* at 587.
58. 369 U.S. 84 (1962)

firmed, and the question of whom to sue was solved. *Causby* had established that there was a cause of action and a remedy, but it left open the question of where to place the liability. There are three entities which possibly could be held liable: the owner of the over-flying aircraft, the operator of the airport at which the landing or taking off occurs, or the United States Government which controls the paths and altitudes of aircraft. Factually, this case was similar to *Causby*, but here the defendant was the county which designed and built the airport with the assistance and approval of the federal government. As in *Causby*, there were direct overflights by low-level aircraft using the approach zones to the Greater Pittsburgh Airport. The Board of Viewers determined that there was a taking by the county and awarded damages to Griggs. The Pennsylvania Supreme Court reversed, saying that "there had been no taking of the plaintiff's property by the County of Allegheny. . . ."[59] They added that the aircraft which had made the flights over the plaintiff's land should have been held liable.[60] In practice it would be unfair, and it would provide an inadequate remedy, to follow the theory of the Pennsylvania court and require the subjacent landowner to look to the over-flying aircraft for recovery. The landowner's problem of obtaining the identity, type, size, altitude and schedules of the commercial airlines would be further complicated by the presence of military, private and non-scheduled flights.[61]

The Supreme Court refused to agree with the Pennsylvania decision and speaking through Mr. Justice Douglas, stated that:

> [R]espondent, which was the promoter, owner and lessor of the airport, was in these circumstances the one who took the air easement in the constitutional sense. Respondent decided, subject to the approval of the C.A.A., where the airport would be built, what runways it would need, their direction, and length, and what land and navigation easements would be needed. The Federal Government takes nothing; it is the local authority which decides to build an airport *vel non*, and where it is located. We see no difference between its responsibility for the air easements necessary for operation

59. Griggs v. County of Allegheny, 402 Pa. 411, 415, 168 A.2d 123, 127 (1961), *rev'd*, 369 U.S. 84 (1962).

60. *Ibid.*

61. See Note, 74 HARV. L. REV. 1581, 1586-87 (1961) for a discussion of this problem.

of the airport and its responsibility for the land on which the runways are built.[62]

At the time this decision was rendered, the term "navigable airspace" had been defined to include the airspace needed for takeoffs and landings.[63] Mr. Justice Douglas, who wrote the majority opinions in both the *Causby* and *Griggs* cases, noted this change in the statute since the 1946 *Causby* opinion, but citing *Causby*, he indicated that the presence of the *Griggs* aircraft within the navigable airspace would not alter the result.[64] Consequently, the *Griggs* decision stands for the propositions that there is a taking of private property even where planes are taking off or landing within the navigable airspace and that the county or operator of the airport is the correct party to sue.[65]

There have been two recent federal cases in South Carolina.[66] In both cases the district court relied on *Batten* to hold that since there had been no direct overflights, there was no taking within the constitutional sense.

From the development of the federal case law in this area, it is apparent that the basic problem under the present interpretation of *Causby* and *Griggs* is to determine what constitutes a reasonable use and enjoyment of one's land. One theory advanced is that of "possible effective possession" under which the owner is thought to have a proprietary interest in as much of the airspace above his land as he is able to occupy or use in the enjoyment of his land irrespective of whether or not such land is presently being used by the owner.[67] Another approach is under the theory of actual use, whereby the right encompasses that amount of space above the ground that the landowner can occupy and use while enjoying the use of his land.[68] It is apparent that under this theory the right of a landowner to the space above his land is not fixed, and one circuit court has pointed out that "it varies with our varying needs and is co-extensive with them. The

62. Griggs v. County of Allegheny, 369 U.S. 84, 89 (1962).

63. 72 Stat. 739, 49 U.S.C. § 1301(24).

64. Griggs v. County of Allegheny, 369 U.S. 84, 88 (1962).

65. Mr. Justices Black and Frankfurter dissented in *Griggs*. They said that under *Causby* there was a taking, but that the United States and not the county of Allegheny had done the taking. Griggs v. County of Allegheny, 369 U.S. 84, 90 (1962).

66. Bellamy v. United States, 235 F. Supp. 139 (E.D.S.C. 1964); Leavell v. United States, 234 F. Supp. 734 (E.D.S.C. 1964).

67. Thrasher v. City of Atlanta, 178 Ga. 514, 523, 173 S.E. 817, 826 (1934).

68. See Hinman v. Pacific Air Transp., 84 F.2d 755 (9th Cir. 1936).

owner of land owns as much of the space above as he uses, but only so long as he uses it. All that lies beyond belongs to the world."[69] It would appear that the former theory permits the landowner to use all the space above his land so long as he can make effective use of it, while the latter theory permits the landowner to claim that amount of space above his land which he is actually using, and he may claim that amount of space only so long as he continues to make use of it.[70]

A great deal of litigation in the field of avigation easements has revolved around the date of taking. The Tucker Act has a statute of limitation period barring suits not begun within six years after the cause of action arose. In the case of an avigation easement, this period begins to run at the date of taking.[71] Common law principles come into play here also, and if the plaintiff purchased land after the avigation easement had been "taken," the title which the purchaser acquired would be subject to a prescriptive easement.[72] The introduction of the jet aircraft into commercial service in mid-1958 brought on a new flood of cases, as illustrated by *Highland Park v. United States*.[73] The United States had operated propeller-driven aircraft at Hunter Air Force Base without objections from landowners because these craft did not seriously disturb the "use and enjoyment" of the property.[74] In December, 1953 the Air Force introduced the B-47 jet aircraft into service. The operation of this type of aircraft at low altitudes did disturb the claimant's property and was held to constitute a taking for which compensation should be allowed.[75] The court noted that the difficult question was setting a just compensation,[76] and in placing a value on the property to establish amount of compensation, the "date of taking" was set at December 31, 1953 when the jet aircraft were introduced at the Hunter base.[77] Finally, the court held that the defendant, the United States, was "vested with a perpetual easement of

69. *Id.* at 758.

70. Another theory advanced is that the airspace is like navigable waters. See Harvey, *Landowner's Right in the Air Age: The Airport Dilemma*, 56 MICH. L. REV. 1313, 1318 (1958).

71. 28 U.S.C. § 2501 (1948); United States v. Dickinson, 331 U.S. 745 (1947).

72. Smithdeal v. American Airlines, 80 F. Supp. 233, 234 (N.D. Tex. 1948).

73. 142 Ct. Cl. 269 (1958).

74. *Ibid.*

75. *Ibid.*

76. *Ibid.*

77. *Id.* at 274-75.

flight over plaintiff's property at an elevation of one hundred feet or more above the ground with airplanes of any character."[78]

When again faced with the problem of "when did this interference become so serious that a taking occurred and a cause of action arose,"[79] the Court of Claims attempted to lay down an objective standard.

> [T]here is, unfortunately, no simple litmus test for discovering in all cases when an avigation easement is first taken by overflights. Some annoyance must be borne without compensation. The point when that stage is passed depends on a particularized judgment evaluating such factors as the frequency and level of the flights; the type of planes; the accompanying effects, such as noise or falling objects; the uses of the property; the effect on values; the reasonable reactions of the humans below; and the impact upon animals and vegetable life.[80]

One case, decided in 1958, indicated that the taking of an avigation easement over a tract of land at a certain elevation gave the government the right to operate every type of aircraft in the affected airspace.[81] A more recent decision stands for the proposition that even where the government has previously acquired a perpetual easement for the flight of aircraft, the subsequent introduction of heavier, noisier aircraft constitutes a new taking even though the new aircraft do not violate the boundaries of the initial easement.[82] This would appear to be the most reasonable approach to the problem.

Under the federal approach to the taking of avigation easements, the fifth amendment of the United States Constitution provides for just compensation for a *taking of*, but not *damages to*, private property.[83] The federal government is not required to pay for consequential damages in taking or acquiring an interest in private property by direct action or by inverse condemnation. The controlling rule was established by *Transportation Co. v. Chicago*[84] to the effect that acts done in the lawful

78. *Id.* at 276.
79. Jensen v. United States, 158 Ct. Cl. 333, 338 (1962).
80. *Ibid.*
81. Adaman Mut. Water Co. v. United States, 143 Ct. Cl. 921 (1958).
82. Avery v. United States, 165 Ct. Cl. 357 (1964).
83. "[N]or shall private property be taken for public use without just compensation." U.S. CONST. amend. V.
84. 99 U.S. 336 (1878).

exercise of governmental authority may impair the use of property with a corresponding fall in its value, but such acts do not require just compensation unless there is an actual encroachment or invasion of the property. Those damages experienced by the individual, as opposed to those experienced by the public at large, are the only damages for which the federal government may be liable.[85] Just compensation is paid to those property owners who suffer damages different in kind, and not merely in degree, from those which are "common to the public at large."[86]

C. The Approach Under the State Cases

The point of primary importance in this area is that the illogical, and in many cases unjust, restriction found in the area of recovery against the federal government is not necessarily carried over into suits against municipal, county or state governments. The theory of trespass has not been blindly followed by the state courts.[87] Furthermore, several state constitutions include language allowing recovery for a "taking" as well as for a "damaging."[88] The South Carolina Constitution only specifies "taking," but this has been held to include "damaging."[89] The court has declared that "a property owner is entitled under the applicable constitutional provision to compensation for damaging or taking of his property resulting from the obstruction by the State of surface waters. . . ."[90] In another case the court said that "in construing this provision of the Constitution (Art. 1, Sec. 17), we have held, along with many other courts, that an actual physical taking of property is not necessary to entitle its owner to compensation."[91] Further, "to deprive him of the *ordinary beneficial use and enjoyment* of his property is, in law, equivalent to a taking of it, and is as much a 'taking' as though the property itself were actually appropriated."[92]

Some states have only the restrictive language of the federal constitution, but Oregon, a state with such language in its con-

85. Richards v. Washington Terminal Co., 233 U.S. 546 (1914).

86. Thompson v. Kimball, 165 F.2d 677, 681 (8th Cir. 1948).

87. Martin v. Port of Seattle, 64 Wash. 2d 309, 391 P.2d 540 (1964); Thornburg v. Port of Portland, 233 Ore. 178, 376 P.2d 100 (1962).

88. 2 NICHOLS, EMINENT DOMAIN § 6.44 (3d ed. 1963).

89. S.C. CONST. art. 1, § 17 (1895).

90. Milhous v. State Highway Dep't, 194 S.C. 33, 41, 8 S.E.2d 852, 857 (1940).

91. Gasque v. Town of Conway, 194 S.C. 15, 21, 8 S.E.2d 871, 873 (1940).

92. *Ibid.* (Emphasis added.)

stitution,[93] has charted a course which in logic and reasoning is unassailable. *Thornburg v. Port of Portland*[94] involved an action of inverse condemnation for flights directly over the plaintiff's land, which amounted to a nuisance, and for flights which passed close to, but not directly over, the plaintiff's land likewise constituting a nuisance. The plaintiff's theory was one of nuisance, while the defense was that of no trespass and further that the flights in question were within the public domain. The Oregon court first recognized that freedom from noise can be a legally protected right. The court determined that it must accept:

> [T]he principles of the law of servitude and the validity of the propositions that a noise can be a nuisance; that a nuisance can give rise to an easement; and that a noise coming straight down from above one's land can ripen into a taking if it is persistent enough and aggravated enough, then logically the same kind and degree of interference with the use and enjoyment of one's land also can be a taking even though the noise vestor may come from some direction other than the perpendicular.[95]

The Oregon court took direct aim at the *Batten* case and clearly showed the fallacy of that decision. The *Thornburg* case turned on the theory of nuisance which could ripen into an easement, and thereby constitute a taking, and as if to ensure that there would be no doubt about the position of Oregon on this point, the court further concluded:

> [I]t is a sterile formality to say that the government takes an easement in private property when it repeatedly sends aircraft directly over the land at altitudes so low as to render the land unusable by its owner, but does not take an easement when it sends aircrafts a few feet to the right or left of the perpendicular boundaries (thereby rendering the same land equally unusable). The line on the ground which marks the landowner's right to deflect surface invaders has no particular relevance when the invasion is a noise nuisance. Neither is the 500 foot ceiling relevant, desirable though it may be as an administrative devise.[96]

93. ORE. CONST. art. 1, § 18.
94. 233 Ore. 178, 376 P.2d 100 (1962).
95. Thornburg v. Port of Portland, 233 Ore. 178, 184, 376 P.2d 100, 106 (1962).
96. *Id.* at 187, 376 P.2d at 109.

The state of Washington has a constitutional provision providing for both taking and damaging.[97] In *Martin v. Port of Seattle*[98] the Washington Supreme Court had before it a group of plaintiffs who were suffering from direct overflights, a second group in which there was a dispute as to whether or not there were any direct overflights and a third group wherein the property owners suffered no direct overflights. Recovery was allowed to those plaintiffs outside the flight path; however, of more significance was the court's statement that "substantial injury" had no place in an action for inverse condemnation but rather comes to light in the determination of damages.[99] The court said where other requirements are present but the injury is such as to be called "incidental," then "recovery would not be forthcoming. This is so not because of some arbitrary rule set for convenience in administration of justice, but because of an inability to prove damages according to the common and well understood rules of suit."[100] Such an approach is more liberal than that of the *Thornburg* case, which used the balancing of interest test in conjunction with the requirement of substantial injury before one could reach a determination of damages.

The Kentucky Court of Appeals was faced with the typical problem in *Louisville & Jefferson County Air Bd. v. Porter*[101] where a suit based on the theory of nuisance was instituted for diminution in market value of homes near the airport. The lower court awarded damages to the appellee, and the court of appeals recognized that the non-negligent operation of a business could give rise to a nuisance. The turning point of the case was the manner in which the court viewed the evidence, concluding that "the operations of which the Porters [appellees] complain are reasonable and for the most part necessary and unavoidable."[102] The court went further to recognize that the damage to the appellee had been substantial but said that his annoyance was not materially different from that which all persons living near a large airport had endured.[103] While it may seem that the Kentucky court has disregarded all of the theories generally found

97. WASH. CONST. art. 1, § 16, amend. 9.
98. 64 Wash. 2d 309, 391 P.2d 540 (1964), *cert. denied,* 379 U.S. 989 (1965).
99. Martin v. Port of Seattle, 64 Wash. 2d 309, 315, 391 P.2d 540, 546-47 (1964), *cert. denied,* 379 U.S. 989 (1965).
100. *Ibid.*
101. 397 S.W.2d 146 (Ky. 1965).
102. Louisville & Jefferson County Air Bd. v. Porter, 397 S.W.2d 146, 152 (Ky. 1965).
103. *Ibid.*

applicable, it probably can be better explained on the ground that under the court's view of the evidence, coupled with the importance of the airport to the community, the appellee did not adequately bear his burden of proof.[104]

D. Future Problems

In 1961 it was estimated that more than sixty-five million take-offs and landings occur each year at airfields in the United States;[105] the figure is undoubtedly larger today and will increase continuously in the future. The introduction of the commercial jetliner into widespread use brought this problem area to a head in 1958 and the ensuing years. The Federal Aviation Agency has found that the modern four-engine commercial jetliner, after take-off, casts a one hundred decibel overpressure on land beneath its path of flight to a lateral width of one-half mile on either side of the path and to a distance of over three miles from the point of take-off.[106] The plight of the subjacent landowner will enter its next stage with the introduction of the supersonic jet transport, and to further complicate matters there is the sonic boom which follows the aircraft while it is above the speed of sound. Such a sonic boom will travel the breadth of the land during a New York to San Francisco flight, and its effects on the subjacent landowner are still open to question and investigation.

No cases have yet reached the South Carolina Supreme Court. However, with increased industrialization and the opening of three jet airports in the state it is only a matter of time before the court will be presented with the problem. It is hoped that when the question arises, the court will not adopt the restrictive view of the majority in *Batten* but rather will follow the view of Judge Murrah.[107] South Carolina, by court interpretation, is not hampered as is the federal government in the distinction between taking and damaging. The property rights of the subjacent landowner should not be violated, and when the scales are tipped to the side of the landowner's interest and he has shown substantial interferences, it is to be recommended to the South Carolina Supreme Court that it permit recovery without restricting this state to a strict view of trespass.

104. No cases on this topic have reached the South Carolina Supreme Court.
105. Note, 74 HARV. L. REV. 1581 (1961).
106. F.A.A., NOISE ABATEMENT PLANNING SERIES, No. 3 (1960).
107. See generally Harvey, *Landowner's Rights in the Air Age: The Airport Dilemma*, 56 MICH. L. REV. 1313, 1317 (1958); 74 HARV. L. REV. 1581 (1961).