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CONSTITUTIONAL LAW-TAKING PRIVATE PROPERTY FOR PUBLIC USE-CONTROL OF AIRSPACE

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COMMENTS

CONSTITUTIONAL LAW—TAKING PRIVATE PROPERTY FOR PUBLIC USE—CONTROL OF AIRSPACE—The airspace above land is the object of at least five conflicting claims of right. The owner of the land beneath it claims the right to use it and at least a limited right to prevent its use. The aviator demands the right to fly through it. The airport operator, whether governmental agent or private individual, has an interest in keeping it free from obstructions. The state claims sovereignty over it. The federal government claims the power to control it for the purposes of interstate commerce as well as international relations.

Even before the advent of the free balloon, the fashioning of the legal framework within which these conflicting interests may eventually be reconciled was begun in the fields of trespass and tort for and injunction of non-aeronautical invasions of the airspace above land.[1] The problem of airspace can, therefore, hardly be considered a new problem. But the more recent achievement of the Wright brothers, culminating in the modern commercial transport, has lent such a sharp focus to the inter-relationships involved that some of the maxims formerly considered inflexible have undergone reconsideration, and in some cases suffered total discard.[2] Until recently, however, any suggestion of constitutional limitations upon a conciliation of these conflicting interests has been comparatively limited.[3] In the related fields of interstate commerce by water and railroad the constitutional restrictions on infringements of a property owner's rights have been well threshed out[4] but those principles cannot be casually applied to the infringements necessitated by aerial commerce if only for the reason that doctrines developed around essentially continuous surface invasions may not thoroughly satisfy the needs of all the parties to a fundamentally intermittent infringement that is carried on at some distance above the surface.

There seems to be no serious dissent from the proposition that a landowner cannot complain of a transient passage through the airspace above his land at such height as to be practically unnoticed by the landowner.[5] Therefore, regardless of the legal theory[6] on which this result is based, it remains true that the mere presence of an aircraft with its occupants, with some degree of noise, light and danger from falling objects cannot be made the subject of a legal objection by the possessor of land. Then the essential problem is how close and under what

[1] Smith v. New England Aircraft Co., 270 Mass 511 at 529, 170 N.E. 385 (1930), 69 A.L.R. 300 at 316 (1930).

[2] "It is ancient doctrine that at common law ownership of the land extended to the periphery of the universe—Cujus est solum ejus est usque ad coelum. But that doctrine has no place in the modern world." United States v. Causby, 328 U.S. 256 at 260, 66 S. Ct. 1062 (1946).

[3] Cf. Portsmouth Harbor Land & Hotel Co. v. United States, 260 U.S. 327, 43 S. Ct. 135 (1922); Delta Air Corporation v. Kersey, 193 Ga. 862, 20 S.E. (2d) 245 (1942), 140 A.L.R. 1352 at 1362 (1942)..

[4] Pumpelly v. Green Bay Company, 13 Wall. (80 U.S.) 166 (1871); United States v. Lynah, 188 U.S. 445, 23 S. Ct. 349 (1903); United States v. Welch, 217 U.S. 333, 30 S. Ct. 527 (1910); United States v. Cress, 243 U.S. 316, 37 S. Ct. 380 (1917); Richards v. Washington Terminal Co., 233 U.S. 546, 34 S. Ct. 654 (1914), L.R.A. 1915A 887.

[5] Cf. Burnham v. Beverly Airways, Inc., 311 Mass 628, 42 N.E. (2d) 575, 1942 U.S. Av. 1.

[6] For a discussion of the four theories see 58 HARV. L. REV. 1252 (1945).

circumstances can an airplane with all of its characteristics come to the land before it is legally objectionable, and the converse of this problem is to what extent may the land possessor rear obstructions into the air that interfere with this passage? Since it is to the interest of the pilot as well as the land owner that a plane while in free flight be a considerable distance above the earth, the principal area of conflict between the two arises when the plane takes off from or lands upon the earth. Except for forced landings then, this area of conflict has been and in all probability will continue to be localized at the airport.

The first instance of an application of federal constitutional principles to this area of conflict actually arose in a case where military agents of the federal government[7] invaded the airspace above plaintiffs' home to such an extent as to destroy the use of plaintiffs' land as a chicken farm.[8] Since under these circumstances the plaintiffs could hardly hope to recover against the federal government in trespass or tort[9] or to enjoin the prosecution of the war, their only hope for redress lay in the Fifth Amendment to the federal Constitution on a theory of recovering for a taking of private property.[10] They were successful in their suit. In so far as the decision may be interpreted as an application of tort and property principles developed by the state courts to federal invasions not remediable except by interpretation of the words "property" and "taken"[11] it is important to understand these state decisions, for our major interest is to determine to what extent the principles here announced may in the future be used to control state and federal legislative attempts to reconcile and control the conflicting interests which abound in this area of increasing friction.

I

Perhaps the first[12] major opinion in this field was handed down by Chief Justice Rugg for the Supreme Judicial Court of Massachusetts

[7] There seems to have been no question of authority for the actions involved. Cf. Portsmouth Harbor Land & Hotel Co. v. United States, 260 U.S. 327, 43 S. Ct. 135 (1922).

[8] United States v. Causby, 328 U.S. 256, 66 S. Ct. 1062 (1946).

[9] Id. at 271.

[10] ". . . nor shall private property be taken for public use, without just compensation."

[11] 46 COL. L. REV. 121 (1946); 19 SO. CAL. L. REV. 130 (1945).

[12] But see Neiswonger v. Goodyear Tire & Rubber Co., (D.C. Ohio 1929) 35 F. (2d) 761, where it was held that plaintiff's right to recover damages for a violation of the federal five hundred foot altitude rule resulting in injuries to his person was implied in the statute. However, the Court suggested that it was difficult to see how the minimum altitude rule could apply to intrastate flights since intrastate craft moving in a lower plane could hardly endanger or interfere with interstate craft navigating at or above the prescribed elevation.

in 1930 in the case of *Smith v. New England Aircraft Co.*[13] wherein an adjoining landowner attempted to enjoin the nuisance of continuing trespasses over his land which had materialized in the form of (a) flights above five hundred feet over his palatial country mansion, and (b) flights below one hundred feet in the course of landing and taking off over unoccupied brush and wood lands far from plaintiff's residence. The court refused to enjoin either of the alleged invasions, and refused to reverse the lower court for failure to retain the cause for assessment of nominal damages for the latter "trespass." After finding that "The noise, proximity and number of the aircraft have not been such in the case at bar as to be harmful to the health and comfort of ordinary people,"[14] the court found it necessary to decide that the federal Air Commerce Act of 1926[15] and a similar Massachusetts act[16] authorized the flying of aircraft over privately-owned land,[17] but did not in this particular limit the landowner's rights nor restrict the height of his building.[18] Further, the five hundred foot minimum altitude of flight was not in excess of the permissible interference of the state police and the federal interstate commerce powers,[19] and the exceptions from the minimum altitudes in favor of take-offs and landings were not designed to authorize interference with recognized property rights.[20] The resultant decision was that plaintiff was entitled to no relief for flights over five hundred feet, although he was entitled to nominal trespass damages, but not injunctive relief, for the technical invasion of his area of "possible effective possession,"[21] because "the injury thus done to and the interference with any and all valuable use of the property of the plaintiffs are not certain and substantial but rather are slight and theoretical."[22]

In the final analysis, then, the court decided that plaintiff landowner had no effective remedy unless the airspace invasions were so close as to be a certain and substantial interference with the valuable use of plaintiff's property.[23]

[13] 270 Mass 511, 170 N.E. 385 (1930), 69 A.L.R. 300 (1930).
[14] Id. at 518.
[15] 44 Stat. L. 568, c. 344 (1926).
[16] Mass. Acts (1922) c. 534.
[17] 270 Mass 511 at 521, 170 N.E. 385 (1930).
[18] Id. at 522.
[19] Id. at 526.
[20] "Otherwise they might authorize flights so near the surface of the land as to constitute unquestionable interference with the rights of the landowner. . . . It would be a strained and unnatural construction to interpret them as designed to authorize interference with recognized property rights." Id. at 527.
[21] Id. at 529.
[22] Id. at 526.
[23] Six years later the Ninth Circuit took practically the same position on almost

Two years later the case of *Swetlund v. Curtiss Airports Corporation*[24] was decided under slightly different circumstances. There the owner of a palatial country mansion sought to enjoin the prospective use of adjoining property by a private corporation as a private training airport on a showing that the planned use of the property would involve a brightly illuminated field, almost constant noise of warming up planes, and, when the wind was right, dust over plaintiff's property as well as a scheduled twenty take-offs or landings per hour less than five hundred feet above plaintiff's residence. It was also shown that defendant corporation had already acquired at least one other site equally suitable for the planned operation. After finding that plaintiff had already suffered a property depreciation of $65,000, "and if the defendants are permitted to use this airfield as they now contemplate" would suffer further inconveniences not measurable in damages,"[25] the court stated that "The defendants have a right to establish airports but they cannot lawfully establish one at a place where its normal operations will deprive plaintiffs of the use and enjoyment of their property. . . .[26] The courts have not hesitated to enjoin the operation of a legitimate business which because of its location constituted a private nuisance when it clearly appeared that there was no other complete remedy for the injury done. Considering therefore the balance of convenience the defendants are not entitled to use the property as they now contemplate [and are] enjoined from operating the airport as now located."[27]

From this short summary it appears that the court was concerned with aeronautical invasions of airspace as only one of four different types of otherwise non-aeronautical invasions of plaintiff's quiet en-

identical facts in Hinman v. Pacific Air Transport, (C.C.A. 9th, 1936) 84 F. (2d) 755, with the difference that both injunction and trespass damages were refused for take-offs and landings as low as five feet above seventy-two and a half acres of unused land in Burbank, California. Besides stating that no easement in the airspace over land can be gained by prescription, the court at page 758 said:

"When it is said that man owns, or may own, to the heavens, that merely means that no one can acquire a right to the space above him that will limit him in whatever use he can make of it as a part of his enjoyment of the land. To this extent his title to the air is paramount. No other person can acquire any title or exclusive right to any space above him.

"Any use of such air or space by others which is injurious to his land, or which constitutes an actual interference with his possession or his beneficial use thereof, would be a trespass for which he would have remedy. But any claim of the landowner beyond this cannot find a precedent in law, or support in reason."

[24] (C.C.A. 6th, 1932) 55 F. (2d) 201, 83 A.L.R. 319 at 333 (1933).

[25] Id. at 203.

[26] Ibid.

[27] Id. at 204.

joyment of his property,[28] but the court did not entirely ignore the aeronautical aspect of the case for it held that even if it were a trespass to invade the airspace a landowner might reasonably expect to occupy for himself,[29] the invasions were not that low in this case, and that above that stratum the landowner had only the right to prevent uses of it that would unreasonably interfere with his complete enjoyment of the surface.[30] This court also agreed with the Massachusetts court that the Air Commerce Act of 1926, also adopted by Ohio where the land was located, "does not determine the rights of the surface owner, either as to trespass or nuisance."[31] In its bearing on the problem of aeronautical invasion this case then meant that, in the area above that stratum where plaintiff might have a complete right to prevent trespass, he had a right only to prevent unreasonable interference with his complete enjoyment of the surface.

While other courts continued to whittle away at the doctrine that a landowner's property extends upwards to infinity[32] the Massachusetts court in *Burnham v. Beverly Airways, Inc.*[33] reversed its field under color of following *Smith v. New England Aircraft Co.* and under substantially similar facts held that plaintiff landowner was entitled to an injunction against intermittent flights of a single Piper Cub up to five hundred feet above his land, for even if it were not a nuisance, plaintiff had a right to object to the noise which the plane was certain to produce.[34] Near the end of its opinion the court threw out the suggestion that "The statute . . . now . . . [includes] the right of eminent domain where the exercise of that right is necessary."[35]

[28] Compare citation of cases, id. at 203, with those reviewed in Smith v. New England Aircraft Co., 270 Mass. 511 at 523-525, 170 N.E. 385 (1930).

[29] Cf. Smith v. New England Aircraft Co., ibid.

[30] "We cannot hold that in every case it is a trespass against the owner of the soil to fly an aeroplane through the air space overlying the surface. . . . As to the upper stratum which he may not reasonably expect to occupy, he has not right except to prevent the use of it by others to the extent of an unreasonable interference with his complete enjoyment of the surface. . . . We cannot fix a definite and unvarying height below which the surface owner may reasonably expect to occupy the airspace for himself. [But in this case] the flying of the defendants over the plaintiff's property was not within the zone of such expected use." Swetlund v. Curtiss Airports Corporation, (C.C.A. 6th, 1932) 55 F. (2d) 201 at 203, 83 A.L.R. 319 at 333 (1933).

[31] Ibid.

[32] Thrasher v. City of Atlanta, 178 Ga. 514, 173 S.E. 817 (1934), 99 A.L.R. 158 at 173 (1935); Batcheller v. Commonwealth, 176 Va. 109, 10 S.E. (2d) 529 (1940); Delta Air Corporation v. Kersey, 193 Ga. 862, 20 S.E. (2d) 245 (1942), 140 A.L.R. 1352 at 1362 (1942).

[33] 311 Mass. 628, 42 N.E. (2d) 575, 1942 U.S. Av. 1.

[34] Id. at 637.

[35] Id. at 635.

Perhaps the latest case in any state supreme court is *Warren Township School District v. Detroit*,[36] where the court, in refusing to grant a prospective injunction against the construction of an airport when Detroit denied plaintiff's allegations that the airport would be used for large commercial transports, recognized that an airport is not a nuisance per se. The opinion of the court amounted to practically a grant of such injunction, however, since the court warned the city in no uncertain terms that although "airplanes may be flown at proper heights over the land below, and . . . noises . . . and annoyances will be considered *damnum absque injuria*,[37] . . . only those flights are privileged which are conducted at such a height as not unreasonably to interfere with the possessory interest in land."[38]

2

Under these circumstances the case of *United States v. Causby*[39] came before the Supreme Court of the United States. Military agents of the federal government had flown heavy bombers eighteen feet above the highest tree on plaintiff's land, sixty-three feet above their barn and sixty-seven feet above their house whenever the direction of the wind demanded use of the northwest-southeast runway which passed directly over the Causby property.[40] This situation had destroyed the use of the property as a commercial chicken farm, and noise so close to the buildings was startling to the occupants. Moreover, the area was brightly illuminated by landing lights at night, and two fatal accidents had occurred in close proximity to the airport. The United States rested its case mainly on the propositions that plaintiff did not own any property in the airspace above the height of his actual user, that when the Civil Aeronautics Authority approved the 30-1 safe glide angle it tacitly prescribed airspace for landing or taking off as within the navigable airspace authorized as a part of the public domain by act of Congress, that any damage to plaintiffs' property was merely incidental to authorized aerial navigation, and that any claim plaintiffs might have at most was for a trespass or tort which was not within the jurisdiction of the Court of Claims. Plaintiff rested his case mainly on *Portsmouth Harbor Land and Hotel Co. v. United States*[41] wherein it was held that successive firings of a coastal defense battery

[36] 308 Mich. 460, 14 N.W. (2d) 134 (1944).

[37] Id. at 478.

[38] Id. at 468.

[39] 328 U.S. 256, 66 S. Ct. 1062 (1946).

[40] Figuring 1750 take-offs and landings of military aircraft per month, of which 10 per cent were heavy bombers, a heavy bomber passed over plaintiff's property twenty times per month; about once in every five months at night.

[41] 260 U.S. 327, 43 S. Ct. 135 (1922).

over plaintiff's island, which destroyed its only valuable use as a resort, would warrant a finding that the government had subordinated the strip of land to a servitude of firing projectiles across it, and that such a servitude would constitute a taking for which compensation should be made.[42]

In view of the decisions previously discussed,[43] it is not surprising to find the court holding that the Civil Aeronautics Authority's approval of safe glide angles did not authorize interference with plaintiff's use of his property,[44] so that, excluding questions as to the measure of compensation, the important issue before the court was whether or not and to what extent aeronautical interferences with the possessory interest in land normally protected only by trespass, tort, or injunction remedies would be subjected to relatively rigid constitutional safeguards. Limiting its decision to the actual facts before it the Court held that the United States, through its agents, may not make flights over private land so low and so frequent as to be a direct and immediate interference with existing enjoyment and use of the land[45] without making compensation required by the Fifth Amendment, at least if Congress has not authorized such invasions through exercise of the commerce power,[46] and if the state has so defined property as to include the immediate reaches of the superadjacent airspace.[47] But that the majority opinion may not be safely so limited[48] is indicated not only by its language and citation of authority, but by the dissenting views of Justices Black and Burton.

The Court did not depend on the state's definition of property, but asserted its own authority to define that word as used in the Fifth Amendment, merely noting that the state law was not inconsistent with its holding.[49] The Court did not lean heavily on its holding that airspace needed for landing and taking off was not included in the Congressional reservation of navigable airspace, but indicated that even if it were, flights of a certain character would still constitute a taking.[50]

[42] Id. at 329 et. seq.

[43] See also Perdomo-Escobar, "Aeronautic Servitudes, A Comparative Study," 44 MICH. L. REV. 1013 at 1029 (1946), for a discussion of bill H.R. 3420, introduced before Congress in 1943, presenting the view that Congress did not contemplate that the present Civil Aeronautics Act authorizes interference with property rights.

[44] United States v. Causby, 328 U.S. 256 at 263, 66 S. Ct. 1062 (1946).

[45] Id. at 265.

[46] Ibid.

[47] Id. at 266.

[48] For a discussion of the decision below, see law review articles supra, notes 6 and 11.

[49] Supra, note 45.

[50] "If any airspace needed for landing and taking off were included, flights

Though the invasion under consideration was actually an interference with the existing use of the land as a chicken farm at the time of the invasion, the language used indicates that prospective uses of the land might also be safeguarded by the same constitutional control.[51] Since the United States was treated as no better than a private trespasser, the majority opinion may be interpreted to mean that no one may make flights over private land so low and so frequent as to be a direct and immediate interference with the then existing or prospective enjoyment and use of the land, even though Congress authorizes such invasions through the exercise of the commerce power,[52] and even though the state so defines property to exclude the immediate reaches of the superadjacent airspace, unless the landowner is compensated for the diminution in land value.[53] If further the state supreme courts follow this interpretation in construing their own constitutions, or if an eminent domain clause is read into the Fourteenth Amendment,[54] the same constitutional limitation will apply to state legislative attempts to control superadjacent airspace.

3

Since the essential problem is to what extent can the state or federal governments reconcile by legislative devices the conflicting interests

which were so close to the land as to render it uninhabitable would be immune. But the United States concedes . . . that in that event there would be a taking." United States v. Causby, 328 U.S. 256 at 264, 66 S. Ct. 1062 (1946).

[51] "Market value fairly determined is the normal measure of the recovery. And that value may reflect the use to which the land could readily be converted, as well as the existing use. . . . But the use of the airspace immediately above the land would limit the utility of the land and cause a diminution in its value." Id. at 261, 262. "The fact that he does not occupy it in a physical sense—by the erection of buildings and the like—is not material. . . . An intrusion so immediate and direct as to subtract from the owner's full enjoyment of the property and to limit his exploitation of it [is a taking]." Id. at 264.

[52] That a statute authorizing interference with property rights without providing for compensation may be void see Pumpelly v. Green Bay Co., 13 Wall. (80 U.S.) 166 at 182 (1871).

[53] The dissenting opinion of Justices Black and Burton seems to indicate that the majority opinion may be properly so interpreted: "The future adjustment of the rights and remedies of property owners, which might be found necessary because of the flight of planes at safe altitudes, should, especially in view of the imminent expansion of air navigation, be left where I think the Constitution left it, with Congress. . . . When . . . 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." United States v. Causby, 328 U.S. 256 at 271, 275, 66 S. Ct. 1062 (1946). Compare cases cited supra, note 4.

[54] Pumpelly v. Green Bay Co., 13 Wall. (80 U.S.) 166 at 179.

localized at the airport[55] it appears that the possible effects of *United States v. Causby* can be avoided either by condemning easements of flight over lands situated close to airports[56] or by providing for compensation to the landowner in any legislation designed to control his rights or to authorize landing or taking off over his property. However, the former is much too slow and cumbersome a process to be very popular, even disregarding the element of high cost involved, and the case of *Village of Euclid v. Ambler Realty Co.*[57] indicates a legislative power to zone the areas surrounding airports[58] without providing for compensation. Legislation of this kind may be designed not only to protect the safety of plane passengers and crews by removing or limiting obstructions but also to facilitate air transportation by providing that aircraft may traverse the airspace above those zones within certain limits in the course of landing or taking off without being liable in damages to the property owner for interference with his possessory interest.

That large well-located airports are a necessity to the modern commercial city appears certain, and that freedom from continuous litigation is as important to air commerce as freedom from present or prospective obstructions to safe flight appears equally certain. *Village of Euclid v. Ambler Realty Co.*[59] held that prospective uses of property, otherwise lawful, may be prohibited without compensation by a zoning law passed in the exercise of the police power. Now *United States v. Causby*[60] decides that the United States cannot interfere with the existing enjoyment and use of private airspace without making compensation, perhaps even when authorized by Congressional commerce clause legislation.[61] It becomes important to determine whether these two extremes of no compensation and complete compensation can be reconciled. The most feasible method of reconciliation, and one perhaps suggested by the cases themselves, would be to require compensation for the destruction of existing obstructions and for actual diminution in value of existing uses of land resulting from the appropriation of easements of flight, but not to require it for the prohibition of pros-

[55] For a complete discussion of the methods for protecting areas for access to airports see Perdomo-Escobar, "Aeronautic Servitudes, A Comparative Study," 44 MICH. L. REV. 1013 at 1027 (1946). See also Bolt, "Airport and Landing Fields, Their Acquisition and Establishment," 25 MICH. S. B. J. 16 (1946).

[56] Cf. United States v. 357.25 Acres of Land, (D.C. La. 1944) 55 F. Supp. 461.

[57] 272 U.S. 365, 47 S. Ct. 114 (1926).

[58] For reference to present and contemplated legislation in the United States see Perdomo-Escobar, "Aeronautic Servitudes, A Comparative Study," 44 MICH. L. REV. 1013 at 1028 et. seq. (1946).

[59] Supra, note 55.

[60] Supra, note 37.

[61] Supra, note 48.

pective uses of the land either by the rearing of obstructions to safe flight or by converting the enjoyment of the land to uses more susceptible to interference from aerial navigation close overhead.[62]

This or any other result cannot today be predicted with any amount of certainty, but perhaps it is best that the law be unsettled for the present. The problems presented are not new but have been the subject of widespread discussion since the early thirties,[63] and yet concerted legislative attempts to solve the conflicting interests which abound at the airport have not been impressive.[64] In the meantime, the size of commercial air transports and their frequency of flight have increased with each year. Though *United States v. Causby* may have placed more pitfalls in the way of federal than state legislation, the door has not been completely closed to Congressional action while at the same time notice has been served that the United States Supreme Court is ready to act if Congress is not.

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[62] That this solution would still involve large public cost does not seem all important, for the damage done to the use and enjoyment of property within the area of the airport will entail cost to someone, and it seems more reasonable that the landowners in proximity to the airport should not bear the full brunt of this burden when the benefits of air commerce accrue to the community as a whole. On the other hand, the damage to future uses to which the land may be converted is more conjectural, for although the incidence of take-offs and landings may eliminate the possibility of certain types of growth, proximity to the center of air commerce will almost assuredly enhance the possibilities of other types of value increase.

[63] Eubank, "Ownership of Airspace," 9 PHILIPPINE L. J. 351 (1930); Hise, "Ownership and Sovereignty of the Air or Airspace Above Landowners' Premises With Special Reference to Aviation," 16 IOWA L. REV. 169 (1931).

Bouvé, "Private Ownership of Navigable Air Space Under the Commerce Clause," 21 A. B. A. J. 416 (1935).

[64] Supra, note 56.