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LANDOWNERS' RIGHTS IN THE AIR AGE: THE AIRPORT DILEMMA*

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IF Lord Tennyson had been a student of the common law, he might well have qualified his poetic foresight of "the heavens fill[ed] with commerce" by some cautious reference to the complaints of landowners below against the "pilots of the purple twilight, dropping down with costly bales." The result doubtless would have been poorer poetry but a far more accurate forecast of the problems to confront mid-20th century lawyers. Although the phenomenal growth of civil aviation since the first World War has opened up a host of difficulties, the only ones of concern in this article are those presenting the conflict of interest between the operators of aircraft and the owners of land over which they fly. I should also emphasize from the outset that I do not offer a definitive study. My aim is far more modest—to put in perspective a battery of acute problems which await solution.

The area of conflict is fairly well restricted and may be defined with substantial precision. Insofar as high level flight is concerned, no one today seriously suggests that it infringes upon the rights of the underlying landowner. If the ancient maxim—*Cujus est solum ejus est usque ad coelum*—was ever a vital force in our law, its epitaph was spoken by the Supreme Court of the United States in 1946: ". . . that doctrine has no place in the modern world. The air is a public highway as Congress has declared. Were that not true, every transcontinental flight would subject the operator to countless trespass suits. Common sense revolts at the idea. To recognize such private claims to the airspace would clog these 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."[1] Nor are

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[1] United States v. Causby, 328 U.S. 256 at 261 (1946).

we now concerned with the rights and liabilities arising in those relatively rare instances when an airplane or some object from it actually collides with the land.

Our attention will be focused on the modern airport and the entry of planes, in the course of take-off and landing, into airspace superjacent to land in the vicinity of the airport. The problem originated with the first flight of power-driven aircraft, but it steadily grows more serious. This can be explained briefly. Aside from helicopters and certain craft still at the experimental stage, planes take off and land along an inclined flight-path extending from the end of the runway. In order to assure that this flight path is free of obstructions, clearance standards commonly make use of an imaginary inclined plane, extending upward from a point near the runway end,[2] the so-called glide angle plane. The small, light planes used in the early years of civil aviation required a glide angle plane for take-off and landing which may be described by the ratio 7-1, seven feet of horizontal movement for each foot of ascent or descent. At this stage, therefore, landowners with some reasonable basis for complaint against flights above their land at low altitudes were usually confined to those in the immediate environs of the airport. Progress in plane design and manufacture has brought a steady flattening of the glide angle plane, however, and a modern airport, equipped to accommodate the larger, heavier planes in use today should probably make provision for a glide angle plane of a ratio of about 50-1. Thus the area within which planes taking off and landing regularly fly at relatively low levels may today extend several miles from the boundaries of the airport proper.

In many cases complaints by landowners against flights over their lands have been considered by the courts. It is not my purpose to examine these decisions in detail; analyses are plentiful in the literature.[3] We do need, however, to look briefly at the analytical framework within which the complaints have been

2 See Administrator of Civil Aeronautics, Technical Standard Order, N-18.

3 See, for example, RHYNE, AIRPORTS AND THE COURTS (NIMLO Rep. No. 106) (1944); Rhyne, "Airport Legislation and Court Decisions," 14 J. AIR L. 289 (1947); Hackley, "Trespassers in the Sky," 21 MINN. L. REV. 773 at 803 (1937); Green, "Trespass by Airplane," 31 ILL. L. REV. 499 (1936); Sweeney, "Adjusting the Conflicting Interests of Landowner and Aviator in Anglo-American Law," 3 J. AIR L. 329, 531 (1932); Kingsley and Mangham, "The Correlative Interests of the Landowner and the Airman," 3 J. AIR L. 374 (1932); Fagg, "Airspace Ownership and the Right of Flight," 3 J. AIR L. 400 (1932).

considered. In a large majority of the cases, ownership has been the basic concept employed—that is, ownership of a column of airspace defined by imaginary projections upward of the boundaries of the land—so as to make available to the landowner a remedy against trespass. The more difficult problem has arisen in defining the upper limit of such ownership. While asserted by some plaintiffs and broadly stated in some statutes,[4] I believe the common law notion of ownership extending vertically from the bowels of the earth to the ceiling of the sky has had relatively little influence on the actual course of decision. Judicially sanctioned claims have been much more modest. In Massachusetts, for example, the view has been followed that airspace below the level specified by federal and state legislation as the minimum safe altitude of flight belongs to the landowner, so that flights by planes below that level would *ordinarily* constitute "at least a technical trespass."[5] On the other hand, the Court of Appeals for the Ninth Circuit has limited the ownership-trespass zone to "as much of the space above [the landowner] as he uses, but only so long as he uses it."[6] Since the concept of "use" is relatively ambiguous and therefore flexible, this view probably does not restrict the landowner's interest as sharply as might at first appear. It seemingly contemplates protection of the airspace actually occupied plus a further buffer area in which incursions by planes would be "an actual interference with . . . [the landowner's] possession or his beneficial use. . . ."[7]

If the prime method for ascertaining the limits of the ownership-trespass zone in airspace is by determining whether the landowner's use and enjoyment of the surface have been subjected to unreasonable interference, it is apparent that the concept of nuisance is equally available with trespass as an analytical tool. In fact, some decisions range freely over both the trespass and the nuisance rationales—the airspace zone in which intrusion by air-

4 More than 20 states enacted §§3 and 4 of the Uniform Aeronautics Act [11 U.L.A. §§3, 4 (1938)] which provided that "the ownership of the space above the lands and waters of the state is declared to be vested in the several owners of the surface beneath," subject to a right of non-harmful flight. The Uniform Act was withdrawn from the active list by the Commissioners on Uniform State Laws in 1943. The American Law Institute's *Restatement of the Law of Torts*, §194 (1934), also appears to recognize ownership of superjacent airspace *ad coelum* subject to a privilege of flight.

5 Burnham v. Beverly Airways, 311 Mass. 628 at 636, 42 N.E. (2d) 575 (1942); Smith v. New England Aircraft Co., 270 Mass. 511, 170 N.E. 385 (1930).

6 Hinman v. Pacific Air Transport, (9th Cir. 1936) 84 F. (2d) 755 at 758.

7 Id. at 758.

craft would be a nuisance apparently being considered in certain opinions as coterminous with that in which it would constitute a trespass,[8] while others which rely upon nuisance as the ground of decision might easily be interpreted in trespass terms.[9]

One further basis for relief of the landowner was employed by the Supreme Court of the United States in *United States v. Causby*.[10] The Causbys owned a small chicken farm near a Greensboro, North Carolina airport which the United States leased in 1942. While planes had flown over their land for many years without objection from the Causbys, the situation changed drastically with the government's introduction of heavier, more powerful planes—bombers, transports and fighters—and with the greatly increased frequency of flights. The glide angle plane approved by the Civil Aeronautics Authority passed over the Causby property at a height of 83 feet, and the evidence showed that planes actually flew so low as to blow the old leaves off the trees. Chickens flew into the walls from fright and were killed; the Causbys became nervous and frightened. The Court of Claims allowed recovery on the ground that such use of the airspace over the Causby property constituted a taking of property by the United States,[11] and the Supreme Court sustained the granting of relief on this basis.[12]

While flatly rejecting the *ad coelum* doctrine, the Supreme Court recognized the landowner's ownership of "at least as much of the space above the ground as he can occupy or use in connection with the land." Whether the Court's use of the word "can" in this context contemplated an extension of protection beyond the area of actual use to that of reasonable expectation need not be debated here. The essential idea is merely that within some vaguely defined zone of airspace, repeated invasions by planes may constitute a taking of property. In fact, it does not seem to me critical that the Court talked of ownership in airspace, since

8 Delta Air Corp. v. Kersey, 193 Ga. 862, 20 S.E. (2d) 245 (1942).

9 Swetland v. Curtiss Airports Corp., (6th Cir. 1932) 55 F. (2d) 201. Note the concurring opinion of Judge Hickenlooper who appears to believe that his colleagues based the remedy on trespass doctrine.

10 328 U.S. 256 (1946).

11 Causby v. United States, (Ct. Cl. 1945) 60 F. Supp. 751.

12 The judgment of the Court of Claims was actually reversed on the ground that its findings of fact did not adequately describe the nature of the easement taken by the government. The Supreme Court could not therefore determine the propriety of the amount of recovery.

the flights had substantially deprived the Causbys of their beneficial use of the surface. Use of the concept of a constitutional taking in order to protect the landowner who complained of intrusions in the air above him did not originate in the *Causby* case. It had been invoked in an earlier case when guns had been fired repeatedly over land[13] and had been at least suggested in a case involving intrusions by planes.[14] Its use in the *Causby* case may be explained perhaps by the fact that the Supreme Court handed down its decision on May 27, 1946, whereas the Federal Tort Claims Act was not passed until August 2, 1946. In any event, the *Causby* rationale now enjoys the prestige of acceptance by our highest court, and, as we shall see, has strongly influenced later efforts to solve the problems presented by low-flying planes.

The significant post-*Causby* efforts to resolve the landowner-flyer dilemma have been focused on two recent cases, in which the Civil Aeronautics Board and the Administrator of Civil Aeronautics presented the federal position. Each case requires close examination. The first, *Gardner v. Allegheny County*,[15] grew out of the complaints of landowners in the vicinity of the greater Pittsburgh Airport, which was erected, owned, and maintained by Allegheny County but operated under leases by the airlines which were named co-defendants. The plaintiffs, occupying houses built and bought before the nearby property was acquired for an airport, complained of flights in the course of take-off and landing about fifteen to thirty feet above the chimneys of their respective houses. These flights were alleged to be continuing trespasses and a "taking" of the properties. Plaintiffs asked alternatively for an injunction against flying over their properties *below the floor of the navigable airspace* or payment to them of the fair value their properties would have without air operations in the area. The case reached the Supreme Court of Pennsylvania on preliminary objections raising the question, inter alia, whether plaintiffs stated a cause of action within the jurisdiction of a court of equity. By leave of the court, the Civil Aeronautics Board and the Administrator of Civil Aeronautics filed a brief as amici curiae, and it is on the views there advanced that our interest focuses.

The basic thesis advanced by the agencies was that a right to fly over private land without consent is conferred upon the public

[13] Portsmouth Co. v. United States, 260 U.S. 327 (1922).
[14] Delta Air Corp. v. Kersey, 193 Ga. 862, 20 S.E. (2d) 245 (1942).
[15] 382 Pa. 88, 114 A. (2d) 491 (1955).

by the Constitution of the United States. The basis of this asserted right was found in "the self-executory operation of the Commerce Clause,"[16] by analogy to the right of transit in navigable waters. It was further insisted that "this right would exist even if no federal legislation confirming or expressing it had been enacted."[17] The exact dimensions of this right were not, however, traced to the Constitution but to a complex pattern of federal legislation and administrative regulation.

The federal legislation recognizes a "public right of freedom of transit in air commerce through the navigable air space of the United States."[18] What is "navigable air space" thus becomes the critical question. It is defined by statute as "air space above the minimum altitudes of flight prescribed by regulations issued" by the Civil Aeronautics Board.[19] We are not now particularly concerned with those parts of the pertinent regulations which specify a minimum altitude over congested areas of 1000 feet and over non-congested areas of 500 feet.[20] These figures have remained constant over the years. But does an aviator enjoy the right of flight in navigable air space below the level of 500 feet in the course of take-off and landing? On this question the regulations have vacillated. Prior to 1930, the regulations specified minimum safe altitudes of flight "exclusive of taking off from or landing on" an airport.[21] Thus initially these critical phases of flight were seemingly outside the protected area. In 1930, a change in the wording of the regulation, perhaps motivated by the issuance of an injunction against airport operations in the *Swetland* case,[22] made it quite clear that the navigable air space was to include an appropriate take-off and landing zone.[23] Effective

16 Quoted from the agencies' brief, p. 4. This brief will be cited hereafter as "Amici Curiae."

17 Id. at 8.

18 Civil Aeronautics Act of 1938, §3, 52 Stat. 980, 49 U.S.C. (1952) §403; Air Commerce Act of 1926, §10, 44 Stat. 574, 49 U.S.C. (1952) §180.

19 Civil Aeronautics Act of 1938, §1, 52 Stat. 977, 49 U.S.C. (1952) §401; Commerce Act of 1926, §10, 44 Stat. 574, 49 U.S.C. (1952) §180.

20 Civil Air Regulations, §60.17, 14 C.F.R. (1956) §60.17. The latest revision of this regulation appears in 20 Fed. Reg. 6694 (1955).

21 1928 U.S. Av. Rep. 405 at 408.

22 Swetland v. Curtiss Airports Corp., (N.D. Ohio 1930) 41 F. (2d) 929, modified (6th Cir. 1932) 55 F. (2d) 201.

23 The amended regulation provided: "The minimum safe altitudes of flight in taking off or landing, and while flying over property of another in taking off or landing, are those at which such flights by aircraft may be made without being in dangerous proximity to persons or property of the land or water beneath, or unsafe to the aircraft." See Sweeney, "Landowner and Aviator," 3 J. AIR L. 531 at 600 (1932).

November 1, 1937, the old form of regulation was re-adopted,[24] however, and was in effect at the time of the *Causby* case. Thus, the Supreme Court was warranted in declaring that "the flights in question were not within the navigable airspace which Congress placed within the public domain."[25] The current form of regulation upon which the federal agencies based their argument in the *Gardner* case became effective on July 1, 1945.[26] We must look further at it.

The present section 60.17 of the Civil Air Regulations prescribes minimum safe altitudes at 1000 and 500 feet "except when necessary for take-off or landing." Whether this form of language is sufficient to bring take-off and landing levels within the navigable airspace has been questioned,[27] but the Civil Aeronautics Board has interpreted it "as establishing a minimum altitude rule of specific applicability to aircraft taking off and landing. It is a rule based on the standard of necessity, and applies during every instant that the airplane climbs after take-off and throughout its approach to land. Since this provision does prescribe a series of minimum altitudes within the meaning of the act, it follows, through the application of section 3, that an aircraft pursuing a normal and necessary flight path in climb after take-off or in approaching to land is operating in the navigable airspace."[28] There is no thought to question here the reasonableness of this interpretation of the language of regulation 60.17, the conformance of that regulation with the intent of the Congress, or the constitutionality under the commerce clause of implementing that intention. The question nevertheless remains—if the public has a right of transit through the airspace down to the surface of the earth, insofar as this is necessary for take-off and landing, what right if any is enjoyed by the landowner whose property is traversed by such low level flights?

24 2 Fed. Reg. 2181 at 2184 (1937).

25 United States v. Causby, 328 U.S. 256 at 264 (1946).

26 10 Fed. Reg. 5066 (1945).

27 In apparent recognition of such questions the Civil Air Policy Report of the Air Coordinating Committee, released by the President on May 26, 1954, recommended that the regulations be examined to determine the desirability of revision "to dispel any possible inference that the federal government has not exercised its regulatory jurisdiction over the entire flight of an aircraft in the airspace above the United States navigable in fact."

28 Civil Air Regulations, Part 60, Interpretation No. 1, adopted July 22, 1954, 19 Fed. Reg. 4602 at 4603 (1954).

The answer provided by the federal agencies, as reflected in their brief in *Gardner v. Allegheny County,* may be briefly stated—the landowner has no right against such flights until their interference with his enjoyment of his property approximates a constitutional "taking." At that point the constitutional guarantee of compensation for private property appropriated to a public use takes hold. The agencies' answer as to *who must pay* is clear only in a negative sense, however—the United States is not liable. The amici curiae insisted:

> "But neither from the basic constitutional provision nor from the congressional enactments thereunder, nor from the administrative regulations and licenses authorized by congressional delegation of power, does it follow that the Government of the United States has assumed the obligation of providing a free highway in airspace under circumstances where it can not be used by modern aircraft without compensation to landowners. The air traffic regulations, of course, have no collateral effect of bestowing a right to fly vis-a-vis landowners. Nor does economic operating authority have such an effect. The certificates of public convenience and necessity pursuant to which the regular airlines furnish common carriage do not imply a governmental guarantee against liability to landowners nor make these private carriers the agents of the Government. Even less is the Government responsible for any 'taking' of private land which may result from the location of airports over which it has no control."[29]

Moreover, in the agencies' view, annoyance to the landowner falling short of a taking is immunized by the so-called "legalized nuisance" doctrine.[30] The legalization was traced to the declarations of the federal statutes rather than to a state or local legislation dealing more directly with the establishment of airports.

The views presented by the agencies in the *Gardner* case as to the effect of federal law on the remedies available to landowners are complex and confusing. Where flights lower than necessary for take-off or landing are made, the landowner was said to have an option of an administrative remedy under federal law[31] or

29 Amici Curiae, pp. 16-17.

30 The agencies relied on such cases as Richards v. Washington Terminal Co., 233 U.S. 546 (1914).

31 Civil Aeronautics Act of 1938, §§1002(c), 1005(a), 1007(a), 52 Stat. 1018, 1023, 1025, 49 U.S.C. (1952) §§642(c), 645(a), 647(a).

a legal or equitable remedy in the courts. Because of an asserted need for expert judgment and national uniformity, the agencies further insisted that where a dispute arises in a judicial proceeding as to whether flights complained of are lower than necessary (and thus outside the navigable airspace), the courts must stay their proceedings until this question is administratively determined by the federal agency. If the determination is made that the flights are unnecessarily low, the state substantive law and arsenal of remedies then presumably have full operation. On the other hand, if the flights are found not to be unnecessarily low (and thus within the navigable airspace), the question must then be decided by the court whether the resulting injury to the landowner is within the range immunized by the *federal* legalization of a nuisance or is sufficiently serious that it constitutes a taking of property requiring compensation. At this point the analysis urged by the agencies becomes exceedingly vague and difficult to understand. The question was suggested whether, if a taking is found to have occurred, the landowner may be protected by an injunction against the flights. The answer offered was "that federal law inhibits injunctions against otherwise lawful flight in navigable airspace except where less drastic remedies for the invasion by such flights of constitutionally protected property rights are inadequate as a matter of constitutional law."[32] This statement would seem to have meaning or significance only if it is assumed that in some instances the "less drastic" remedy of compensation for a taking of private property is constitutionally inadequate. If such can be the case, it would seem to postulate a novel and extremely vague limitation on the power of eminent domain. I am inclined to suspect that the agencies' brief reflects in this regard inadequate analysis of the constitutional protection. If a taking of an authorized sort has occurred, surely the maximum of the landowner's right is compensation up to the full value of his property. Short of that, the essential questions concern the scope of the interest taken and its proper value. On the agencies' own theory, injunction against the taking would not appear to be an available remedy, unless the very foundations for the exercise of the power of eminent domain are successfully attacked.

[32] Amici Curiae, p. 24.

The decision of the Supreme Court of Pennsylvania in the *Gardner* case contributes little to an assessment of the court's willingness to accept the views advanced by the federal agencies. The case having come up on preliminary objections to the plaintiffs' pleading, the court was able to remand for trial without considering the merits of the government's arguments. The complaints had alleged that the flights were *below the floor of the navigable airspace;* by their preliminary objections defendants were regarded as admitting this fact. While the court showed some disposition to accept the extension of navigable airspace down to the surface of the earth insofar as this is necessary for take-off and landing, the defendants by their procedural admission were foreclosed from taking advantage of this view. The complaint was therefore held to state a cause of action for equitable relief by injunction against repeated trespasses below the navigable airspace. On the alternative claim for relief the court further held that a court of equity in Pennsylvania had no jurisdiction to assess damages for a taking of property. In order to obtain such relief plaintiffs would have to pursue a special remedy defined by the statutes of the commonwealth. Questions as to who would be liable for such a taking and who the necessary parties to an action for compensation would be were expressly left unanswered.

One other case, *Allegheny Airlines, Inc. v. Village of Cedarhurst,*[33] which bears upon the present problem, though not as directly as *Gardner v. Allegheny County,* must be mentioned. In 1952, the Village of Cedarhurst, situated adjacent to the New York International Airport (Idlewild) passed an ordinance prohibiting flights over the Village at any altitude less than 1,000 feet. Airlines using Idlewild, the New York Port Authority (operator of the airport) and certain pilots who flew planes into the airport sued to enjoin the enforcement of the ordinance. Subsequently the Civil Aeronautics Board and the Administrator of Civil Aeronautics intervened as complainants in the suit. While the Village and its officers initially asserted that flights over the Village, which the evidence showed were never lower than 450 feet, were invasions of property rights through trespass and nuisance, these claims were later entirely withdrawn. Thus, the problem of the impact of federal aviation law on the rights of private landowners

[33] (2d Cir. 1956) 238 F. (2d) 812.

was not involved in the decision of the Court of Appeals for the Second Circuit affirming a permanent injunction against enforcement of the ordinance by the Village.

The arguments advanced by the intervening federal agencies in the *Cedarhurst* case do have some relevance, however. In general, they proceeded along the same lines as in the *Gardner* case but with certain possibly significant differences. It may be noteworthy that while in the *Gardner* case the federal agencies had urged that the right of free transit in airspace arose through the self-executing operation of the commerce clause, this contention was modified in the *Cedarhurst* argument: "it is our position that the 'public right of freedom of transit' in navigable airspace declared to exist by the Air Commerce Act and the Civil Aeronautics Act stems from a valid congressional exercise of power conferred by the Commerce Clause of the Constitution."[34] The argument was then made, and ultimately accepted by the court of appeals, that the Congress had thus pre-empted the field of air traffic regulation to the exclusion of local legislation like the ordinance attacked. As part of their analysis of the pattern of federal regulation, the agencies again contended that the navigable airspace, through which a public right of freedom of transit exists, extends, subject only to the criterion of necessity, down to the surface of the earth. The court of appeals clearly accepted this argument and sustained the validity of the pertinent CAB regulations. Although the rights of private landowners in relation to those exercising the right of flight were not directly involved, the courts' discussion was in terms of protection only when the airspace use has achieved the status of a constitutional "taking."

I have explored in some detail the arguments advanced in *Gardner v. Allegheny County,* and *Allegheny Airlines, Inc. v. Village of Cedarhurst* because of their obvious importance to the ultimate determination of the aviator-landowner dilemma. It seems to me imperative that these be understood not only because of the partial answers they would provide, if generally accepted, but because of the important, in fact crucial, questions they raise but totally fail to answer.*

[34] Brief of the federal agencies, p. 10. This brief will be cited hereafter as "Intervenor."

*Newark v. Eastern Airlines, (D.C. N.J. 1958) 159 F. Supp. 750, decided since this article was written, should be noted. The City of Newark, a number of other municipalities in the vicinity, and certain individuals sued the airlines using the Newark Airport. In the first count of the complaint, plaintiffs sought to enjoin the defendant airlines

Certain postulates of the federal position can be stated briefly and put aside, for surely today they cannot be seriously questioned. The development of aviation facilities and the use of the airspace as a medium of transportation are in the public interest, and maximum utilization presupposes substantial national uniformity of regulation. While federal power in this area is bottomed primarily on the commerce power, intrastate flights are within the range of the pertinent federal regulatory scheme because of their relation to and effect upon the movement of interstate and foreign commerce.[35] The development of aviation must, however, be considered in relation to other interests on which from time to time it may infringe. Thus we are presented with a complex series of questions which involve essentially a balancing of competing, important interests. How well does the evolving federal view accomplish that balancing?

Should the problem be treated entirely at the constitutional level? In examining the arguments advanced in the two cases considered, I am impressed by the tendency to seek solutions primarily in the lofty halls of the Constitution. In the *Gardner* case the

from operating any planes over the conjested residential areas of the municipalities lower than 1200 feet from the ground; in the second, to enjoin alleged trespasses to the plaintiffs' realty as well as to recover damages for prior trespasses by planes. The views of the district court on the issues raised in the text are by no means clear. The court discussed the federal statutes and regulations and declared (at 756) that the "navigable airspace . . . includes not only the space above the minimum altitude of 1,000 feet prescribed by the regulation but also that space below the fixed altitude *and apart from the immediate reaches above the land.*" [Emphasis added.] Concluding that the relief prayed in the first count of the complaint would impinge upon the statutory authority of the Civil Aeronautics Board, the court dismissed the count on the ground that primary jurisdiction to determine the facts in its specialized competence and, if necessary and appropriate, to modify the relevant regulations on flight altitudes and operating specifications rested in the Board. The italicized reservation in the court's definition of "navigable airspace" derives from the Causby decision and does not take into account the later change in regulation 60.17 which the district court discussed.

In dealing with the second count involving the plaintiffs' claims for damages and injunctive relief against trespass, the court declared (at 759-760) that the "rule, as we interpret it, is that the landowner owns not only as much of the space above the ground as he occupies but also as much thereof as he may use in connection with the land." In order to sustain an action for trespass, "there must be evidence that the aircraft flights were at such altitudes as to interfere substantially with the landowner's possession and use of the airspace above the surface." The evidence adduced by the plaintiffs did not warrant relief within these principles, and the second count was therefore dismissed. Since the case before it did not properly raise the point, the court did not need to consider the incipient conflict between its views of the landowner's rights and the extension of "navigable airspace" effected by the current regulation 60.17.

35 This scope of operation for federal regulation was insisted upon in both of the recent cases discussed. Thus the solutions proposed would be applicable to all movements of aircraft whether or not the particular flight was interstate.

agencies insisted that the right of flight itself derived from the *self-executing operation* of the commerce clause. To be sure no effort was made to delineate the right at the constitutional level except by reference to the limits of the Fifth (and perhaps the Fourteenth) Amendment, and in the *Cedarhurst* case there is evidence that direct reliance on the Constitution had been abandoned. Insofar as the critical problem of protecting or curtailing the interest of the private landowner is concerned, however, there is a continuing disposition to talk in essentially constitutional terms—protection begins only at the point where airspace use becomes a "taking" in the constitutional sense. Should a greater effort be made to work out solutions at some lower, and perhaps more flexible, level?

In his dissent in *United States v. Causby* Justice Black considered this question. His warning is worth reconsideration:

> "No greater confusion could be brought about in the coming age of air transportation than that which would result were courts by constitutional interpretation to hamper Congress in its efforts to keep the air free. Old concepts of private ownership of land should not be introduced into the field of air regulation. I have no doubt that Congress will, if not handicapped by judicial interpretations of the Constitution, preserve the freedom of the air, and at the same time satisfy the just claims of aggrieved persons. The noise of newer, larger, and more powerful planes may grow louder and louder and disturb people more and more. But the solution of the problems precipitated by these technological advances and new ways of living cannot come about through the application of rigid constitutional restraints formulated and enforced by the courts. What adjustments may have to be made, only the future can reveal. It seems certain, however, that courts do not possess the techniques or the personnel to consider and act upon the complex combinations of factors entering into the problems. The contribution of courts must be made through the awarding of damages for injuries suffered from the flying of planes, or by the granting of injunctions to prohibit their flying. When these two simple remedial devices are elevated to a constitutional level under the Fifth Amendment, as the Court today seems to have done, they can stand as obstacles to better adapted techniques that might be offered by experienced experts and accepted by Congress."[36]

[36] United States v. Causby, 328 U.S. 256 at 274-275 (1946).

The main thrust of Justice Black's argument goes to assuring movement of flight without relatively inflexible constitutional barriers. Might not an equally forceful argument be made that interests of landowners subjected to low flights are apt to receive less than the protection they merit if granting *any* protection requires a finding that the intrusions into the superjacent airspace have reached the aggravated level of a "taking"?

Who does the "taking"? On the theory of the federal agencies which offers protection to the subjacent landowner only when and if a "taking" occurs, the question arises—who does the taking? As has been pointed out, the agencies' answer is partial and negative—it is not the federal government. The economic bases for this denial are obvious, but if the federal view is ultimately accepted in its broad outline, doubt may be raised whether the responsibility for the taking can be shunted to non-federal shoulders. On the theory advanced, pursuant to federal constitutional and statutory provisions, implemented by administrative regulation, the airspace down to the surface of the earth, subject only to the standard of necessity, has been brought into the public domain. Insofar as this results in a "taking" of private property, it may well be argued that the federal government is the taker. This contention might be supported by the analogy on which the agencies have relied—the development of navigable waters. It seems clear that insofar as private property is taken by federal action in making streams navigable or in developing waters used for navigation, the responsibility for compensation is upon the government even though the actual users of the waters are primarily private concerns.[37] Arguments of considerable cogency can be made for this solution. The financial burdens incident to a duty to compensate landowners in the vicinity of airports whose property is "taken" may be such that private carriers or local governmental units could hardly bear them. Furthermore, the practical administration of such a remedial right against the actual users of the airspace could present intolerable difficulties. Consider the situation existing around many airports which are used by federally certificated air carriers, military and naval planes, as well as smaller private craft. In their cumulative effect such uses

[37] See United States v. Cress, 243 U.S. 316 (1917); Kansas City Life Ins. Co. v. United States, (Ct. Cl. 1947) 74 F. Supp. 653; Iowa-Wisconsin Bridge Co. v. United States, (Ct. Cl. 1949) 84 F. Supp. 852.

may effect a "taking" of property under the take-off and approach zones. Yet is it feasible to make all such users parties to an action for compensation, or to determine the extent of their respective shares in the "taking" and obligation to compensate?

Whence comes the power of eminent domain? The arguments of the federal agencies have also failed to answer the critical question as to the source of the power of eminent domain being exercised in any "taking" which occurs. The power is an incident of sovereignty, and today surely no one would contend that, if granted, it cannot properly be exercised to meet the needs of aviation. This has been done by the federal government,[38] and probably every state legislature has granted to municipalities the power to condemn interests in land for airport purposes.[39] The power may also be granted to private concerns to be used for the acquisition of airport properties.[40] Insofar, however, as the "taking" is not done by a sovereign political entity, there must be found a grant of the power of eminent domain, and traditional doctrine calls for strict construction of the grant.[41] Where is that grant to be found if the multifarious users of airspace are to be regarded as "takers" of private property? Is it made by the federal legislation declaring a right of free transit in airspace, as supplemented by the altitude regulations which define the navigable airspace? Or is the grant derived from state legislation which more directly affects the exact location of an airport? The federal position thus far indicated seems ambivalent. In *Gardner v. Allegheny County,* the agencies declared, "Federal air traffic regulation is concerned only with the safety of flight and does not confer a right to fly vis-a-vis landowners. Lawfulness of flight as regards safety regulation, and lawfulness as regards landowners' rights obviously depends on different and unrelated standards, and one does not flow from the other."[42] On this view, a federal authorization to private users of airspace to "take" private property would be difficult to spell out, since such a right obviously pertains "vis-a-vis landowners." On

[38] Jasper v. Sawyer, (D.C. D.C. 1951) 100 F. Supp. 421.

[39] See, for example, the Uniform Airports Act, §§3, 8; Municipal Airport Act, §2; Airport Authorities Act, §§7, 8.

[40] Central Hanover Bank & Trust Co. v. Pan American Airways, Inc., 137 Fla. 808, 188 S. 820 (1939).

[41] 2 NICHOLS, EMINENT DOMAIN, 2d ed., §358 (1917). In this connection see also the opinions in the Steel Seizure Case [Youngstown Co. v. Sawyer, 343 U.S. 579 (1952)], particularly the concurring opinion of Justice Douglas.

[42] Amici Curiae, p. 10, note 9.

the other hand, in the same case the agencies took what appears to be an inconsistent position when they contended that the legalization of any nuisance short of a taking from the landowner derives from the federal law.[43] An effort might be made to reconcile the two views by urging that the first relates to such administrative regulations as section 60.17, while the latter depends upon the statutory declaration of a right of flight. The distinction is hardly persuasive, however, when it is remembered that regulation 60.17, while primarily a safety measure, has the *statutory function* of delimiting the navigable airspace in which the right of flight exists.

The significance of the source of the power to take private property for the use of aviation may appear in a number of particulars, one of which will be considered in the next section.

What constitutional guarantee is applicable? It is beyond the purpose of this article to examine in detail the scope of the guarantee of compensation in the Fifth (or Fourteenth) Amendment or to compare it with those in various state constitutions. It suffices to point out here that the constitutions in many states require the payment of compensation when private property is either taken *or damaged* for public use.[44] The Fifth Amendment guarantee on the other hand is operative only when a "taking" occurs.[45] Without detailed analysis, I think we may safely assume that state guarantees of the type mentioned afford a broader protection to landowners than does the Fifth Amendment. If low flights occur in the vicinity of an airport situated in a state having a "damage" guarantee, is it operative or does the landowners' right depend on the more limited guarantee of the Fifth or Fourteenth Amendment? Again the developing view of the federal agencies has provided no answer.

It might appear that if the taking is authorized by the federal government pursuant to the commerce power, the broader compensation requirements of state constitutions could not be applied. On the other hand, if the taking is accomplished in reliance on a state grant of the power of eminent domain, the state constitution should govern. As has been pointed out, the federal argument in *Gardner v. Allegheny County* did not identify the source of the authority to take. There was, however, insistence on the necessity

[43] Id. at 21.
[44] 2 NICHOLS, EMINENT DOMAIN, 2d ed., §311 (1917).
[45] Richards v. Washington Terminal Co., 233 U.S. 546 (1914).

of national uniformity in the law which vitally affects aviation. Also the agencies expressly urged that any nuisance was legalized up to the point of a "taking." Thus it appears that no obligation to compensate for mere damage was contemplated, though how this is to be avoided if the eminent domain power is derived from the state was not made clear.

When does the taking occur? The arguments advanced by the federal agencies presumably do not contemplate that either the state or federal government or the private users of airspace will in general precipitate a judicial inquiry into their obligations to landowners by beginning a formal proceeding for the condemnation of some interest in land traversed by planes at low altitudes. The initiative will in many, and perhaps most instances be left to the landowner who feels aggrieved.[46] Under the agencies' argument he will have a cause of action, however, only when incursions by aircraft have effected "a taking." Uncertainty as to when that occurs, coupled with statutes of limitation affecting his right to sue, may well confront the landowner with a situation in which the existence of a right of action can hardly be determined short of suit and in which periodic actions may be essential in order to avoid the barring of a valid claim. Consider the case of Landowner with property adjacent to an airport, which he now uses for farming. Seemingly planes might fly in the superjacent airspace at extremely low levels without interfering unduly with the use and enjoyment of the land; presumably, therefore, no taking would result from such flights. If in the course of time Landowner subdivided his property for development of single family dwellings, a more difficult question would arise and the existence of a cause of action for a taking could be determined only by beginning a suit for compensation. If Landowner delayed his action and tolerated the reduction in the use and enjoyment of his land, he apparently would run some risk of being told in his later

46 The federal government does in many instances proceed directly to the condemnation of "avigation easements" to protect the approaches to federally-owned airports. See United States v. 4.43 Acres of Land, (N.D. Tex. 1956) 137 F. Supp. 567; United States v. 48.10 Acres of Land, (S.D. N.Y. 1956) 144 F. Supp. 258. It should be noted, however, that the interests taken in these proceedings were limited to easements to prevent the growth or erection of obstructions on the land. The easements did not include any right in the government actually to fly planes over the land, and thus compensation to the owners for injuries resulting from flights, even to the point of "taking," could not properly be included in the award. It was presumably contemplated that if the owners were to assert such injuries resulting from the flight of planes, they would have to seek compensation in an independent proceeding under the Federal Tort Claims Act or the Tucker Act.

action that his claim had matured much earlier and had been barred by the statute of limitations.[47]

Another aspect of the problem probably has greater long-run significance, however. In the development of new airport facilities in outlying areas it is hardly reasonable to expect the developing agency (usually a municipality or other public body) to assume voluntarily the financial burden of condemning air easements in its approach and take-off zones running miles from the airport. This would doubtless be especially true if the surrounding area were undeveloped so that complaints about airport activity and low flying would not present serious immediate problems. Land uses can change rapidly, however, and experience has shown a tendency for areas around airports to build up rapidly. Short of a taking of some interest, the airport owner has no power to control developments in areas under its take-off and approach zones. Thus far the view of the courts has been that the surface owner has full power and privilege to develop his land, even though the development would interfere with the movement of aircraft through the superjacent airspace,[48] if the development is not motivated merely by spite against the air traffic movement.[49] The time of an effective taking of an interest in the landowners' property may thus be determined by a developing pattern of land use in an area extending a considerable distance from the airport proper, over which the airport owner exercises no control. While the analysis is presented here in terms of a newly-established airport, the same problem can arise for an established facility, in those more remote areas not now in its take-off and approach zone but which may of necessity come into such zone as larger and heavier equipment is introduced. As the surrounding area is developed, a "taking" is apt to result in larger liability for

47 The argument here is to some extent speculative since I have not attempted to examine all applicable state statutes of limitation. An illustration of the point can be found, however, in the six-year limitation on actions in the Court of Claims. 28 U.S.C. (1952) §2501.

48 Guith v. Consumers Power Co., (E.D. Mich. 1940) 36 F. Supp. 21; Capitol Airways, Inc. v. Indianapolis Power & Light Co., 215 Ind. 462, 18 N.E. (2d) 776 (1939); Air Terminal Properties v. City of New York, 172 Misc. 945, 16 N.Y.S. (2d) 629 (1939); Strother v. Pacific Gas & Electric Co., 94 Cal. App. (2d) 525, 211 P. (2d) 624 (1949); Roosevelt Field v. Town of North Hempstead, (E.D. N.Y. 1950) 88 F. Supp. 177; Reaver v. Martin Theatres of Florida, (Fla. 1950) 46 S. (2d) 896.

49 United Airports Co. v. Hinman, 1940 U.S. Av. Rep. 1 (1939); Iowa City v. Tucker, 1936 U.S. Av. Rep. 10 (1935); Commonwealth v. Bestecki, 1937 U.S. Av. Rep. 1 (1937); Liles v. Jarigan, 1950 U.S. Av. Rep. 90 (1949).

compensation. Particularly is this true in view of the fact that under the view advanced by the federal agencies the "taking" does not occur until actual, substantial interference with the surface use exists. This may not in fact materialize until expensive improvements have been made by the owner, for which compensation would have to be paid.

It may be suggested that this whole problem for aviation may be avoided by a wise use of the power of eminent domain possessed by most airport development agencies. They should condemn avigation easements early and thus forestall surrounding developments with which flight would interfere materially and which would present an obstruction to air traffic. While the merit in such a procedure may be recognized on an abstract basis, it appears on a practical level to provide only a partial and therefore unsatisfactory solution. In the development of airport facilities it is understandable that there should be reluctance to assume immediately through condemnation the financial burden of acquiring air easements not immediately needed. Both limited foresight and limited financing may prevent the present acquisition of easements for protection of approach zones. In recognizing this fact one should also recognize the hazard confronting the airport and/or its users of contingent, undetermined liabilities arising out of later development of surrounding land use.

Conclusion

Up to this time efforts to solve the problems arising from the location and use of airport facilities have shown all the inadequacies of purely corrective justice administered within a highly conceptual framework. Quite naturally the courts have faced the problem only when injuries were actually inflicted or seriously threatened. In such instances they have mainly utilized analytical tools of the common law, such as the airspace ownership-trespass rationale, which have serious limitations in meeting the problems of the air age. In this article I have attempted to analyze the emerging views of the federal agencies concerned with aviation and to question their sufficiency. Unfortunately, it seems to me, they are still directed toward merely corrective justice, the righting of wrongs already accomplished. Protection of the landowner and in a real sense the protection of a vital aviation industry are keyed to the vague, constitutional concept of a "taking" of property. Thus far the federal agencies have not answered a number

of critical questions on which the actual operation of their proposed solution must depend.

I do not mean to suggest that the solution of our airport problem is exclusively the concern of the federal government or its specialized aviation agencies. The solution will require thorough study by the aeronautical engineer, the transportation economist, the city and area planner, and the lawyer. It will require activity at the federal, state, and local levels and real cooperation among all groups. The best hope for solution does not lie primarily in fundamental constitutional guarantees but in the experimentation of informed legislatures. Increasingly we must turn to preventive techniques which forestall the development of sharp conflicts of legitimate interests by wise planning of much broader areas than are conventionally considered in zoning regulations. This planning must be implemented through the state police power and the federal commerce power. Neither the welfare of aviation nor our traditional respect for the owner's rights in his land can be summarily sacrificed. Neither is absolute however; each must be qualified to accommodate the other. It is, of course, far easier to frame the issue than to formulate the answer. This article will have served its function if it calls laborers into the vineyard.