Airport Noise Litigation in the 21st Century: A Survey of Current Issues

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I. Introduction

More than 60 years ago, the Supreme Court recognized in *Causby v. United States*\(^1\) that property owners could recover damages for injuries caused by aircraft overflights. Fifty years ago, the Court held in *Griggs v. Allegany County*\(^2\) that airport operators were liable for such damages. Although much about the nature of aviation and airports has changed in the intervening years, the basic principles of liability established in *Causby* and *Griggs* continue to guide courts in addressing claims for damages arising from aircraft overflights and airport operations. Indeed, it is striking how modern courts continue to struggle with the same fundamental issues as to the nature and underlying basis of liability that the Court addressed at the dawn of commercial aviation.

This article presents a survey of current trends and issues in the area of liability for aircraft overflights. The article first summarizes the foundational cases of *Causby* and *Griggs*. This discussion is important not only for historical purposes, but because the bases for liability reflect a confused blend of takings, trespass, and nuisance theories that has caused continued doctrinal confusion in courts up to the present day. Having explained the basic principles, the article addresses a number of current trends and issues in the law. It is important to acknowledge that this article is *not* intended to be a comprehensive treatment of overflight liability, nor does it address attempts to stop airport expansion, location, or improvement projects.


1 328 U.S. 256 (1946).

2 369 U.S. 84 (1962).
II. Discussion

A. The Theory of Overflight Liability

Although this article focuses on current trends and issues, it is necessary to understand the origins of the theory of liability for overflights, because many of the particular problems in the law today reflect directly the way in which the theory of liability was originally articulated. Fundamentally, courts have wrestled with how to resolve the unavoidable conflict between the public need for airports and the impact aircraft overflights have on people living near airports. As illustrated below, the Court’s decision in the seminal case of *Causby* to classify such actions as takings has fundamentoally shaped how courts and legislatures have addressed these cases for almost 60 years.

1. *Causby v. United States*: Overflights Can Constitute Takings

In *Causby*, the property owner owned a farm approximately one-third of a mile from the Greensboro-High Point Municipal Airport.\(^3\) Although most operations did not bother the Causbys, operations by Army bombers began to cause substantial injuries beginning in 1942. The evidence showed that bombers flew approximately 83 feet above the property, with great frequency both day and night.\(^4\) The effects of those overflights were substantial: “This noise and glare disturbed respondents’ sleep, frightened them, and made them nervous. The noise and light also frightened respondents’ chickens so much that many of them flew against buildings and were killed.”\(^5\)

Writing for the Court, Justice Douglas first rejected the idea that the case was governed by the ancient principle that a land ownership extends “to the periphery of the universe.”\(^6\) Instead, the Court held that the overflights constituted a taking of property under the Fifth Amendment because the effect of the overflights was so great that use of the surface estate was destroyed, or nearly so.\(^7\) Accordingly, the United States’ use of the airspace

\(^3\) 328 U.S. at 269 (Black, J., dissenting).
\(^4\) *Id.*
\(^5\) *Id.*
\(^6\) *Id.* at 260–61.
\(^7\) *Id.*
created a servitude – later referred to as an avigation easement – the taking of which was compensable.\footnote{Id.} Justice Douglas also seemed to rely on the fact that the “navigable airspace which Congress has placed in the public domain” as defined under then-existing regulations, extended only as low as 300 feet above ground level, and did not include the airspace necessary for take-offs and landings, meaning that the bombers were not operating in the navigable airspace.\footnote{Id. at 263–64.}

Justice Douglas did not limit his holding to how aircraft impair the use of the surface, however. He went on to explain that “if the landowner is to have full enjoyment of the land, he must have exclusive control of the immediate reaches of the enveloping atmosphere. Otherwise buildings could not be erected, trees could not be planted, and even fences could not be run.”\footnote{Id.} Justice Douglas concluded that “the superadjacent airspace at this low altitude is so close to the land that continuous invasions of it affect the use of the surface of the land itself. We think that the landowner, as an incident to his ownership, has a claim to it and that invasions of it are in the same category as invasions of the surface.”\footnote{Id. at 265.} Accordingly, the Court held that “[f]lights over private land are not a taking, unless they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land.”\footnote{Id. at 266.} Despite the apparent focus on the impact of the overflights on the use of the land, the Court remanded the case to the Court of Claims (now the Court of Federal Claims) for a precise definition of the aerial avigation easement that was taken – in terms of frequency of flight, permissible altitude, type of airplane, and permanent or temporary nature.\footnote{Id. at 267.} Thus, \textit{Causby} introduced the concept of an avigation easement in the airspace, defined by the flight path and noise levels of the aircraft but triggered by the impacts of those overflights on the surface estate, and rooted its treatment of overflight cases in the real property doctrines of takings and easements.

In dissent, Justice Black identified the central tension inherent in the majority decision. He noted that the Court appeared to hold that the “mere flying of planes through the column of air

\footnotesize{
\begin{itemize}
\item \footnote{Id.} 
\item \footnote{Id. at 263–64.} 
\item \footnote{Id.} 
\item \footnote{Id. at 265.} 
\item \footnote{Id. at 266.} 
\item \footnote{Id. at 267.} 
\end{itemize}
}
directly above respondents’ land does not constitute a ‘taking.’”  

If the flight itself was not the taking, because it did not occupy or use plaintiffs’ property, the taking must have been caused by the impact of the noise and glare. Justice Black noted that the Court had never extended the Fifth Amendment to protect against such impacts, the injuries from which would be a nuisance or other tort, not a taking, and therefore not actionable in the Court of Claims. Justice Black rejected the notion that the Fifth Amendment protects property owners from the impact of noise and light caused by the use of adjacent property because those are “at best . . . mere torts committed by Government agents while flying over land.” He concluded that “[t]he 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 eminent expansion of air navigation, be left where I think the Constitution left it, with Congress.”

Although not stated expressly, Justice Black’s dissent also reflects the tension inherent in the majority opinion between finding a taking based on how overflights affect the use of the land but defining the property taken as an ownership interest in the airspace. Justice Black’s solution of treating the issue as a tort would have eliminated that tension and focused attention solely on how the overflights affected the use of land. This tension between tort law, property law, and Constitutional law, between takings and nuisance, is a central theme in the jurisprudence on aircraft overflight liability.

2. **Griggs v. Allegheny County: Airport Owners Are Liable for Overflight Damages**

One aspect of *Causby* that the Court did not address specifically was who should be liable for damages caused by an overflight. The aircraft were Army bombers operating from an airport leased by the United States, and the Court seemed to accept without discussion the presumption that the United States was the proper defendant. Approximately 16 years later, in

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14 *Id.* at 269 (Black, J., dissenting).
15 *Id.* at 270 (Black, J., dissenting).
16 *Id.*
17 *Id.* at 271 (Black, J., dissenting).
18 *Id.*
Griggs v. Allegheny County, the Court was presented squarely with the question of who is liable in overflight cases. Griggs involved a suit by homeowners against Allegheny County seeking compensation for that taking of property as a result of aircraft overflights from the then newly constructed Greater Pittsburgh Airport. The County argued that “someone other than respondent was the taker – the airlines or the [Civil Aeronautics Administration] acting as an authorized representative of the United States.”

The Court rejected that argument and held that because the County had selected the location of the airport and the location and configuration of the runways, which in turn defined the flightpaths, it was responsible for acquiring any necessary easements in the same way it was responsible for acquiring the land for the airport itself. The Court concluded that: “Without the ‘approach areas,’ an airport is indeed not operable. Respondent in designing it had to acquire some private property. Our conclusion is that by constitutional standards it did not acquire enough.”

In addition to determining who is liable for overflights, the Court in Griggs also addressed a question left somewhat unresolved by Causby: The significance of whether aircraft are in the “navigable airspace.” As noted above, Justice Douglas in Causby thought it significant that the bombers were flying below the altitude defined as the navigable airspace, suggesting that flights in the navigable airspace could not effect a taking. The matter was not clear, however, because Justice Douglas also seemed to accept the United States’ concession that overflights that made the land uninhabitable would effect a taking even if the flights were in the navigable airspace. By 1962, however,
Congress had redefined the term “navigable airspace” to include airspace necessary for takeoffs and landings.\textsuperscript{25} Under a narrow reading of \textit{Causby}, the Court could have found that no taking had occurred in \textit{Griggs} because the aircraft taking off from and landing at Pittsburgh were operating in the navigable airspace as defined by Congress.

Without any discussion, however, the Court in \textit{Griggs} found that a taking had occurred despite the fact that the takeoffs and landings were within the navigable airspace.\textsuperscript{26} Thus, it appears that the legal definition of the navigable airspace is not outcome determinative in overflight cases, and is something of a red herring. As in \textit{Griggs}, and as discussed below, courts tend to ignore the fact that the navigable airspace includes the airspace needed for takeoffs and landings. Instead, courts tend to presume that a taking has occurred for overflights below 500 feet, which is the generally applicable definition of navigable airspace, and presume that no taking has occurred for overflights over 500 feet.

3. State and Federal Court Application of \textit{Causby} and \textit{Griggs}

Relying on \textit{Causby}, federal courts adopted a standard of liability that requires a plaintiff to show that overflights occurred “directly above the subject property, below navigable airspace (i.e., below 500 feet), and that those flights were of such frequency that they substantially interfered with the use and enjoyment of the underlying land.”\textsuperscript{27} State courts have adopted the same basic

\begin{footnotesize}
\textsuperscript{25} \textit{Griggs}, 369 U.S. at 89 (citing Section 101(24) of the Federal Aviation Act of 1958, 72 Stat. 739, now codified at 49 U.S.C. § 40102(32) (2006) (“‘navigable airspace’ means airspace above the minimum altitudes of flight prescribed by regulations under this subpart and subpart III of this part, \textit{including airspace needed to ensure safety in the takeoff and landing of aircraft.”) (emphasis added)).

\textsuperscript{26} \textit{Id.} at 89–90.

\textsuperscript{27} Persyn v. United States, 34 Fed. Cl. 187, 196 (1995). \textit{See also} Aaron v. United States, 311 F.2d 798, 800 (Ct. Cl. 1963). Notwithstanding the Court’s apparent decision in \textit{Griggs} that a taking could occur even if an aircraft were operating in the navigable airspace, the federal courts continued to articulate a test that seemed to depend on whether an aircraft was operating \textit{below} the navigable airspace. \textit{See}, e.g., \textit{Aaron}, 311 F.2d at 801 (affirming commissioner’s decision to find liability only for flights \textit{below} 500 feet). This language is something of a red herring, however, because, as discussed above, aircraft on takeoff and landing are operating in the navigable airspace but can still support a takings claim under \textit{Causby}.
\end{footnotesize}
rule, but with several variations. Some states follow the federal rule and require a direct invasion or overflight of the super-adjacent airspace.\textsuperscript{28} Other states have rejected that requirement on a more straightforward theory that it is the impact on the land that causes the servitude, not the physical location of the aircraft, and therefore the altitude and location of the aircraft are not determinative.\textsuperscript{29} Finally, other states have broader takings clauses that allow recovery for taking or damage to property, which courts construe to permit recovery for overflights without regard to the altitude or location of the aircraft.\textsuperscript{30}

\subsection*{B. Current Trends}

\subsubsection*{1. Scope of Liability}

Despite the passage of time and changes in aviation, courts continue to rely on and apply the basic principles of \textit{Causby} and \textit{Griggs} in overflight cases.\textsuperscript{31} Nonetheless, there have been incremental changes in the way courts apply those basic principles. Broadly speaking, these changes reflect courts’ recognition that the simple \textit{Causby} paradigm does not address all cases and is not in full accord with modern takings jurisprudence. Accordingly, courts have articulated exceptions and variations on the \textit{Causby} rule to address different facts.

\textit{The 500 Foot Rule.} Under a strict reading of \textit{Causby}, an overflight is actionable only if it physically invades plaintiff’s prop-

\textsuperscript{28} See, e.g., Hillsborough County Aviation Auth. v. Benitez, 200 So. 2d 194, 198 (Fla. Dist. Ct. App. 1967).
\textsuperscript{31} In \textit{City of Austin v. Travis County Landfill Co.}, 73 S.W.3d 234, 239 (Tex. 2002), the Texas Supreme Court considered for the first time whether aircraft overflights were actionable as takings under Texas law. In deciding overflights could constitute a taking, the Court adopted the federal standard, as established in \textit{Causby}, as the Texas standard. See also Melillo v. City of New Haven, 732 A.2d 133 (Conn. 1999) (applying \textit{Causby} standard but finding no compensable taking because expert testimony on property values showed no harm was caused by overflights).
Property by flying directly overhead and at altitudes below 500 feet; interference through noise, light and fumes at greater distances is not actionable.\footnote{See Avery v. United States, 330 F.2d 640, 645 (1964); Batten v. United States, 306 F.2d 580, 585 (10th Cir. 1962).} In \textit{Argent v. United States},\footnote{124 F.3d 1277, 1284 (Fed. Cir. 1997).} however, the Federal Circuit was presented with a case in which hundreds of Navy training operations per week occurred very close to plaintiffs’ property, but not directly overhead. The problem was that the fighter jet engines blasted directly over plaintiffs’ property as the aircraft made a sharp “cornering” turn in the training pattern, substantially interfering with plaintiffs’ use and enjoyment of their property.\footnote{\textit{Id.}} Although the flights were below 500 feet, they did not pass directly over plaintiffs’ property. The court held that because “plaintiffs complain of a peculiarly burdensome pattern of activity, including both intrusive and non-intrusive flights, that significantly impairs their use and enjoyment of their land, those plaintiffs may state a cause of action.”\footnote{\textit{Id.}} Similarly, in \textit{Branning v. United States},\footnote{654 F.2d 88, 90, 101–102 (Ct. Cl. 1981).} the Court of Claims held that overflights by Marine Corps jets were actionable, despite the fact that they occurred at altitudes above 500 feet, because the flights were “peculiarly” burdensome to the property owner.\footnote{\textit{Id.}} Based on the facts of \textit{Branning} and \textit{Argent}, it appears that “peculiarly burdensome” means that the flights were continuous and nearly constant. These cases suggest the emergence of a more flexible rule that recognizes that more frequent but lower impact operations can be just as damaging as less frequent but higher impact operations, and that bright-line rules based on property lines and altitude are insufficient to fully address the issue.

One state court, relying in part on \textit{Branning}, has taken a similar approach, and more directly addressed the limitations of the \textit{Causby} framework. The case, \textit{Biddle v. BAA Indianapolis},\footnote{860 N.E.2d 570 (Ind. 2007).} is worth considering in some detail not only because of the way it addressed the legal issue, but because the facts of the case illustrate many of the modern trends in overflight litigation, particularly at commercial service airports. First, the suit exemplifies one modern trend because it arose following the construction of a
new runway whose approach and departure paths went over plaintiffs’ neighborhood at altitudes between 1300–4800 feet.\textsuperscript{39} Plaintiffs alleged that overflights disturbed their use and enjoyment of their property by disrupting sleep, conversation, and watching television, and by reducing the value of their homes.\textsuperscript{40} Unlike the earlier cases like \textit{Causby}, in which overflights were alleged to have severely limited the usefulness or habitability of the property, the plaintiffs in \textit{Biddle} seemed to be complaining about inconveniences and compromises in their lifestyle.

In addressing the central issue of liability, the court contrasted the general law on inverse condemnation, exemplified by the \textit{Penn Central}\textsuperscript{41} test that focuses on economic impact and interference with investment-backed expectations, with overflight takings cases, exemplified by the \textit{Causby} rule based on the altitude of the overflight.\textsuperscript{42} The court adopted a modified approach which used the 500-foot federal standard as a presumption of whether or not a taking occurred and then applied the \textit{Penn Central} standard to make a final determination.\textsuperscript{43} Applying that standard, the court affirmed the trial court’s entry of summary judgment against plaintiffs because the noise from aircraft flying well above 500 feet, while “considerable,” still allowed homeowners to make valuable use of their property and did not amount to a taking.\textsuperscript{44}

Second, the airport had acted proactively to address potential noise issues by implementing a noise mitigation program that included a Sales Assistance Program, a Sound Insulation/Purchase Assistance Program, and a Guaranteed Purchase Program.\textsuperscript{45} The predecessor in title of one plaintiff family, the Fakes, had participated in the noise program and received a payment from the airport in compensation for the noise. When the Fakes purchased their home, they received a formal written notice of the noise, as required by the noise program. Although the arguments in the lower courts appeared to focus on real estate issues of releases

\textsuperscript{39} \textit{Id.} at 573.
\textsuperscript{40} \textit{Id.}
\textsuperscript{42} \textit{Biddle}, 860 N.E.2d at 576–580.
\textsuperscript{43} \textit{Id.} at 580.
\textsuperscript{44} \textit{Id.} Similarly, in \textit{Melillo v. City of New Haven}, 732 A.2d 133 (Conn. 1999), the court found no taking, despite jet overflights as low as 100 feet over plaintiffs’ property, because there was no evidence of harm to the value to the property.
\textsuperscript{45} \textit{Id.}
and notice, the Supreme Court of Indiana focused on the *Penn Central* test to find that because the Fakes had paid a reduced price for the property based expressly on the existence of airport noise, the noise could not have interfered with their investment-backed expectations.\textsuperscript{46}

*Loss of Value and Economic Injury.* Another area that has undergone similar change is what kind of impairment of the use and enjoyment of property must a plaintiff show and whether a reduction in value alone is sufficient to establish a taking. The general rule has been that a reduction in value alone is not sufficient, but that a reduction in value coupled with some showing of interference with the use and enjoyment of the property would be sufficient.\textsuperscript{47} For example, in *Travis County Landfill*, the Texas Supreme Court rejected a takings claim despite evidence of reduction in value when there was no evidence that the overflights had affected or impaired the use of the property as a landfill or had caused the property value to decline.\textsuperscript{48}

The Federal Circuit, however, has suggested a different approach based on the theory that interference with resale value alone could support a finding of a taking or partial taking. In *Brown v. United States*,\textsuperscript{49} owners of a ranch in West Texas sued for damages based on overflights by Air Force aircraft conducting touch-and-go training exercises on a nearby landing strip. The aircraft flew directly over the ranch at altitudes below 500 feet.\textsuperscript{50} The evidence further showed that the overflights did not interfere with any current use of the property, including cattle grazing, hunting, and other recreational uses. The Browns claimed, however, that the overflights decreased the value of the property and impaired its resale value. The trial court held that because there was no interference with any current use of the property, there could be no taking. The Federal Circuit reversed, however, finding that:

\textsuperscript{46} *Id.* at 582. *But see* Brenner v. City of New Richmond, No. 2010AP342, 2011 WL 1760465 (Wis. Ct. App. 2011) (800 N.W.2d 957 (mem.)) (reversing because trial court applied regulatory taking standard instead of physical occupation standard).

\textsuperscript{47} See *Travis County Landfill*, 73 S.W.3d at 242 (collecting and discussing cases).

\textsuperscript{48} *Id.* at 242–43.

\textsuperscript{49} 73 F.3d 1100 (Fed. Cir. 1996).

\textsuperscript{50} *Id.*
An important element in a property owner’s bundle of rights is the right to economically exploit his land—the right to sell the land for the best price available in the market, based not only on its current use but on potential other uses for which the market is presently prepared to pay.\(^{51}\)

The Federal Circuit remanded the case for further factual development to determine whether the overflights interfered sufficiently with potential future uses of the property and its resale value to constitute a taking of that element of the owner’s bundle of property rights.\(^{52}\)

State courts have indicated a similar willingness to consider the potential future value of property in determining whether a taking has occurred. In cases in Minnesota and Nevada arising from the adoption of airport overlay zoning regulations that restrict the development potential of land, the courts borrowed heavily from \textit{Causby} to find a property interest in the airspace over the land up to 500 feet, and to find that state law protected the future development potential of that property.\(^{53}\) By keeping these cases in the \textit{Causby} “physical invasion” paradigm, and then classifying future economic return as a present property right, \textit{Brown, Sisolak}, and \textit{DeCook} may signal a new broadening of potential liability in overflight cases based on consideration of purely economic injuries.

Taking a very different approach, Florida courts require plaintiffs to show a physical invasion of, and substantial ouster from, their property that led to a substantial decrease in value.\(^{54}\) More-

\(^{51}\) \textit{Id.} at 1104.

\(^{52}\) \textit{Id.} at 1106. The Federal Circuit did make clear that plaintiffs must clearly prove their loss. “Clearly, minor, indirect, or speculative reductions in the value of property would not be enough.” \textit{Id.}

\(^{53}\) McCarran Int’l Airport v. Sisolak, 137 P.2d 1110 (Nev. 2006) (airport height restriction that limited future development potential without interfering with any current use was a compensable taking); Vacation Vill. v. Clark County, 497 F.3d 902 (9th Cir. 2007) (applying \textit{Sisolak} to find a taking under facts very similar to \textit{Sisolak}); DeCook v. Rochester Int’l Airport Joint Zoning Bd., 796 N.W.2d 299, 307 (Minn. 2011) (rejecting \textit{Penn Central} analysis when airport zoning regulates land uses in runway safety zones and requiring compensation for diminution in market value). \textit{But see} Watson v. Bermuda Dunes Airport Corp., No. E035117, 2005 WL 775848 (Cal. Ct. App. Apr. 7, 2005) (dismissing trespass and nuisance claims because overflights and overlay zone were statutorily authorized).

over, Florida courts require that the decrease in value be absolute, not just a “decreased increase” or slower rise in property value. Given the historic trend of increasing property values in Florida, this was a powerful defense. It is unclear the extent to which the collapse of the housing market following 2008 will affect overflight cases in Florida.

Community Damage. One central problem in overflight cases, particularly when the complaint centers on noise that is disruptive but not destructive, is how to define what level of interference rises to a taking. This is a particular problem in states that allow recovery for “damaging” of property. Some states have addressed this problem by adopting what is called the “community damage” rule, which requires that plaintiffs show that they have suffered unique injuries that are not shared by the community in general.

Liability of Non-Airport Owners. Although no cases have questioned the Griggs rule that airport owners are liable for overflight noise near airports, a 2010 Ohio case forced the court to reconsider the applicability of Griggs. In State ex rel. Gerhardt v. Springfield City Commission, homeowners filed a takings claim against the city based on noise from a jet engine testing facility at an airport leased and controlled by the United States. Relying on earlier Ohio cases in which state courts had rejected arguments by airport owners that the United States was the proper defendant because the Federal Aviation Administration (FAA) controls aircraft flight paths, plaintiffs argued that the city, not the United States, was the proper defendant. The Court of Appeals rejected that argument, finding that the city played no role in the operation of the military jet engine testing facility other

55 Id. at 964 (“'[S]ubstantial loss in market value’ was not and cannot be equated with a ‘decreased increase’ in market value. Therefore, the inverse condemnation remedy is not available to equalize the increase in value of Plaintiffs’ property with value increases in similar property situated elsewhere.”) (quoting trial court) (emphasis in original).

56 See, e.g., Wilkinson v. Dallas/Fort Worth Int’l Airport Bd., 54 S.W.2d 1, 13 (Tex. Ct. App. 2001) (affirming dismissal of claims brought by large group of neighbors alleging damages from construction and pre-construction activities related to the construction of a runway extension because all neighbors were affected in the same way); Claassen v. City & County of Denver, 30 P.3d 710 (Colo. Ct. App. 2001) (same resolution of claims by neighbors near Denver International Airport); Thompson v. City & County of Denver, 958 P.2d 525 (Colo. Ct. App. 1998) (same).

57 941 N.E.2d 819 (Ohio Ct. App. 2010).

58 Id.
than to act as landlord. That limited role was not sufficient to support liability. Moreover, the role of the United States, which enjoyed exclusive control over the leased land and activities on the land, was different than its role as regulator in the typical overflight case.\textsuperscript{59} The court analogized the case to \textit{Causby} and other military overflight cases where the United States leased the airport and therefore was directly liable. Accordingly, the court dismissed the case as having been filed against the wrong party.\textsuperscript{60}

Although \textit{Gerhardt} is a unique circumstance, it raises an interesting question about the future presumption of airport-owner liability under \textit{Griggs}. In \textit{Gerhardt} the court was able to determine that the cause of the noise was not controlled by the airport owner, but was solely attributable to actions by the United States. Similarly, once an airport is established, it is possible to determine that changes in operations that lead to new takings claims may be caused solely by entities other than the airport owner. For example, the FAA has sole authority over changes in departure and arrival patterns. Thus, the FAA, not the airport owner, could be responsible for takings claims arising from a new arrival or departure procedure that increases noise in a particular area. Similarly, airlines – not airport owners – are solely responsible for aircraft equipment choices and flight schedules, and arguably could be responsible for damages arising from new aircraft types or more frequent operations. While such a theory would require a court to revisit the principles underlying \textit{Griggs}, it is the case today that claims arise from changes in operational patterns and not just from the establishment of a new airport or runway, which could present a fair question of responsibility for those changes.

2. Statute of Limitations

Applying the defense of statute of limitations in the overflight context is not a new issue, and has always presented courts with difficult issues of how to decide when an overflight claim accrues for purposes of the statute of limitations. In short, most courts, following the lead of the federal courts, deem overflight claims to accrue at the time when the flights begin to interfere seriously with the use and enjoyment of the property and it becomes clear

\textsuperscript{59} \textit{Id.} at 823.
\textsuperscript{60} \textit{Id.}
that that level of interference will continue indefinitely.\textsuperscript{61} Although making that determination was often difficult when dealing with a new airport or new operations, the fact that many airports have been in regular use for decades presents a new wrinkle: When does the statute of limitations accrue when noise levels and operational patterns change over time?

The Court of Federal Claims addressed this question in a trio of cases decided in 2011, all involving substantially the same facts.\textsuperscript{62} The claims in all three cases were brought by residents near Dobbins Air Reserve Base near Atlanta, Georgia. Dobbins had been operational, in various capacities, since the 1940s. Dobbins is also the location of a Lockheed-Martin plant at which a number of aircraft types have been constructed over the years. Accordingly, the area had been subject to aircraft overflights of varying kinds for a number of years. In addition, the plaintiffs had executed avigation easements in favor of the government allowing aircraft operations over their property at varying altitudes. The lawsuits were filed in December, 2009.

Federal law imposes a six-year statute of limitations for takings claims. The Court recognized first that the prior easements, and the long history of prior flights, were not necessarily a bar to recovery. “The taking of an avigation easement at some point in the distant past does not preclude the taking of a new avigation easement due to the imposition of a substantial new burden on the affected property.”\textsuperscript{63} Accordingly, the court required plaintiffs to show that the impacts to their property had substantially increased since December, 2003 (six years before the suits were filed) as a result of a greater number overflights, overflights at different altitudes, or overflights by different aircraft types.\textsuperscript{64} The court carefully examined each of these operational patterns,

\textsuperscript{61} See Lacey v. United States, 595 F.2d 614, 618 (Ct. Cl. 1979). See also Benton v. Savannah Airport Comm’n, 525 S.E.2d 383 (Ga. Ct. App. 2000) (claim time-barred based on evidence showing that overall operations, including operations by “noisier Stage 2 aircraft,” declined during limitations period; classifying overflight claims as a permanent, not continuing, nuisance).


\textsuperscript{63} Goodman, 100 Fed. Cl. at 307; Lengen, 100 Fed. Cl. at 333–34; Morgan, 101 Fed. Cl. at 163.

\textsuperscript{64} Goodman, 100 Fed. Cl. at 307; Lengen, 100 Fed. Cl. at 334; Morgan, 101 Fed. Cl. at 164.
and considered further the use of a new “assault runway,” concluding that there had been no changes to operations that could have resulted in new impacts to plaintiffs and finding the claims to be time-barred.  

3. Class Actions and Collective Claims

Another way in which the inherent tension between the public need for airports and their necessary environmental impacts and the harms imposed on particular individuals has manifested itself is in the way courts have dealt with collective claims. Because noise, glare, fumes, and other impacts of overflights usually affect entire neighborhoods similarly, it is not surprising that groups of homeowners have tried to assert collective claims based on the same facts and generalized testimony regarding impacts. Courts, however, have rarely granted relief in such cases. As discussed above, for example, courts have invoked the “community damage” rule to deny relief in cases where the evidence shows that a large group of homeowners have suffered the same degree of harm from overflights.  

Similarly, courts have typically refused to certify class actions seeking damages for large groups of homeowners near an airport. As the Seventh Circuit explained in affirming a denial of a class of property owners near Chicago’s O’Hare International Airport:

The magnitude of any effect on residential owners depends on topography, flight patterns, and many other variables; homeowners who want to sell to businesses (or are in areas zoned for business) may benefit from extra flights and so oppose homeowners differently situated. No wonder courts routinely decline to certify classes in airport-noise cases.  

Almost every other court that has been asked to certify a class action in an aircraft overflight case has refused to do so, primarily on the ground that individual issues of harm, impact, and dam-

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65 Goodman, 100 Fed. Cl. at 309–11; Lengen, 100 Fed. Cl. at 336; Morgan, 101 Fed. Cl. at 166.

66 See supra text accompanying note 56.

ages would predominate over common issues.\textsuperscript{68} In perhaps the most extreme example of courts denying recovery in a collective action, California courts denied recovery in a consolidated case involving hundreds of property owners on the ground that the overflights had gone on for so long that the airport had acquired an avigation by prescription, thereby barring plaintiffs’ claims under the statute of limitations.\textsuperscript{69}

4. Secondary Effects of Noise Mitigation and Airport Planning

One interesting “second-generation” problem that has arisen is that attempts by airports to address noise problems or take other steps to adopt land use planning measures to prevent future conflicts have themselves given rise to damages claims. Although different than overflight cases, these cases present a new area of potential liability in the airport noise and planning context. For example, the voluntary acquisition of property for noise mitigation or airport development can cause blight that may constitute a taking of properties not purchased. In \textit{City of Los Angeles v.\textsuperscript{68}}

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\textsuperscript{68} City of San Jose v. Superior Court, 12 Cal. 3d 447, 460–61 (1974) (finding that the myriad of individual facts needed to prove liability by any property owner defeated class certification despite the fact that such impacts were caused by the same overflights); Testwuide v. United States, 56 Fed. Cl. 755, 765–66 (2003) (refusing to certify a class based on noise exposure contours and property ownership because of predominance of individual issues); Ario v. Metro. Airports Comm’n, 367 N.W.2d 509, 515 (Minn. 1985) (finding that common issues would not predominate over individual issues among class of 2,000 property owners and class action would not be a superior method of handling litigation where individual owners’ proofs of damages would necessarily duplicate class proof of liability); Virginians for Dulles v. Volpe, 344 F. Supp. 573, 575 (E.D. Va. 1972), \textit{aff’d as to denial of class}, 541 F.2d 442, 443–44 (4th Cir. 1976) (denying class certification because of absence of evidence that injuries of named plaintiffs were typical of injuries of unnamed plaintiffs); Town of East Haven v. Eastern Airlines, 331 F. Supp. 16, 18 (D. Conn. 1971) (denying class treatment because there were “too many variables in the extent to which residents of the neighborhood were affected by airport and airline activities”). \textit{But see} Alvarado v. Memphis-Shelby County Airport Auth., Case Nos. 99-5159 & 5162, 229 F.3d 1150 (mem.), 2000 WL 1182446 (6th Cir. Aug. 15, 2000) (approving a class action settlement involving, \textit{inter alia}, inverse condemnation claims for aircraft overflights without discussion of class certification decision); Ursin v. New Orleans Aviation Bd., 902 So. 2d 508 (La. Ct. App. 2005) (same).

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Superior Court,70 Los Angeles had begun to buy property in neighborhoods near Los Angeles International Airport on a voluntary basis.71 Upon acquisition, Los Angeles used the homes for fire-fighting training or as film sets before demolishing the homes. Property owners whose homes had not been purchased sued for inverse condemnation alleging that the program drove down property and rental values, gave Los Angeles effective control over the entire neighborhood, and were a deliberate effort by Los Angeles to drive down the value of the remaining homes.72 The court analyzed the claims under the doctrine of “unreasonable precondemnation action” or “condemnation blight,” which recognizes that a public entity can inversely condemn property through unreasonable delay in implementing a condemnation plan by effectively making property unmarketable.73 The court rejected the claim, finding that Los Angeles had no plan to condemn property in the area and no plan to use the property for airport or other public purposes.74 Moreover, the court found that Los Angeles had not acted unreasonably in relocating residents complaining of airport noise but not renting out the acquired homes to new residents.75

Another aspect of noise control efforts is the use of previously granted avigation easements by airports to bar claims for damages. In general, courts appear reluctant to accept previously granted avigation easements as a bar to damages claims. Courts will scrutinize avigation easements carefully, and construe their scope narrowly, to permit claims that arise from noise levels or operational patterns that are in any way broader than the scope of the avigation easement.76 As the Biddle case from Indiana illustrates, however, courts will rely on past participation in noise

71 Id. at 501.
72 Id. at 502.
73 Id. at 508–10. Many states require that property values in condemnation actions be adjusted to eliminate the downward effect on market values caused by public knowledge of the project for which the property is being acquired. See Baston v. County of Kenton, 319 S.W.3d 401 (Ky. 2010) (requiring property acquired for construction of a new runway be valued as of a date prior to the date the project was announced).
74 Id. at 511–12
75 Id. at 512–13.
76 Sisolak, 137 P.3d at 1120–21 (construing avigation easement as limited to noise impacts, but not permitting all overflights and not barring a suit challenging zoning regulations on property); Goodman, 100 Fed. Cl. at 307; Lengen, 100 Fed. Cl. at 333–34; Morgan, 101 Fed. Cl. at 163 (prior
mitigation programs, and take notice of the fact that homeowners purchased property with express knowledge of noise impacts, to bar claims for damages.\footnote{See supra text accompanying notes 38–46.}

Finally, noise mitigation programs themselves can trigger litigation. As discussed in greater detail below, the City of Atlanta’s implementation of a home acquisition program triggered litigation over overflight damages and challenges to the acquisition program itself based on Atlanta’s decision to purchase single-family homes before acquiring multifamily residences.\footnote{City of Atlanta v. Watson, 475 S.E.2d 896, 898 (Ga. 1996).} Although the court ultimately ruled in favor of Atlanta, these cases illustrate the limitations and risks of taking affirmative steps to address noise problems.

5. Statutory Developments


The Part 150 Program. The Part 150 program has three key elements. First, it authorized and provided a funding mechanism for airports to conduct noise studies to document the noise prob-
lem. Second, it authorized and provided a funding mechanism for airports to develop a “noise compatibility program” that specifies how an airport would address its noise problem through such measures as access restrictions, sound insulation programs, and land or avigation easement acquisition programs. Third, the law restricts the availability of damages for noise from airport operations if the airport has published a noise exposure map prepared in accordance with 49 U.S.C. § 47503.

Although many airports have implemented Part 150 programs, there has been limited judicial discussion of the Section 47506 immunity provision. Whether this is because airports rarely invoke Section 47506, because Part 150 programs effectively prevent litigation, or because Section 47506 issues rarely present themselves on appeal, is unclear. At least one reported case has addressed Section 47506, and affirmed its general appli-

85 Section 47506 reads as follows:
   (a) GENERAL LIMITATIONS.—A person acquiring an interest in property after February 18, 1980, in an area surrounding an airport for which a noise exposure map has been submitted under section 47503 of this title and having actual or constructive knowledge of the existence of the map may recover damages for noise attributable to the airport only if, in addition to any other elements for recovery of damages, the person shows that—
   (1) after acquiring the interest, there was a significant—
      (A) change in the type or frequency of aircraft operations at the airport;
      (B) change in the airport layout;
      (C) change in flight patterns; or
      (D) increase in nighttime operations; and
   (2) the damages resulted from the change or increase.
   (b) CONSTRUCTIVE KNOWLEDGE.—Constructive knowledge of the existence of a map under subsection (a) of this section shall be imputed, at a minimum, to a person if—
   (1) before the person acquired the interest, notice of the existence of the map was published at least 3 times in a newspaper of general circulation in the county in which the property is located; or
   (2) the person is given a copy of the map when acquiring the interest.
86 Fed. Aviation Admin., AIP and PFC Funding Summary for Noise Compatibility Projects, http://www.faa.gov/airports/environmental/airport_noise/part_150/funding/ (last visited May 2, 2012) (noting that approximately 256 airports participate in the Part 150 program, and the FAA has awarded or approved the use of approximately $115 million in AIP grants and PFC revenues to prepare Part 150 studies, and another approximately $9.2 million to implement Part 150 programs).
cability to overflight damages claims, including inverse condemnation claims.

In City of Atlanta v. Watson, owners of multifamily residences near Hartsfield International Airport sued the airport owner under a variety of theories, including inverse condemnation due to noise. The suit was prompted in part by Atlanta’s Part 150 program that showed the residences to be in the area adversely affected by noise. When Atlanta purchased single-family homes in the first phase of its Part 150 noise compatibility program, but refused to acquire plaintiffs’ multifamily residences, plaintiffs filed suit. Among other defenses, Atlanta pointed out that it had prepared the required noise exposure map and asserted immunity pursuant to Section 47506. The trial court determined that Section 47506 applied to the case and instructed the jury on the fact issues to be resolved in order to determine whether Atlanta could take advantage of the defense. After a mistrial, the jury returned a verdict in favor of Atlanta.

The Court of Appeals reversed on the ground that the trial court had improperly instructed the jury without first determining whether Section 47506 applied to the facts of the case. The Supreme Court of Georgia reversed, finding that the trial court had properly addressed the issue and correctly instructed the jury. Importantly, the court also held that Section 47506 did preempt state damages claims, including claims for inverse condemnation.

The case also addressed 49 U.S.C. § 47507, which deems inadmissible Part 150 noise exposure maps, noise compatibility tables, and certain other Part 150 documents. Although the statute appears to be directed at plaintiffs who try to use those documents against an airport, Section 47507 excludes the use of such docu-

87 475 S.E.2d 896 (Ga. 1996).
88 Id. at 898.
89 Id. at 902.
90 Id.
91 Section 47507 reads as follows:
No part of a noise exposure map or related information described in section 47503 of this title that is submitted to, or prepared by, the Secretary of Transportation and no part of a list of land uses the Secretary identifies as normally compatible with various exposures of individuals to noise may be admitted into evidence or used for any other purpose in a civil action asking for relief for noise resulting from the operation of an airport.
ments for any purpose in a noise suit. In *Watson*, however, the homeowners offered the land use compatibility chart prepared by Atlanta, apparently to demonstrate that their homes were adversely affected by noise. The trial court excluded the chart, but the Court of Appeals reversed, finding that Section 47507 did not preempt Georgia procedural law on admissibility of evidence. The Georgia Supreme Court reversed, affirming the trial court’s exclusion, finding that Section 47507 was part of a broader federal statutory scheme to address noise issues that Congress intended to apply to state court trials that therefore preempted state rules of evidence. An interesting issue not presented in *Watson* is whether Section 47507 could be invoked to prevent an airport from using evidence of its own Part 150 program to establish its immunity under Section 47506 or for some other defensive purpose.

**ANCA and Part 161.** In ANCA, and its implementing regulations (Part 161), Congress addressed the problem of noise through a kind of grand bargain. First, Congress mandated that the older generation aircraft that tended to be louder, known as Stage 2 aircraft, weighing over 75,000 pounds must be phased out over a 10 year period, by December 31, 1999. The phase-out applied to virtually all commercial passenger aircraft and required airlines to replace the older Stage 2 aircraft with newer, and generally quieter, Stage 3 aircraft. The result overall would be a quieter commercial air carrier fleet and reduced noise near airports. Second, FAA adopted new procedural requirements for the adoption of noise or access restrictions such as curfews or restrictions on aircraft types. Although ANCA did not address

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92 475 S.E.2d at 903.
95 49 U.S.C. § 47524(b) (Stage 2 restrictions); Id. at § 47524(c) (Stage 3 restrictions). Although control of aircraft operations is generally vested in the federal government, the Supreme Court recognized that airport owners retain some power to restrict aircraft operations in order to manage their liability for overflights. City of Burbank v. Lockheed Air Terminal, 411 U.S. 624, 635 n.14 (1973). Under this so-called “proprietors exception,” airports may not regulate flight paths or other matter that relate to air traffic control or safety, but may impose reasonable, non-discriminatory restrictions on access to their airport. Airports have relied on this principle to adopt access restrictions in order to minimize liability exposure and address the problem of aircraft noise. See, e.g., Alaska Airlines v. City of Long Beach, 951 F.2d 977, 982 (9th Cir. 1991) (upholding noise cap and other noise control measures); Nat’l Bus. Aviation Ass’n v. City
liability specifically, it is apparent that the change to an all-Stage 3 air carrier fleet has reduced liability exposure for airports. For example, in at least two cases courts have dismissed overflight actions as barred by the statute of limitations based in part on evidence that operations by “noisier Stage 2” aircraft had declined during the statutory period.96

III. Conclusion

As this survey of the law illustrates, the issue of liability for aircraft overflights continues to challenge courts and litigants alike, giving rise to a wide range of judicial decisions that defy easy categorization. Rather than attempt to articulate a “unified field” theory of the law in this at-times confusing area, this article will conclude with a more empirical observation about the nature of the cases being litigated. It is striking that the early cases involved property located immediately adjacent to airports and impacts that made the property all but uninhabitable, as perhaps most graphically illustrated by the chickens in Causby that literally killed themselves because of the noise.

Today, the impacts of overflights are more benign. As cases like Biddle illustrate, overflight cases today often involve the impairment of a certain quality of life, but not the destruction of any use of property. Given that, it is not surprising that most reported decisions involving commercial service airports seem to deny recovery to homeowners in cases based solely on noise. It would appear that land use controls and noise mitigation programs, as well as advances in jet engine technology, have been effective in eliminating the very worst impacts of noise. It is striking, however, that courts seem willing to compensate plaintiffs for loss of the economic potential of their land in cases like

Browning and DeCook. If one can identify a trend in the law in this area, it is this shift from protecting the current use and enjoyment of property from impacts that make the property all but uninhabitable to protecting the economic interests of property owners.
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