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Low Altitude Airspace: A Property Rights No-Man's Land

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LOW ALTITUDE AIRSPACE: A PROPERTY RIGHTS NO-MAN'S LAND

COLIN CAHOON

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I. INTRODUCTION

THE MODERN WORLD has become a place of increasing antagonism between landowners and the aeronauts that inhabit the skies above them. Real estate developers push their glass and steel structures skyward,\(^1\) while newly regulated airspace compresses less sophisticated aircraft closer to the ground.\(^2\) Military jets thunder across valley...
floors training to avoid enemy radar,\(^3\) and helicopters circle above private homes in search of illegal activities.\(^4\) Cramped airports impose new runway departure and arrival routes onto nearby unwilling neighborhoods\(^5\) as urban development creeps towards existing airport runways.\(^6\)

As a constitutionally protected commodity,\(^7\) property is something with which academicians have long been concerned, but a debate about who owns the sky has occasionally been scoffed at by pragmatists interested in more "pressing" property issues.\(^8\) A discussion of airspace property rights, however, can no longer be considered a frivolous academic exercise, for it is fraught with real and practical implications. In today's shrinking world, even the layman now has reason to wonder just how far these rights extend above his roof top.

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\(^3\) AIM, supra note 2, at ¶ 132. A little known and less understood type of airspace is the Military Training Route (MTR). Id. Normally, all aircraft operating below 10,000 feet mean sea level (MSL) are limited to a maximum speed of 250 knots. 14 C.F.R. § 91.70. Military aircraft operating within an MTR, however, may exceed 250 knots at altitudes well below 1500 feet above ground level (AGL). AIM, supra note 2, at ¶ 132.

\(^4\) Florida v. Riley, 109 S.Ct. 693 (1989) (a police helicopter circling 400 feet above a home did not constitute a "search" for which a warrant was required); see also California v. Ciraolo, 476 U.S. 207 (1986) (police officers flying over a private home at 1000 feet in search of marijuana was not considered a "search" for which a warrant was required).


\(^6\) See, e.g., PRACTISING LAW INSTITUTE, AIRPORT LOCATION PROBLEMS (1972); Rezoning Worries Dallas-Ft. Worth Officials, AV. WEEK & SPACE TECH., Jan. 9, 1978, at 36.

\(^7\) The fifth amendment of the United States Constitution provides that, "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation." U.S. CONST. amend V. Similar language appears in the fourteenth amendment, which states, "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

\(^8\) See Spector, Vertical and Horizontal Aspects of Takings Jurisprudence: Is Airspace Property?, 7 CARDozo L. REV. 489 (1986) (question of whether property extended vertically above the surface categorized as "silly").
The intrusion of low-flying aircraft at annoying altitudes sparks numerous interesting and important questions. Did a trespass take place? Can an action for nuisance be filed? Has someone taken an easement of some sort, making an inverse condemnation suit appropriate? Is a search warrant needed by government pilots when looking into citizens' backyards? Is someone negligent if the landowner is disturbed in the use and enjoyment of his land? What about noise pollution? While these issues deserve lengthy discussion, this article will focus on a much more fundamental question: Just exactly who owns the airspace?

The subject of this comment is limited to airspace property rights in the landowner versus aviation context. A landowner's right to extend structures into the airspace above his property is a different issue involving land use and zoning considerations, which several recent articles have addressed at length. In addition, the following discussion focuses on "low altitude" airspace property rights. The reason for this narrow focus, as opposed to a

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11 See, e.g., Kettelson, Inverse Condemnation of Air Easements, 3 REAL PROP. PROB. & TR. J. 97 (1968); Spector, supra note 8; Note, supra note 10.
16 "Low Altitude Airway Structure" is defined in the Pilot/Controller Glossary as, "[t]he network of airways serving aircraft operations up to but not including 18,000 feet MSL." AIM, supra note 2, at 240. For the purposes of this writing, "low altitude airspace" is defined as airspace within a few thousand feet of ground level.
discussion of airspace property rights in general, is practical in nature. That a landowner has no right to airspace at 30,000 feet above his property not only makes common sense, but has clearly been determined by the United States Supreme Court as well. Proponents of landowners' rights to airspace have long since abandoned the field of high altitude airspace to the aviation community. The battle, however, continues to rage in the low altitude airspace arena.

II. THE ORIGINS OF AIRSPACE PROPERTY RIGHTS

Theories

The first written theory of airspace property rights comes from the Roman Law maxim *cujus est solum, ejus est usque ad coelum* (whoever has the land possesses all the space upwards to an indefinite extent). This maxim later found its way into English common law and was pro-

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17 Anderson, *supra* note 9, at 341. "It is obvious that in the context of latter-day air commerce a rigid application of the [ownership from the earth to the heavens] doctrine could not long survive, at least without substantial modification." *Id.*

18 See Laird v. Nelms, 406 U.S. 797 (1972). In *Laird*, the Supreme Court held that even when damage to the underlying property occurred (allegedly from the sonic booms created by high flying military jets), the property interests of the landowner were not intruded upon. *Id.* at 799-80. As support for this proposition, the Court quoted language from the landmark airspace property rights case, United States v. Causby, 328 U.S. 256 (1946), which dismissed the idea of ownership of land extending to the periphery of the universe. The language cited by the Court from the *Causby* opinion states:

[T]hat doctrine has no place in the modern world. The air is a public highway . . . 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. *Laird*, 406 U.S. at 799-80 (quoting *Causby*, 328 U.S. at 260-61).


moted with great force by Sir Edward Coke. Lord Blackstone also pitched his support behind the maxim, which was eventually accepted as the predominant common law airspace property rule in English courts.

Like many other common law rules, *cujus est solum, ejus est usque ad coelum* soon found its way across the Atlantic and solidly established itself in the United States. Lord Coke’s touted maxim withstood the scrutiny of time in the American courts, remaining the uncontested rule on airspace property rights until the turn of the twentieth century. On December 17, 1903, however, two daring American brothers near Kitty Hawk, North Carolina sparked a technological revolution that would soon bring Lord Coke’s well reasoned doctrine crashing in upon itself. The flaw in his reasoning was quite simple, “Lord Coke never took an airplane ride.”

III. Airspace Property Theories in an Aeronautical World

A. The Great Airspace Debate

With the military build-up leading to the Second World War and the spread of civil aviation around the world, the American court system soon faced a plethora of airspace trespass and nuisance cases. This flood of novel legal problems caught American courts without a sensible legal rule with which to address the inevitable clashes between

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22 See id.

23 See id. at 31-65.

24 See Portsmouth Harbor Land & Hotel Co. v. United States, 260 U.S. 327 (1922) (holding that every firing of artillery projectiles over claimant’s land constituted a trespass).

25 For a brief account of the Wright Brothers and their historic flight, see Binns, *The Wright Brothers*, in *Those Inventive Americans* 164-74 (1971).

26 R. Wright, supra note 21, at 7.

27 For a history of the explosion of both civil and military aircraft activity in the United States from 1930 through the Second World War, see generally R. Bilstein, *Flight in America* 83-165 (1987).
landowners and pioneering airmen. To hold that every overflight was an actionable trespass would hamper the young industry and the military’s ability to train; yet, to allow every low-flying barnstormer to terrorize rural communities with no consequence seemed an equally bad alternative. Concerned legal minds soon rose to the challenge, and during the early twentieth century a great debate over airspace property rights thundered across the American legal landscape.

B. Separate Approaches to a Common Problem

No less than six separate theories were thrust into the airspace debate. In order to better appreciate the survivors of these original theories, and make coherent recommendations for the future, each of these six theories will be briefly described.

1. Absolute Ownership Theory

This is Lord Coke’s old ad coelum maxim, whereby the owner of the land owns the airspace above it without limit. This theory, undoubtedly the most threatening to the aviation industry, was never adopted by any court as applied to aviation cases.

[References]

28 S. Rhyne, Airports and the Courts 107 (1944).
29 See, e.g., Ball, The Vertical Extent of Ownership in Land, 76 U. Pa. L. Rev. 631 (1928); Bouve, Private Ownership of Airspace, 1 Air L. Rev. 232 (1930); Fagg, Airspace Ownership and the Right of Flight, 3 J. Air L. & Com. 400 (1932); Kingsley, The Correlative Interests of the Landowner and the Airman, 3 J. Air L. & Com. 375 (1932); Swee-ney, supra note 19.
30 See R. Wright, supra note 21, at 145. Writers on the topic very on the exact number of categories needed to define the airspace property rights spectrum. Id. The most commonly accepted approach has been referred to as “Rhyne’s division,” which utilizes five categories. Id. at 145-47; S. Rhyne, supra note 28, at 154-62. For ease of explanation, Rhyne’s category which encompasses the property public easement theory and the tort privilege of flight theory has been divided into two separate categories, making a total of six. See S. Rhyne, supra note 28, at 155-57.
31 R. Wright, supra note 21, at 102; S. Rhyne, supra note 28, at 96.
32 Anderson, supra note 9, at 341. “The ‘ad coelum’ doctrine was ... necessarily limited to cases involving overhanging objects or missiles that encroached on the landowner’s airspace. It is obvious that in the context of latter-day air commerce a rigid application of the ‘ad coelum’ doctrine could not long survive, at
2. Public Easement Theory

This theory espoused the idea that the owner in fact owns the airspace above his property, but that property is subject to a public easement to aviation traffic. This theory is one of two modifications to the *ad coelum* rule. That the owner does in fact own all the airspace above his property is recognized, but aviation is legally afforded a property right (easement) to traverse this property. Flight over the property is only actionable in the event the easement is misused.

3. Privilege of Flight Tort Theory

Like the Public Easement Theory, this tort based theory is also a modification of the *ad coelum* rule. The landowner is once again recognized as the owner of all the airspace above his property. When an aircraft traverses his property, a trespass has occurred, but this trespass is privileged. The privilege acts as a defense to the claim of trespass. The property owner will only prevail when it is found that the privilege was abused or exceeded. This tort approach differs from the property approach listed least without substantial modification."

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Id., see also R. Wright, supra note 21, at 102; S. Rhyné, supra note 28, at 96.

35 R. Wright, supra note 21, at 108. This theory was introduced by the proposed Uniform State Law of Aeronautics in 1922, which was eventually adopted in about half of the American states. Id.

34 S. Rhyné, supra note 28, at 156 (characterizing misuse as "unreasonable interference").

36 Restatement of Torts § 194 (1934). Section 194 of the Restatement, entitled "Travel Through Air Space" stated:

An entry above the surface of the earth, in the air space in the possession of another, by a person who is traveling in an aircraft, is privileged if the flight is conducted (a) for the purpose of travel through the air space or for any other legitimate purpose, (b) in a reasonable manner, (c) at such a height as not to interfere unreasonably with the possessor's enjoyment of the surface of the earth and the air space above it, and (d) in conformity with such regulations of the State and federal aeronautical authorities as are in force in the particular State.

Id.

37 Id.
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above in theory only. Under both approaches, aircraft can freely traverse the airspace, as long as the privilege to trespass or the scope of the easement is not exceeded.\textsuperscript{38}

4. \textit{Ownership to a Fixed Height Theory}

This theory is the first of two variations of the "zone" concept.\textsuperscript{39} The extent of a landowner's property rights to airspace is strictly defined by a horizontal boundary, which divides airspace into property "zones." All airspace above the boundary, a fixed altitude above ground level, is public property. All airspace below the boundary is the property of the landowner.\textsuperscript{40} Under this theory, overflight cases become quite simple to analyze. If the aircraft flew above the boundary, the landowner has no cause of action. If the aircraft flew below the boundary, an actionable trespass occurred.\textsuperscript{41}

This boundary is usually defined by proponents of this theory as the altitudes designated by Congress as "navigable airspace."\textsuperscript{42} It is reasoned that Congress, by defining what airspace is navigable, set aside that airspace as public domain, to which the landowner below can exert no property right.\textsuperscript{43}

5. \textit{Possible Effective Possession Theory}

Under this approach, a landowner's airspace property rights are limited to a fixed height of effective possession.\textsuperscript{44} This height depends on the nature of the land and

\textsuperscript{38} See supra note 30 and accompanying text for an explanation of how the "public easement" theory and "privilege of flight" tort theory are usually combined in one category by writers on the topic.

\textsuperscript{39} R. Wright, \textit{supra} note 21, at 118-19.


\textsuperscript{42} See R. Wright, \textit{supra} note 21, at 119-27.

\textsuperscript{43} Id.

\textsuperscript{44} See, e.g., Swetland v. Curtiss Airports Corp., 55 F.2d 201 (6th Cir. 1932);
its possible uses. For example, this height limit would not allow for the building of the Empire State Building in the middle of a Kansas wheat field. A very effective argument could be made, however, for fixing this height limit to allow for the construction of a grain silo or similar structures that are common to that type of land. This twist on the “zone” concept forces the court to determine just where the property rights boundary exists in each case. Once this is done, the application of this theory is identical to that of the “Ownership to a Fixed Height Theory.” All airspace above the possible effective possession of the landowner is public property to which the owner can claim no legal right.

6. No Ownership Theory

The most pro-aviation of the six, the no ownership theory, advanced by the highly criticized Hinman v. Pacific Air Transp. case, provides the landowner rights to only that airspace which is actually occupied. An overflight is compensable only when actual physical damage to the underlying property has occurred regardless of the altitude flown.

C. Confusion Reigns

With the exception of Lord Coke’s ad coelum theory, all of these approaches were applied to varying degrees in different American jurisdictions. The legal landscape was a patchwork of airspace property theories, and, if for

Delta Air Corp. v. Kersey, 193 Ga. 862, 20 S.E.2d 245 (1942); Thrasher v. City of Atlanta, 178 Ga. 514, 173 S.E. 817 (1934).

See, e.g., Swetland v. Curtiss Airports Corp., 55 F.2d 201 (6th Cir. 1932); Delta Air Corp. v. Kersey, 193 Ga. 862, 20 S.E.2d 245 (1942); Thrasher v. City of Atlanta, 178 Ga. 514, 173 S.E. 817 (1934).

For a demonstration of this type of analysis, see Causby v. United States, 75 F. Supp. 262, 264 (Ct. Cl. 1948).

Id.

84 F.2d 755 (9th Cir. 1936). Considered by one commentator as “probably the worst opinion ever written on the topic.” R. Wright, supra note 21, at 131.

Hinman, 84 F.2d at 755.

See Wright, supra note 15, at 596.
no other reason than a need for some modicum of certainty, it soon became evident that consistent judicial standards had to be set. The aviation industry was, after all, national in nature. A few hours flight could traverse numerous jurisdictions, all applying different laws and theories to determine the legal effect the flight had on the property below. If a constitutional amendment could not be mustered, the Supreme Court would eventually have to act, and eventually they did.

IV. THE SUPREME COURT SPEAKS: UNITED STATES V. CAUSBY

A. Factual Background

In 1942, a sleepy, municipal airport near Greensboro, North Carolina, was leased to the federal government. Soon various large military aircraft were making use of this facility. This development greatly distressed the Causbys, who owned a house and a chicken farm less than 800 yards from the end of the runway. Large, four-motored bombers frequently passed at tree top level over the Causby's land in considerable numbers. With their chicken business ruined, and losing sleep because of the glare and noise of the airplanes' night operations, the Causbys filed suit against the United States government.

The Court of Claims found that there had been a taking

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51 See Anderson, supra note 9, at 358.
52 See R. BILSTEIN, supra note 27, at 83-116. Travel by domestic airlines in the United States grew from 95 million revenue passenger miles in 1932 to 677 million in 1939. Id. at 104. Passenger traffic jumped from 475,000 passengers in 1932 to over 4 million in 1941. Id. at 100.
53 Id. at 85-96. The Boeing 247, mainstay of the United Airlines fleet in the early 1930s, carried 10 passengers from coast to coast in about 20 hours. Id. at 89.
54 See Sweeney, supra note 19 at 331.
55 328 U.S. 256 (1946).
57 Id. at 753-55.
58 Causby, 328 U.S. at 258-59.
59 Id. at 259.
60 Causby, 60 F. Supp. at 755-56.
for which the Causbys were entitled compensation.\(^6^1\) The court then concluded that an easement worth $2,000 had been taken, but made no finding as to the specific nature of the easement or its duration.\(^6^2\) Noting the importance of the question presented, the Supreme Court granted certiorari in order to determine if the Causby's property had been taken within the meaning of the fifth amendment.\(^6^3\)

This was a case of first impression in the Supreme Court, and certainly one long in coming.\(^6^4\) The highest court in the land would address the issue that had yielded so many different results in cases with strikingly similar fact patterns. The Court had several theories to choose from and major public policy considerations to ponder. As with all Supreme Court decisions that leap into the gulf that divides diametrically opposed viewpoints, the *Causby* decision was anxiously awaited by aviation proponents and landowners alike.

**B. The Court's Rationale**

Justice Douglas delivered the opinion of the Court.\(^6^5\) After briefly reviewing the facts of the case and the contentions of the United States, Justice Douglas quickly dismissed Lord Coke's *ad coelum* doctrine as inappropriate to aviation overflight cases.\(^6^6\) The Court, however, also dismissed the idea that the landowner had no property interest in airspace above his property.\(^6^7\) Thus, within the first few pages of the opinion, both the *ad coelum* theory and

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\(^6^1\) *Id.* at 757-58.

\(^6^2\) *Id.* at 758.

\(^6^3\) *Causby*, 328 U.S. at 258.

\(^6^4\) *Id.*

\(^6^5\) *Id.* Justice Black wrote the dissenting opinion, joined by Justice Burton. Justice Jackson took no part in the decision. *Id.* at 268.

\(^6^6\) *Id.* at 260-61.

\(^6^7\) *Id.* at 261-62. "The fact that the planes never touched the surface would be as irrelevant as the absence in this day of the feudal livery of seisin on the transfer of real estate. [When] the line of flight is over the land, . . . the land is appropriated as directly and completely as if it were used for the runways themselves." *Id.* at 262.
the Hinman "no ownership" theory were banished from the airspace property rights debate. The Court was moving toward a middle ground.

Justice Douglas then outlined the test applied to determine if a taking had occurred. The Court concluded that a property owner owned the "superadjacent" airspace above his property, and an invasion of this airspace should be treated as an actual invasion of the surface. Although the Court refused to determine the precise limits of this "superadjacent" airspace, it stated that a taking would not occur unless overflights were "so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land." From earlier statements in the opinion, it can be inferred that an interference with the enjoyment and use of the land occurs when the value of the property has diminished due to the overflights. At a minimum, the landowner owned as much airspace above the ground as could be occupied or used in connection with the land.

Although the Court conceded that the definition of "property" is normally obtained by reference to local law, the Court seemed to consider its opinion as defining airspace property independently from any state definition. Moreover, one thing is certain, the Court definitely concluded that airspace is "property."

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68 Id. at 265.
69 Id. at 266.
70 Id. at 261. "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." Id. (citations omitted).
71 Id. at 264. "The landowner owns at least as much of the space above the ground as he can occupy or use in connection with the land. The fact that he does not occupy it in a physical sense—by the erection of buildings and the like—is not material." Id. (citation omitted).
72 Id. at 266. The Court stated, "while the meaning of 'property' as used in the Fifth Amendment [is] a federal question, 'it will normally obtain its contents by reference to local law.'" Id. (citation omitted).
73 Id. "If we look to [the controlling state jurisdiction], we reach the same result. Sovereignty in the airspace rests in the State 'except where granted to and assumed by the United States.'" Id. (citation omitted).
74 R. Wright, supra note 21, at 155.
After determining that the Causbys in fact deserved compensation for an easement that had been taken over their property, the Court remanded the case to the Court of Claims for a determination of the nature of the easement.75

C. Analysis of the Decision

Perhaps more significant than what the Supreme Court said is what it did not say. The Court did not seem to embrace any of the six theories of airspace explained above, yet it cited propositions from cases representative of nearly all of these theories.76 The *ad coelum* theory and the *Hinman* "no ownership" theory were certainly dismissed, but a close reading of the case is required to understand the fate of the remaining four theories.

The Court did not appear to rule out the "public easement" or "privileged trespass" theories, as North Carolina followed these theories, and the Court found them not inconsistent with the holding.77 The Court's lack of reference to the abuse of a preexisting privilege or easement, however, leaves these theories of little significance to the airspace as property discussion.78

The Court did seem to adopt the "possible effective possession" theory as the absolute minimum protection to which the landowner was entitled.79 In addition, the Court refused to determine where, exactly, the landowner's property rights ended beyond whatever airspace was needed to insure the use and enjoyment of the underlying land.80

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75 *Causby*, 328 U.S. at 267-68. After the war the United States ceased using the airport near the Causby's home. *Causby v. United States*, 75 F. Supp. 262, 263 (Ct. Cl. 1948). On remand the Court of Claims found that the easement was temporary and awarded the Causbys $1,435 plus interest for the damage done by the overflights. *Id.*

76 R. Wright, *supra* note 21, at 153.

77 *Causby*, 328 U.S. at 266.

78 R. Wright, *supra* note 21, at 154.

79 *Id.* at 154-55.

80 *Causby*, 328 U.S. at 266. "The airspace, apart from the immediate reaches above the land, is part of the public domain. We need not determine at this time
The Court also addressed the "fixed height" concept. It is with respect to this airspace property theory that post-\textit{Causby} decisions have, for the most part, completely misread the Supreme Court's analysis.

\textbf{D. \textit{Causby}'s Fixed Height Dicta}

At the time of the \textit{Causby} decision, navigable airspace was defined as "airspace above the minimum safe altitude of flight prescribed by the Civil Aeronautics Authority."\textsuperscript{81} The Civil Aeronautics Authority had specified minimum safe altitudes for en route flight, but had neglected to define minimum safe altitudes for take-off and landing.\textsuperscript{82} Since the flights over the \textit{Causby}'s property occurred while airplanes were landing at altitudes well below the en route minimum safe altitudes, it was apparent to the Court that the airplanes were not within navigable airspace.\textsuperscript{83} This did not, however, end the Court's inquiry into the "fixed height" theory.

The Court stated that if the low altitudes used for landing over the \textit{Causby}'s property had been designated as minimum safe altitudes by the Civil Aeronautics Authority, the Court would then have addressed the validity of such a regulation.\textsuperscript{84} According to the Court, even the United States conceded that if flights were so close to the land as to render it uninhabitable, a taking would occur even if the altitudes flown were within "minimum safe altitude" flight levels.\textsuperscript{85} Yet, later decisions continue to cite \textit{Causby} for the proposition that aircraft within navigable airspace, as defined by the minimum safe altitude set by

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\begin{itemize}
\item \textsuperscript{81} 49 U.S.C § 180 (repealed 1958).
\item \textsuperscript{82} \textit{Causby}, 328 U.S. at 263. After the \textit{Causby} decision, this oversight was corrected, and today navigable airspace is defined as "airspace at and above the minimum flight altitudes prescribed by or under this chapter, including airspace needed for safe takeoff and landing." 14 C.F.R. § 1.1 (1989) (emphasis added).
\item \textsuperscript{83} \textit{Causby}, 328 U.S. at 263-64.
\item \textsuperscript{84} Id. at 263.
\item \textsuperscript{85} Id. at 264.
\end{itemize}
\end{small}
the Federal Aviation Administration,\footnote{For a history of the Federal Aviation Administration, see R. Burkhardt, The Federal Aviation Administration (1967). Starting as the Aeronautics Branch of the Department of Commerce, the agency then became the Bureau of Air Commerce, then the Civil Aeronautics Authority, then the Civil Aeronautics Administration, next the Federal Aviation Agency, and finally the Federal Aviation Administration. Id. at 3.} do not infringe on any property right of the underlying landowners.\footnote{See, e.g., Lacy v. United States, 595 F.2d 614, 615 (Ct. Cl. 1979); Hero Lands Co. v. United States, 554 F. Supp. 1262, 1264-65 (Cl. Ct. 1983); Matson v. United States, 171 F. Supp. 283, 285-86 (Cl. Ct. 1959); Stephens v. United States, 11 Cl.Ct. 352, 358-59 (1986); Drybread v. City of St. Louis, 634 S.W.2d 519, 520 (Mo. Ct. App. 1962).} Although it may be argued that \textit{Causby} did not rule out this proposition,\footnote{See R. Wright, supra note 21, at 154-55; see also Anderson, supra note 9, at 354. “Although the case has been much discussed, its holding still appears to be disputed.” Id. at 348.} the case certainly does not stand for the proposition.\footnote{See Griggs v. County of Allegheny, 369 U.S. 84, 96-100 (1962) (interpreting \textit{Causby} to support a finding that a taking had occurred, despite the fact that the air traffic was within navigable airspace); Branning v. United States, 654 F.2d 88 (Ct. Cl. 1981). “[I]t is clear that the Government’s liability for a taking is not precluded merely because the flights of Government aircraft are in what Congress has declared to be navigable airspace and subject to its regulation.” Id. at 99.}

E. \textit{The True Causby Test}

Although the actual holding of the case is still disputed,\footnote{Anderson, supra note 9, at 348.} it appears that \textit{Causby} was intended to stand for those minimum rights that must be afforded a landowner.\footnote{Id.} To begin with, a landowner must not be disturbed in the use and enjoyment of his land. In addition, the landowner has a paramount right to exercise prerogatives of ownership over all the unoccupied airspace capable of possession.\footnote{Id.} Any continuous and adverse use of this airspace constitutes a compensable taking of a property interest.\footnote{Id.}
V. POST-CAUSBY DECISIONS

A. General Developments

A survey of the airspace cases that were decided after Causby reveals a significant loose usage of terms and rationales. Though the Causby Court focused on the taking of an avigation easement, many state courts continued to analyze airspace suits under the traditional "trespass" and "nuisance" rationales. Despite the theoretical differences in the words' meanings, courts liberally blended "nuisance" and "trespass" language, regardless of the actual issue to be decided. Much of this confusion may be attributed to the shotgun approach to pleadings that plaintiffs were using at the time. The two theories are, however, closely wed in airspace property analysis.

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94 Id. at 157-68.
95 The word "avigation" has been defined as simply "navigation of aircraft." WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 151 (1966). A more extensive definition can be found in WEBSTER’S NEW TWENTIETH CENTURY DICTIONARY 130 (2d ed. 1983), which defines "avigation" as, "the science or art of piloting aircraft by means of instruments, the position of the stars, or landmarks." Id. The phrase "avigation easement" is sprinkled throughout court opinions and legal writings that discuss the issue of the taking of airspace by aviation overflights. The phrase distinguishes an easement as being through airspace and for aviation traffic, as opposed to an airspace easement for buildings or a navigation easement through water.
96 See R. WRIGHT, supra note 21, at 157-68.
97 A concise explanation of the difference between "nuisance" and "trespass" in this context can be found in Anderson, supra note 9, at 342, where the author states:

Although nuisance and trespass are in some respects analogous, each has important distinguishing characteristics. Since an invasion of realty constitutes trespass, the invasion is actionable per se. A nuisance, however, must involve some interference with the use and enjoyment of property or of personal rights and privileges, and it is therefore the consequences which flow from the invasion which are actionable. The invasion, in nuisance, must be unreasonable, unwarranted, or unlawful. Further, since nuisance developed separately from trespass, different considerations are used by the courts. For example, continuity or recurrence has been given such great weight that it can generally be considered an element that must be proved to establish nuisance.
Id.
98 Id.; R. WRIGHT, supra note 21, at 157-68.
99 R. WRIGHT, supra note 21, at 157.
100 Id. at 160-61. When discussing the interdependence between "nuisance"
and most jurisdictions continued to allow plaintiffs to recover under either nuisance, trespass, or an amalgamation of both.\textsuperscript{101}

The \textit{Causby} case brought a new analysis into vogue as well. The Supreme Court in \textit{Causby} reasoned that a taking of an avigation easement had occurred for which the Causbys were entitled just compensation.\textsuperscript{102} Since most complaints from landowners arise from the irritation caused by planes landing at and departing from government-owned airports, it follows that many of the post-\textit{Causby} lawsuits focused on the theory that a compensable taking had occurred.\textsuperscript{103} Many of the suits were framed as "inverse condemnation" actions.\textsuperscript{104} Takings were also claimed to have occurred when nearby airports got busier or when the airplanes using them got larger and noisier. Plaintiffs argued that the increased flight activity amounted to an enlargement of the scope of any preexisting easement.\textsuperscript{105}

It should be remembered, however, that at the time of the \textit{Causby} decision, an action for the taking of an avigation easement was the only practical means of recovery from the government for many landowners.\textsuperscript{106} The \textit{Causby} dissent, written by Justice Black, focused on the inappropriate use of actual damages as a prerequisite to a taking

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\textsuperscript{101} Id. at 157-68.

\textsuperscript{102} \textit{Causby}, 328 U.S. at 267.

\textsuperscript{103} R. \textit{Wright, supra} note 21, at 164-65.


\textsuperscript{105} R. \textit{Wright, supra} note 21, at 167-68.

\textsuperscript{106} Prior to the passage of the Federal Tort Claims Act, the United States government was considered immune from tort actions by citizens. \textit{D. \textit{Dobbs, Torts and Compensation}} 343-48 (1985). One qualification to this governmental immunity was that under the due process clause of the fifth and fourteenth amendments of the United States Constitution, neither state nor federal governments could take property without just compensation. Id. at 344.
under the Constitution. Justice Black felt that the overflights amounted to nothing more than a nuisance or a trespass. In fact, it has been suggested that the Causbys’ inability to recover in tort using a nuisance or trespass claim may have influenced the Supreme Court decision to find that a taking had occurred.

With the passage of the Federal Tort Claims Act, however, actions for trespass and nuisance became available for plaintiffs in suits against the government. Plaintiffs could now sue under a trespass theory, a nuisance theory, an inverse condemnation type action, or, as was often the case, all three at once.

B. The Fate of the Six Theories

Regardless of the type of action presented, courts still had to determine just exactly what were the landowner’s property interests. This was an area of the law where Causby had some settling effect. Causby established that the landowner did possess some airspace property rights, but these rights had definite limits. How courts interpreted these limits on a landowner’s rights would determine the outcome of future overflight suits.

Considering the emphasis placed on damages and interference with the “use and enjoyment” of land found in the Causby opinion, many courts analyzed overflight cases focusing on the actual effect of the alleged trespass on the

107 Causby, 328 U.S. at 268-275.
108 Id. at 270-71. “[T]he allegation of noise and glare resulting in damages, constitutes at best an action in tort where there might be recovery if the noise and light constituted a nuisance, a violation of a statute, or were the result of negligence.” Id. at 269-70.
109 See Anderson, supra note 9, at 350.
111 D. Dobbs, supra note 106, at 345-47.
112 R. Wright, supra note 21, at 167-68.
113 Id. at 197.
114 Anderson, supra note 9, at 358. “The Causby case seems to have been the unifying force, and, ambiguous as it may be, it has provided some uniformity in a field where uniformity is clearly needed.” Id.
115 R. Wright, supra note 21, at 197-99.
underlying land. Although admittedly an unusual method of evaluating a trespass claim, commentators seem to have accepted this unconventional approach as unique to airspace trespass analysis. Courts allowed plaintiffs basically two methods to prove the damages necessary to trigger a further inquiry into the validity of the claim. The first involved a showing of actual damages like those found in claims made by chicken and mink farmers after frequent overflights caused substantial damage to livestock. The second method required a showing of diminution in the overall value of the underlying property as a result of frequent overflights. These methods of proof, required to show that a trespass or taking has occurred, again show the blending of traditional nuisance elements with those of trespass.

As was mentioned earlier, many jurisdictions also began to drift towards the “ownership to a fixed height” theory of airspace property rights. There are several probable reasons for this drift. When the language “airspace needed for safe takeoff and landing” was added to the definition of what constituted “navigable airspace,” some courts saw this as an expression of Congressional intent to get around the facts of the Causby holding. Other

117 Anderson, supra note 9, at 359.
120 See supra note 97 and accompanying text for a discussion of the relationship between “nuisance” and “trespass.”
121 See, e.g., Matson v. United States, 171 F. Supp. 283, 286 (Cl. Ct. 1959); Mills v. Orcas Power & Light Co., 56 Wash. 2d 807, 355 P.2d 781 (1960); Anderson, supra note 9, at 358-59. “[A]nother element of trespass to airspace appears to be that the flight in question must be below the floor of the navigable airspace as defined by the federal regulations concerning minimum cruising altitudes.” Id.
122 See, e.g., Kuntz v. Werner Flying Serv., 257 Wis. 405, 43 N.W.2d 476 (1950); Antonik v. Chamberlain, 81 Ohio App. 465, 78 N.E.2d 752 (1947).
courts read the *Causby* opinion as a reaffirmance of the proposition that Congress had established public domain as all "navigable airspace," and a landowner's rights in airspace ended at the base of public domain airspace.\textsuperscript{123} Behind this reasoning, however, there may have lurked a more practical rationale for following the "fixed height" theory. If nothing else can be said in its support, the "fixed height" theory did promote certainty and discourage litigation.\textsuperscript{124} If a landowner could not prove that excursions occurred outside the altitudes designated as "navigable airspace," many jurisdictions simply dismissed his suit on this ground alone.\textsuperscript{125}

Despite this subtle shift towards the pragmatic "fixed height" theory, it appeared to many that the judicial trend in America was towards an "effective possession" approach to airspace property rights.\textsuperscript{126} After all, "effective possession" was the theory that seemed most in line with the *Causby* decision.\textsuperscript{127} Two Supreme Court decisions, roughly ten and twenty years after *Causby*, seem to strongly support this view as well.\textsuperscript{128} It looked as if American courts would finally narrow the field of airspace property theories and put the "fixed height" concept to rest. The passage of time, however, revealed that this view of the future of airspace property rights was not quite correct.

\textsuperscript{123} See, e.g., Matson v. United States, 171 F. Supp. 283 (Ct. Cl. 1959). This conclusion is probably based on the dicta found in the *Causby* opinion that reads, "The navigable airspace which Congress has placed in the public domain is 'airspace above the minimum safe altitudes of flight prescribed by the Civil Aeronautics Authority.'" *Causby*, 328 U.S. at 263 (citation omitted).

\textsuperscript{124} For an example of a court's use of the "fixed height" theory, see Powell v. United States, 1 Cl.Ct. 669 (1983).

\textsuperscript{125} Id.


\textsuperscript{127} R. Wright, supra note 21, at 207.

VI. More Direction From the Supreme Court

A. *Dicta Ten Years After: Braniff Airways*\(^{129}\)

Ten years after the *Causby* decision, the Supreme Court was faced with one in a long line of "state power to tax" cases\(^{130}\) that happened to involve aviation. Typical of these types of cases, *Braniff Airways v. Nebraska State Board of Equalization & Assessment* presented the question of the state of Nebraska's power to tax an interstate corporation.\(^{131}\) Although the facts and the holding of this case do not bear directly upon airspace property rights, commentators extracted some of what the Court said as further proof that *Causby* had indeed put the "fixed height" doctrine to rest.\(^{132}\)

Particularly interesting was Justice Reed's majority pronouncement that, "Federal Acts regulating air commerce are bottomed on the commerce power of Congress, not on national ownership of the navigable air space, as distinguished from sovereignty."\(^{133}\) In addition, the *Braniff* Court explained that the *Causby* decision held "that the owner of land might recover for a taking by national use of navigable air space resulting in destruction in whole or in part of the usefulness of the land property."\(^{134}\) These statements appear to dismiss a "fixed height" theory based upon the idea that Federal Acts regulating air commerce define national ownership of navigable airspace.\(^{135}\) The *Braniff* Court considered such Federal Acts as simply regulating commerce and not defining a federal property interest. The issue before the Supreme Court, however,


\(^{130}\) For an attempt at explaining the confusing constitutional analysis of the "state power to tax" by the Supreme Court, see W. Lockhart, Y. Kamisar, J. Choper & S. Shiffrin, *Constitutional Law* 316-76 (1986).

\(^{131}\) 347 U.S. at 590.

\(^{132}\) R. Wright, *supra* note 21, at 200-03.

\(^{133}\) *Braniff*, 347 U.S. at 596.

\(^{134}\) Id.

\(^{135}\) R. Wright, *supra* note 21, at 202-03. "The statement found in some cases that Congress preempted the field with its regulation of air commerce is simply erroneous." Id.
was not airspace property rights. This perhaps explains why courts continued to claim that Congress preempted the airspace property rights field with its regulation of air commerce despite the language found in *Braniff*.136

B. Facing the Issue Squarely: Griggs v. County of Allegheny137

Unlike the *Braniff* case, in *Griggs v. County of Allegheny* the Supreme Court dealt with airspace issues. As in *Causby*, the plaintiff in *Griggs* lived near a noisy airport.138 Planes taking off from the Greater Pittsburgh Airport frequently came within thirty feet of the plaintiff’s residence.139 Claiming that an air easement had been taken without compensation, the plaintiffs filed suit in the Court of Common Pleas of Allegheny County against the County of Allegheny, owner of the Greater Pittsburgh Airport.140

The factual backgrounds of the *Griggs* and the *Causby* cases were very similar, but for two significant differences. First, the plaintiff in *Griggs* chose to sue the county government as opposed to the United States government.141 This choice created the primary issue in contention when the case finally arrived in the United States Supreme Court.142 After the lower court found Allegheny County liable for taking an easement over the plaintiff’s land, the Pennsylvania Supreme Court overturned the decision on the grounds that if there had been a taking in the constitutional sense, the county was not liable.143 The United

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137 369 U.S. 84 (1962).

138 *Id.* at 86-87.

139 *Id.*

140 *Id.* at 85-86.

141 *Id.*

142 *Id.* at 89-90. The dissenting opinion, written by Justice Black with Justice Frankfurter joining, focuses exclusively on the issue of holding Allegheny County liable for a taking rather than the federal government. *Id.* at 90-94. "We are not called on to pass on any question of 'taking' under the Pennsylvania Constitution or laws." *Id.* at 91 n.2.

States Supreme Court disagreed, with two justices dissenting, holding that the county was liable.\textsuperscript{144}

The second factual difference found in \textit{Griggs}, however, pertains to the court’s consideration of the “fixed height” theory. Between the time of the \textit{Causby} decision and the \textit{Griggs} suit, the definition of “navigable airspace” was amended to include that “airspace needed to insure safety in take-off and landing of aircraft.”\textsuperscript{145} If the “fixed height” theory were to be followed to its logical conclusion, no taking could have occurred, since the planes flying over Mr. Griggs’ house were within navigable airspace.\textsuperscript{146}

The Court of Common Pleas held that a taking had occurred regardless of the fact that the flights were admittedly within navigable airspace as defined by Congress and the Civil Aeronautics Administration.\textsuperscript{147} When the case arrived in the United States Supreme Court, the Justices were unanimous in upholding the Court of Common Pleas determination that a taking had occurred.\textsuperscript{148} The \textit{Griggs} Court did not, however, question the validity of the statute defining navigable airspace, as promised in \textit{Causby}.\textsuperscript{149} Instead, the Court held that the fact that the overflights were made within navigable airspace simply had no effect on determining whether or not a compensable taking had occurred.\textsuperscript{150}

By implication, this holding should have put other courts on notice that the foundation of the “fixed height”

\textsuperscript{144} \textit{Griggs}, 369 U.S. at 90-94.

\textsuperscript{145} Id. at 88.

\textsuperscript{146} See \textit{Kuntz v. Werner Flying Service}, 257 Wis. 405, 43 N.W.2d 476 (1950); \textit{Antonik v. Chamberlain}, 81 Ohio App. 465, 78 N.E.2d 752 (1947). Both courts followed the logic that since altitudes necessary for take-off and landing were within “navigable airspace,” a landowner could not bring an action for overflights occurring at these altitudes. \textit{Kuntz}, 43 N.W.2d at 478; \textit{Antonik}, 78 N.E.2d at 758.

\textsuperscript{147} \textit{Griggs}, 369 U.S. at 85.

\textsuperscript{148} Id. at 90-94.

\textsuperscript{149} \textit{Causby}, 328 U.S. at 263. “If [the Civil Aeronautics Authority] prescribed [the altitudes required for landing] as the minimum safe altitude, then we would have presented the question of the validity of the regulation.” \textit{Id}.

\textsuperscript{150} \textit{Griggs}, 369 U.S. at 88-89.
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theory was no longer sound. It might be valid for a court to hold that an overflight was not compensable above 500 feet because that was the altitude that the particular state as sovereign had defined as the maximum height limit of a landowner's property.1 To say, however, that the same flight was not compensable because 500 feet was the altitude designated by Congress as public domain ignores the Griggs analysis.12 Yet, the focus on a Congressional definition of "navigable airspace" is precisely the historical basis for the "fixed height" theory. Many courts considering overflight cases since Griggs, nevertheless, continued a blind adherence to the old "fixed height" rationale.

VII. THE "FIXED HEIGHT" THEORY AFTER GRIGGS

A. A Return to the Causby Approach

Courts considering overflight cases and their attending airspace issues now had three Supreme Court decisions to look to for direction. To begin with, there was the often cited and long discussed Causby decision. Next, the dicta of Braniff, although a case dealing primarily with a different issue, shed further light on the Supreme Court's thoughts on the issue of airspace ownership. Finally,

1 See R. Wright, supra note 21, at 202. The author concludes that "States have a free hand . . . to determine the extent of ownership of airspace and to enforce their laws on the subject." Id. This conclusion can be supported by the following statement made by the Causby court: "[W]hile the meaning of 'property' as used in the Fifth Amendment was a federal question, 'it will normally obtain its content by reference to local law.'" Causby, 328 U.S. at 266. See also Adolph v. Federal Emergency Management Agency, 854 F.2d 732, 737 (5th Cir. 1988) (federal courts look to state law to determine property interests).

12 See R. Wright, supra note 21, at 202-03.

15 For a history of the "fixed height" theory and its dependency on altitudes mandated by the federal government, see S. Rhyne, supra note 28, at 109-118. See also R. Wright, supra note 21, at 202-03.


155 Braniff, 347 U.S. 590 (1954); see supra notes 129-136 and accompanying text for a discussion of the Braniff opinion.
there was the holding in *Griggs*,\(^{156}\) which appeared to prove those commentators and courts correct that had interpreted *Causby* as giving little weight to the "navigable airspace" designation when deciding if avigation easements existed.\(^{157}\) As would be expected, many courts after *Griggs* began analyzing overflight cases using *Causby* terms, such as "superadjacent airspace," and began looking at the effect of overflights on the owner's "use and enjoyment of the land," rather than focusing on whether the overflights occurred above or below certain fixed altitudes.\(^{158}\)

This focus away from the "fixed height" theory and towards the *Causby* approach was adopted in the Restatement (Second) of Torts shortly after *Griggs* was decided.\(^{159}\) Section 194 of the First Restatement, the original theoretical basis for the "privilege of flight" theory,\(^{160}\) was omitted entirely from the Restatement (Second).\(^{161}\) All airspace considerations were consolidated into Section 159 of the Restatement (Second), which states in part, "Flight by aircraft in the airspace above the land of another is a trespass if, but only if, (a) it enters into the immediate reaches of the airspace next to the land, and (b) it interferes substantially with the other's use and enjoyment of his land."\(^{162}\) This view was adopted despite urgings that the Restatement (Second) include specific reference to the minimum safe altitudes determined by federal regulations.\(^{163}\)

One might suspect that this would be a good point to end a discussion on the history of the airspace property

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\(^{156}\) *Griggs* v. County of Allegheny, 369 U.S. 84 (1962); see *supra* notes 137-152 and accompanying text for a discussion of the *Griggs* opinion.

\(^{157}\) See, e.g., *R. Wright, supra* note 21, at 154-55.

\(^{158}\) See, e.g., *Pueblo of Sandia v. Smith*, 497 F.2d 1043 (10th Cir. 1974); *Palisades Citizens Ass'n v. Civil Aeronautics Bd.*, 420 F.2d 188 (D.C. Cir. 1969).

\(^{159}\) *Restatement (Second) of Torts* § 159 (1965).

\(^{160}\) For a discussion of Restatement § 194 and the "privilege of flight theory," see *supra* notes 35-38 and accompanying text.

\(^{161}\) *Restatement (Second) of Torts* § 194.

\(^{162}\) Id. at § 159.

\(^{163}\) *See Anderson, supra* note 9, at 359.
debate. The Supreme Court had elaborated on the issue on three occasions, the Restatement (Second) of Torts was in accord with the Supreme Court, and numerous courts were following the Supreme Court’s lead. Surely now the Causby approach to airspace property would be universally accepted as the last word on the matter. But, like a complicated mystery novel, the law sometimes takes unexpected twists. It appears that neither Causby, Braniff, nor Griggs put the “fixed height” theory to rest.

B. A Theory Reincarnate: Aaron v. United States

Hardly had the ink dried on the Griggs opinion when the United States Court of Claims, in Aaron v. United States, was presented with a unique set of facts that would truly test the nature of airspace property rights. Aaron involved a combination of two cases in which multiple plaintiffs were seeking recovery for the alleged taking of avigation easements over their respective properties. Many of the plaintiffs owned chicken ranches, an enterprise highly susceptible to overflight damages. What made Aaron particularly interesting was the fact that some of the plaintiffs complained of overflights occurring just under the 500 foot “minimum safe altitude” level, while the remaining plaintiffs complained of overflights occurring just above the 500 foot level. The plaintiffs complained of basically the same types of damages, but some owned property that was slightly closer to the flight pattern altitudes than did others.

Applying the Causby approach to these facts, the Aaron court should have first looked to see if the overflights had invaded the “superadjacent” airspace above the plaintiffs’
property, and then determined if the overflights had interfered with the plaintiffs' "enjoyment and use" of their land. Surprisingly, not only did the Aaron court, in a unanimous decision, not apply the Causby test, but nowhere in the opinion was Causby even mentioned. The Court of Claims did make an apparent reference to Causby by remarking that "[p]rior [to the Griggs decision] this court and the Supreme Court had held that the United States was liable, under certain circumstances, for the taking of an easement of flight...." Yet, Causby was never mentioned by name, nor cited for any authority as to the treatment of the issues before the court.

The Aaron opinion did make passing reference to the Griggs case as standing for the proposition that an operator of an airport could be found liable for the taking of an avigation easement over property necessary for approaching and departing airplane traffic. No reference was made to the Griggs holding that overflights may result in a "taking" regardless of whether they are within "navigable airspace." Instead, the Aaron opinion launched quickly into a description of the traditional "fixed height" theory.

In support of the proposition that the "fixed height" theory of property rights should apply to overflight cases the Court of Claims cited but three cases. The first case

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170 Causby, 328 U.S. at 265.
171 Id. at 266.
172 Aaron, 311 F.2d at 802. The opinion was authored by Judge Whitaker with Chief Judge Jones, Judge Davis, Judge Durfee, and Judge Laramore concurring. Id.
173 Id. at 799-802.
174 Id. at 799.
175 Id. at 798-802.
176 Id. at 799.
177 Id. at 798-802.
178 Id. at 801. "'Navigable airspace' is defined as 'air space above the minimum safe altitude of flight prescribed by [the Civil Aeronautics Authority].'... Hence, flights above 500 feet over noncongested areas are in the navigable air space in which there is a 'public right of freedom of transit.'" Id.
cited, *Matson v. United States*,\(^1\) contains the "fixed height" theory dicta which the *Aaron* court stated as the law. A closer reading of the actual holding in this earlier Court of Claims decision, however, reveals an identical finding to that made in the *Griggs* decision. That is, while giving lip service to "500 feet and above" levels of public airspace, the *Matson* opinion actually held that a taking of an avigation easement could occur in "navigable airspace" when aircraft were landing and departing at a nearby airfield.\(^1\)

Yet, not even the dicta in the *Matson* opinion is very convincing when read in its entirety. "It would appear from the *Causby* decision that flights above the 500-foot regulated ceiling are beyond the reach of [the landowner's] objection to interference with the landowner's property rights."\(^1\) This was as decisively as the court in *Matson* was willing to state the proposition, which *Aaron* refers to as the absolute law.\(^1\)

In order to give apparent authority to the *Matson* dicta, the *Aaron* court cited, without any explanation of their relation to the issue at hand, two Supreme Court decisions on the basics of eminent domain and takings under the fifth amendment.\(^1\) Both of these cases predated *Causby* by over twenty years, and neither made any mention of avigation easements or any reference to "navigable airspace" and the "fixed height" theory.\(^1\) In fact, about the only commonality between the two cited Supreme Court decisions and the *Matson* case which they impliedly sup-

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\(^{1}\) 171 F. Supp. 283 (Ct. Cl. 1959).

\(^{1a}\) *Id.* at 285-86. After commenting that the applicable statutes had changed since the *Causby* decision to include the altitudes necessary for take-off and landing within the definition of "navigable airspace," the court concluded, "We do not think, however, that the change in the definition of navigable airspace affects plaintiffs' causes of action." *Id.* at 285.

\(^{1b}\) *Id.* at 286.

\(^{1c}\) See *Anderson*, *supra* note 9, at 354-55. Viewing the *Matson* reasoning as flying in the face of the federal statute, the author concludes that the *Matson* opinion so construed the statute in order to avoid a constitutional question. *Id.*

\(^{1d}\) *Aaron*, 311 F.2d at 801.

\(^{1e}\) *Campbell v. United States*, 266 U.S. 368 (1924) (predating *Causby* by 31 years); *Richards v. Washington Terminal Co.*, 233 U.S. 546 (1914) (predating *Causby* by 21 years).
ported was the presence of the "eminent domain" headnote at the beginning of each case.

A state court decision issued one year prior to Aaron provides a stark contrast to the Aaron holding. The Oregon Supreme Court in Thornburg v. Port of Portland interpreted the Matson and Griggs decisions as rejecting the proposition that only continuous flights at less than 500 feet could constitute a taking. In addition, a federal district court awarded damages for six helicopter flights, made under 800 feet, just two years prior to the Aaron decision. In fact, one commentator has since stated that the rule elaborated in the Aaron case was "clearly erroneous under an appropriate interpretation of the intent of the Griggs decision."

Perhaps the misstatements of the law, dicta taken out of context, and inexplicable case support could have been excused by an eloquent statement of the policy promoted by the Aaron decision. The passage that follows, however, seems an excellent argument for abolishing the rule promoted by the decision, rather than an artful defense of a rule contrary to what the law really was:

It is true that the inconvenience and annoyance experienced from the passage of a plane at 501 feet above a person's property is hardly distinguishable from that experienced from the passage of a plane at, say, 490 feet, but the extent of a right-of-way, whether on the ground or on water or in the air, has to be definitely fixed. . . . Congress has fixed 500 feet as the lower limit of navigable air space; hence, what may be permissible above 500 feet is forbidden below it . . . .

This language hardly seems convincing when contrasted

186 233 Or. 178, 376 P.2d 100 (1962).
187 Id. at 110. The Court stated, "we cannot say, as a matter of law, that jet or rocket or some other kind of noise within 500 feet, or some other number of feet, of private land might not in a particular case cause a taking for public use." Id.
188 Weisberg v. United States, 193 F. Supp. 815 (D. Md. 1961) The helicopter flights at 800 feet were not frequent enough to constitute a taking. Damages were awarded, nonetheless, upon a finding of negligence. Id. at 820.
189 R. WRIGHT, supra note 21, at 179.
190 Aaron, 311 F.2d at 801.
with the rationale rejecting the “fixed height” theory found in the above mentioned Thornburg decision:

Whatever virtue the establishment of a 500-foot floor under the cruising flight of aircraft may have as a matter of public safety, there can be only one sound reason to make it a rule of the law of real property. That reason ought to be the knowledge . . . that flights above 500 feet do not disturb the ordinary, reasonable landowner.191

Needless to say, the Aaron court decided that only those plaintiffs who complained of overflights under the 500 foot level had stated a proper cause of action.192 As to those few plaintiffs, the case was remanded to the Trial Commissioner for a determination of their entitled compensation.193 The petition as to the remaining plaintiffs was dismissed,194 thus leading to the possible result that a plaintiff with substantial damage to his chicken operation was left without compensation, while a neighbor living slightly closer to the airport was entitled compensation for significantly less actual damages.195

C. The Impact of Aaron

Factual patterns like the one found in Aaron were probably not much of a concern at the time Causby was decided, when overflights involved relatively quiet propeller driven planes. With the advent of powerful jet engines, an arbitrary line in space defining a landowner’s right to a remedy became an issue of real concern.196 If the Aaron decision had been merely a quickly forgotten opinion among the many Court of Claims overflight cases, it

191 Thornburg, 376 P.2d at 109-10.
192 Aaron, 311 F.2d at 801-02.
193 Id. at 802. The two cases before the Court of Claims in Aaron originated with Trial Commissioner Mastin G. White. Id. at 799.
194 Id. at 802.
195 See Aaron v. United States, 340 F.2d 655 (Ct. Cl. 1964). On remand, the court found that parcels belonging to nine of the plaintiffs had lost half their market value due to the avigation easement over the land. Id. at 660.
196 See Kettelson, supra note 11, at 97. “[I]t was not until jets began appearing on the scene in the 1950’s that renewed interest in the [avigation easement] problem developed rather extensively.” Id.
would not merit the attention provided above. Unfortunately, as one might suspect, the Aaron case has since become the law according to many recent court decisions.\footnote{See, e.g., Hero Lands Co. v. United States, 554 F. Supp. 1262, 1265 (Cl. Ct. 1983); Speir v. United States, 485 F.2d 643, 646 (Ct. Cl. 1973); Town & Country Motor Hotel, Inc. v. United States, 180 Ct. Cl. 563, 570-71 (1967); Avery v. United States, 330 F.2d 640, 643 (Ct. Cl. 1964).}

Aaron has not been followed universally, however, particularly in state courts.\footnote{See, e.g., 3775 Genesee Street, Inc. v. State, 415 N.Y.S.2d 575 (N.Y. Ct. Cl. 1979); Henthorn v. Oklahoma City, 453 P.2d 1013 (Okla. 1969) (taking occurred due to noise of overflight regardless of the actual physical path of the aircraft); Martin v. Port of Seattle, 64 Wash. 2d 309, 391 P.2d 540 (1964); see also Palisades Citizens Ass'n v. Civil Aeronautics Bd. 420 F.2d 188, 192 (D.C. Cir. 1969) (dicta from opinion rejects strict adherence to "minimum safe altitudes" as test of landowner's recovery).} Some federal courts incorporate the 500-foot ceiling on a landowner's rights by stating that when an overflight occurs in navigable airspace, a presumption of non-taking exists.\footnote{See Stephens v. United States, 11 Cl. Ct. 352, 362 (1986).} This presumption can be overcome by proof of destruction of, or substantial impairment to, the landowner's property.\footnote{Id.}

In 1981, a United States Court of Claims issued a decision that rejected Aaron's strict reliance on the "fixed height" theory and the 500 foot level of navigable airspace.\footnote{Branning v. United States, 654 F.2d 88 (Ct. Cl. 1981), aff'd, 784 F.2d 361 (Fed. Cir. 1986).} Once again, it appeared that the "fixed height" theory might be overcome by the reality of overflight damages.

VIII. THE BRANNING SCARE

A. Branning v. United States:\footnote{Id. at 91-93.} A Timid Rejection of the "Fixed Height" Doctrine

During the early 1970s, the United States Marine Corps Air Station at Beaufort, South Carolina, was used by the United States as a training field for simulated aircraft carrier landings.\footnote{Id.} In order to perform this maneuver, trainees were required to fly their large F-4 jets with their
noses up and tails down, with near maximum power applied, as they approached the simulated carrier deck at low speeds and altitudes.\textsuperscript{204} Since training was conducted squadron-by-squadron, and each plane repeated the maneuver several times, the air traffic to the intended runway was virtually nose-to-tail over a period of several days during each month in which the training was conducted.\textsuperscript{205} The plaintiff in Branning owned 525 acres over which these F-4 jets flew while practicing at the Marine field.\textsuperscript{206} A claim was brought against the United States for the taking of an avigation easement over the plaintiff’s land.\textsuperscript{207}

At first glance, the facts of the Branning case suggest that a “taking” had clearly occurred for which the plaintiff should recover. There was one slight problem, however. The overflights complained of were at 600 feet above the plaintiff’s property, while the “minimum safe” altitude for that airspace was 500 feet.\textsuperscript{208} According to the Aaron rationale, the case should have been dismissed. Fortunately for the plaintiff, the Branning court chose not to follow this rigid analysis.\textsuperscript{209}

The Court of Claims made no attempt to avoid the issue: “The novelty of this decision is in its holding that defendant’s use of airspace at altitudes above 500 feet, and independent of landing and takeoff, may be a taking of land beneath if the use is peculiarly burdensome.” \textsuperscript{210} In reaching this holding, the court reviewed the Causby decision, the Griggs decision, and outlined the Oregon Supreme Court’s reasoning in the Thornburg case.\textsuperscript{211} These cases, along with several other federal court decisions,\textsuperscript{212} were contrasted with the rule found in the Aaron

\textsuperscript{204} Id. at 90.
\textsuperscript{205} Id. at 91.
\textsuperscript{206} Id. at 91-92.
\textsuperscript{207} Id. at 90-91.
\textsuperscript{208} Id. at 91-92.
\textsuperscript{209} Id. at 99-102.
\textsuperscript{210} Id. at 90.
\textsuperscript{211} Id. at 96-102. For a discussion of the Thornburg decision, see supra notes 186, 187, 191 and accompanying text.
\textsuperscript{212} Although mentioning other federal court opinions, the Branning court pri-
opinion. Based on its analysis, the Branning court concluded, "it is clear that the Government’s liability for a taking is not precluded merely because the flights of Government aircraft are in what Congress has declared to be navigable airspace and subject to its regulation."

In support of this conclusion the court stated:

The question thus raised is whether the 500-foot altitude is so critical a measure of the avigational servitude that liability can be avoided simply by flying noisier aircraft at an altitude of 501 feet. Minimum \textit{safe altitude} and minimum \textit{noise levels} are concerned with two different things. While safety may be measured in terms of altitude, a reasonable noise level cannot be measured solely in terms of altitude. ... Since the subjacent property owner has suffered a diminution of the value of the property ... [i]t is abundantly clear that under the law established by Causby, Griggs, and Aaron a taking has occurred in this case.

Having made this conclusion, the case was remanded to the trial division to determine the date of the taking and the amount of recovery.

\textbf{B. The Branning Exception}

Seeing that the 500-foot barrier no longer barred litigation against the government might have prompted landowners, situated around military fields, to attempt other Branning type suits.\footnote{Id. at 101-02.} This, no doubt, concerned the government’s legal counsel. Without the 500-foot altitude bar to litigation, each taking suit would have to be won on

\begin{itemize}
\item\textbf{mainly} focused on a discussion of Lacy v. United States, 595 F.2d 614 (Ct. Cl. 1979). The Branning court read the Lacy opinion as relying on the actual interference with the plaintiff’s land as a measure of recovery, rather than the altitude of the particular overflights. Branning, 654 F.2d at 101.
\item Id. at 101.
\item Id. at 101-02.
\item Id. at 103.
\end{itemize}
its merits. Fortunately for the government, Branning provided for its own demise.

Although the Branning decision was diametrically opposed to the Aaron decision, the Branning court refused to reject Aaron outright. The per curiam opinion in Branning very carefully explained that the holding was limited to the specific facts of the case. This hesitance to reject the Aaron opinion meant that Branning would have little influence on airspace property issues in the future. Courts can simply treat Branning as the exception to the Aaron rule. This being the case, the "fixed height" doctrine remains a viable theory of airspace property rights to this very day.

IX. JUST EXACTLY WHO OWNS THE AIRSPACE?

A. The Modern View

More than eighty years after Kitty Hawk and more than forty years after Causby, courts have yet to adopt a uniform theory of airspace property ownership. When the airspace involved lies below the 500-foot navigable airspace level, most recent opinions focus on whether or not the landowner's use and enjoyment of the land has been interfered with in order to determine if a property right has been taken. According to this approach, the landowner owns just as much airspace above his property as is necessary to allow him to use his land without substantial interference from above.

When the airspace involved lies above the 500-foot level, the owner's rights to this airspace can be evaluated in three different ways. First, courts following a strict Aaron "fixed height" approach would state that a land-

\[\text{\textsuperscript{217}}\] Branning, 654 F.2d at 90. "Whether use of airspace above 500 feet for noisy air navigation of a more conventional variety can be held a taking is an issue that ... is reserved for the case that presents it. In this case our taking holding turns on the peculiar facts the trial judge has found." Id.

\[\text{\textsuperscript{218}}\] See, e.g., Hero Lands Co. v. United States, 554 F.2d 1262, 1265-66 (Cl. Ct. 1983); Powell v. United States, 1 Cl. Ct. 669, 673 (1983).

\[\text{\textsuperscript{219}}\] See, e.g., Lacy v. United States, 595 F.2d 614, 618 (Cl. Ct. 1979).
owner has no rights to airspace above 500 feet. The second approach involves a modified "fixed height" theory, which allows for landowners' airspace rights above 500 feet only when the particular circumstances clearly show that this airspace is required in order for the landowner to use his property without substantial interference. Finally, a court can conclude that the 500-foot line is meaningless to the evaluation, and use the same test applied to airspace falling below the 500-foot level.

B. Modern Airspace Property Rights Considerations

With the emphasis on interference with the "use and enjoyment" of the land as a prerequisite to a determination of airspace property rights, it is important to know just when this interference occurs. Probably the easiest case of such interference occurs when the landowner's livelihood is actually impaired or actual physical damage is caused by the overflights in question. Another example occurs when the property becomes impractical for the intended or possible use contemplated by the landowner.

A helpful tool for determining if property has become impractical for its intended or possible use in the vicinity of military airfields is the Air Installation Compatible Use Zone ("AICUZ") reports. These AICUZ reports, pre-

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223 United States v. Causby, 328 U.S. 256 (1945), itself serves as an excellent example of these types of damages. For a more detailed version of the facts in this case, see Causby v. United States, 60 F. Supp. 751 (Cl. Ct. 1945).
225 See Branning v. United States, 654 F.2d 88, 95-96 (Cl. Ct. 1981). When explaining the Air Installation Compatible Use Zone (AICUZ) Program, the Branning court stated:

[it] has been instituted to coordinate the requirements of the mis-
pared by the government for all military airfields, combine noise levels with accident potential statistics to arrive at a determination of the appropriate use of land in the vicinity of a military airfield. If the AICUZ report classifies a plaintiff's land as unsuitable for practically any profitable purpose, a court will probably determine that there has been an interference with the plaintiff's use and enjoyment of the land.

Another major consideration in recent overflight cases is the running of a statute of limitations. Many recent cases have been dismissed because courts felt that the landowner had waited too long to complain of an overflight problem that had existed for some time. If frequent overflights give rise to an easement, landowners must be required to assert a legal claim to their property within a reasonable time, much like a landowner must do when faced with an adverse possessor. Methods of avoiding any statutes of limitations include claiming that a preexisting easement has since been enlarged or expanded by either noisier, lower, or more frequent overflights. One downside of the previously mentioned AICUZ for landowners is that it may put them on notice of the impact of current air operations, thus starting the statute of limitations running.

Id. at 95; see also Stephens v. United States, 11 Cl. Ct. 352, 363 (1986).
Stephens, 11 Cl. Ct. at 363; Branning, 654 F.2d at 95-96.
Branning, 654 F.2d at 96.
See, e.g., Bieneman v. City of Chicago, 864 F.2d 463 (7th Cir. 1988); Hero
Bieneman, 864 F.2d at 467-70.
See, e.g., Aaron v. United States 311 F.2d 798, 800-01 (Cl. Ct. 1963).
Branning, 654 F.2d at 96.
C. Suggestions for the Future

One particularly interesting approach to the airspace-as-property problem can be found in the dicta of a recent United States Claims Court case entitled Stephens v. United States.\textsuperscript{232} Although applying a modification of the Aaron "fixed height" theory, the Stephens court hinted at a balancing formula that may be used in the future to more accurately and equitably describe a landowner's airspace rights.\textsuperscript{233} The particular language, taken admittedly out of context, begins, "[a]s the height of the overflights [increase], the Government's interest in maintaining air sovereignty becomes weightier while the landowner's interest diminishes, so that the damage showing required [to prove a property interest] increases in a continuum toward showing absolute destruction of all uses of the property."\textsuperscript{234} Concomitantly, the government's interest in maintaining air sovereignty diminishes while the landowner's property interests increase as the height of the overflights come closer and closer to the landowner's soil, until the landowner can be said to have an unquestionable right to that airspace actually in his possession. In this respect, the interests of the landowner and the government in airspace varies linearly and proportionately from absolute ownership in the landowner at ground level to absolute public ownership at a height where the landowner could not possibly be disturbed by aviation overflights.\textsuperscript{235}

This type of approach would require a court to balance the interests of the landowner with the public's right to freedom of transit in every case. The altitude of the overflights would determine the burden and level of proof required. If an arbitrary altitude must be selected as an

\textsuperscript{232} 11 Cl. Ct. 352 (1986)

\textsuperscript{233} See supra notes 199-200 and accompanying text for the Stephens court's modification of the Aaron holding.

\textsuperscript{234} Stephens, 11 Cl. Ct. at 362.

\textsuperscript{235} The altitude at which a landowner's rights become absolutely non-existent might be set at the base of the "Low Altitude Airway Structure." See supra note 16 and accompanying text for the definition of "Low Altitude Airway Structure."
anchor point to the analysis, 500 feet could be used as the point where the burden of proof shifts from the defendant to the landowner to show interference with the use and enjoyment of the land. Unlike an Aaron analysis, this threshold would not give rise to an absolute bar to recovery. Instead, the proof required to show interference from overflights at 490 feet would be very close to that required if the overflight occurred at 510 feet. The 500-foot level would only mark the point at which the analysis would begin to favor the defendant.

This type of analysis would correspond to the reasoning found in Causby by focusing on the interference with the use and enjoyment of the land. The Griggs opinion would also complement this approach, since the proposed analysis gives little weight to the fact that the overflight might or might not be within navigable airspace. Perhaps most importantly, the arbitrary “fixed height” theory would finally be put to rest.

For a discussion of the Causby approach, see supra notes 90-93 and accompanying text.

For a discussion of the Griggs opinion, see supra notes 137-153 and accompanying text.

Branning, 654 F.2d at 102 n.22, provides an interesting example of the arbitrary nature of the “fixed height” rule and its lack of rational relation to some overflight problems:

Giders, for example, would not be a source of noise impact over a residential area, even if flown at altitudes of less than 500 feet AGL over such an area. However, flight of gliders over property at any altitude might constitute a substantial accident risk. Conversely, loud, annoying aircraft such as helicopters, repeatedly passing over a residential area at an altitude above 500 feet AGL, might well be a source of considerable noise impact and yet not create a substantial accident risk at any given point below.

Id.

Another problem raised by the “fixed height” theory is the distinction of a 1000 foot navigable airspace floor over populated areas while over sparsely populated areas the level is set at 500 feet. See Anderson, supra note 9, at 359. This distinction raises the question of discrimination against rural property owners who are afforded half the airspace property rights apparently afforded urban landowners. Id.

It is also interesting to note that while perhaps the statutory 500 foot level protects aviation overflights from being actionable by the landowner, it does not prohibit landowners from trespassing above that altitude into the public domain. The Federal Aviation Administration is practically powerless to prohibit a land-
Until courts adopt such a sliding scale of airspace property rights, they should at least refrain from using the flawed "fixed height" analysis made popular by the Aaron decision. The United States Supreme Court has ignored the "fixed height" theory in Causby, and repudiated the theory in the Griggs holding and in dicta found in Braniff. There seems little justification for the "fixed height" theory other than judicial efficiency. This efficiency justification is clearly outweighed by the constitutionally protected property interests of the landowner.

A better approach to airspace property questions can be found in the Branning opinion. Although admittedly a uniquely aviation related approach to the issue of takings under the Constitution, the proper focus in all overflight cases should be on the harm incurred by the landowner and not on the altitude at which the flight occurred. The realities of larger, noisier, and more frequent air travel in modern America leave little pretext for owner from building structures in the federal airway system, such as radio towers. See 14 C.F.R. Part 77 (1989). The FAA can request that the FCC refuse to license any transmitting structures. Reminga v. United States, 631 F.2d 449, 452-53 (6th Cir. 1980). In this manner the FAA does exert indirect authority over some structures, but not through the invocation of any "minimum safe altitude" regulation. Id. at 453.

Aaron v. United States, 311 F.2d 798 (Ct. Cl. 1963). For a criticism of the reasoning found in the Aaron opinion, see supra notes 164-195 and accompanying text.

United States v. Causby, 328 U.S. 256 (1946); see supra notes 55-93 and accompanying text for a discussion of the Causby opinion.

Griggs v. County of Allegheny, 369 U.S. 84 (1962); see supra notes 137-153 and accompanying text for a discussion of the Griggs opinion.

Braniff, 347 U.S. at 590; see supra notes 129-36 and accompanying text for a discussion of the Braniff opinion.

For a discussion of the judicial efficiency rationale that helped to promote the "fixed height" theory, see supra note 124 and accompanying text.

For a discussion of the unusual focus on harm to the landowner used when evaluating taking issues under the Causby test, see supra notes 107-108 and accompanying text for a discussion of Justice Black's attack on such a focus in the Causby dissenting opinion.

For an analysis of the test presented by the United States Supreme Court in Causby, see supra notes 90-93 and accompanying text.
a continued adherence to a fixed altitude of 500 feet as a bar to all overflight suits.

X. Conclusion

When approaching a potential overflight suit today, a landowner can evaluate some factors of his case with certainty. First, any action involving the taking of an avigation easement must begin before the running of the appropriate statute of limitations. The best argument in support of a claim that the statutory period has not yet run is proof that the scope of any preexisting avigational easement has been expanded by a recent increase in air traffic.

Once over the statute of limitations issue, the landowner must determine if he will be able to prove the harm imposed by the avigation easement. This harm can include actual physical damage, diminution in property value, infringement on the owner's occupation or livelihood, and other interferences with the owner's "use and enjoyment" of his land. If the landowner does possess such proof of harm, then the last point of concern is the altitude of the overflights.

If the overflights complained of occurred below 500 feet above the ground, the landowner's right to bring the suit will probably be conceded. In this event, the issues of the statute of limitations and harm will be the primary points of contention. If the overflights complained of occurred above the 500-foot level, a close reading of the law of the particular jurisdiction is required.

As discussed in this comment, courts may approach the issue of overflights within "navigable airspace" as raising a complete bar to litigation or of no consequence at all. Most courts would at a minimum, however, carefully scrutinize any claim involving flights above 500 feet. Very few jurisdictions can be expected to allow recovery for the taking of an avigational easement within "navigable airspace" without an extraordinary showing of the harm caused by such overflights. What factual situation consti-
tutes an “extraordinary showing” of harm is by no means clear.

With no definitive standard yet enunciated, and courts mixed in their approach to the question, landowners must still wonder just exactly what their property rights are to the airspace above their land. Any answer to this question must carefully balance the constitutional and economic rights of the landowner with the economic and national interests in aviation. If one thing is certain, the landowner does have a property interest in airspace. The difficulty remains in describing with precision what that property interest encompasses. Perhaps the nature of airspace itself will forever preclude an exact answer. Perhaps low altitude airspace will always be a property rights “no-man’s land.”