AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES
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Supplementary Material

Chapter 8: The New Deal/Great Society Era—Individual Rights/Property/Takings

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

Thomas Lee Causby and Tina Causby owned a chicken farm in Greensboro, North Carolina. In 1942, the United States leased a military airport very near their property. The resulting noise from planes, often flying less than 100 feet from the Causby home, killed numerous chickens and prevented the Causbys from sleeping. The Causbys sued the federal government, claiming that low-flying planes constituted a taking in violation of the Fifth Amendment. The United States claimed that no taking had occurred because the United States owned the airspace above the farm and no actual physical invasion of the Causby property had taken place. The Court of Claims sided with the Causbys and ordered the United States to pay $2,000 for the right to fly planes above their land. The United States appealed to the Supreme Court.

The Supreme Court by a 7-2 vote held that a unconstitutional taking had occurred. Justice Douglas's majority opinion held that government actions that make land uninhabitable violate the takings clause of the Fifth Amendment. Causby *is one of the very rare instances when persons from 1932 to 1969 successfully made a property rights claim in the Supreme Court of the United States. Does Justice Douglas's majority opinion explain why the* Causby *case was different from the freedom of contract, contract clause, and other takings clause cases that the justices so routinely rejected during the New Deal/Great Society Era? Consider several possible explanations. Perhaps the justices thought this particular taking was simply more outrageous that other government interferences with property or contract. Perhaps the justices thought that the Causbys were in a position analogous to a "discrete and insular minority." All citizens enjoyed the benefits of the military base, while the Causbys paid a distinctive price.*

JUSTICE DOUGLAS delivered the opinion of the Court.

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It is ancient doctrine that at common law ownership of the land extended to the periphery of the universe—*cujus est solum ejus est usque and coelom ["who owns the land, owns down to the center of the earth and up to the heavens"].* But that doctrine has no place in the modern world. The air is a public highway, as Congress has declared. Were that not true, every transcontinental flight would subject the operator to countless trespass suits. . . .

But that general principle does not control the present case. For the United States conceded on oral argument that, if the flights over respondents' property rendered it uninhabitable, there would be a taking compensable under the Fifth Amendment. It is the owner's loss, not the taker's gain, which is the measure of the value of the property taken. . . . If, by reason of the frequency and altitude of the flights, respondents could not use this land for any purpose, their loss would be complete. It would be as complete as if the United States had entered upon the surface of the land and taken exclusive possession of it.

We agree that, in those circumstances, there would be a taking. Though it would be only an easement of flight which was taken, that easement, if permanent and not merely temporary, normally would be the equivalent of a fee interest. It would be a definite exercise of complete dominion and control over the surface of the land. . . . The owner's right to possess and exploit the land—that is to say, his beneficial ownership of it—would be destroyed. . . .

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. . . The landowner owns at least as much of the space above the ground as the 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. As we have said, the flight of airplanes, which skim the surface but do not touch it, is as much an appropriation of the use of the land as a more conventional entry upon it. We would not doubt that, if the United States erected an elevated railway over respondents' land at the precise altitude where its planes now fly, there would be a partial taking, even though none of the supports of the structure rested on the land. The reason is that there would be an intrusion so immediate and direct as to subtract from the owner's full enjoyment of the property and to limit his exploitation of it. While the owner does not in any physical manner occupy that stratum of airspace or make use of it in the conventional sense, he does use it in somewhat the same sense that space left between buildings for the purpose of light and air is used. 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.

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The airplane is part of the modern environment of life, and the inconveniences which it causes are normally not compensable under the Fifth Amendment. The airspace, apart from the immediate reaches above the land, is part of the public domain. We need not determine at this time what those precise limits are. Flights 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.

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JUSTICE JACKSON took no part in the consideration or decision of this case.

JUSTICE BLACK, dissenting.

The Fifth Amendment provides that "private property" shall not "be taken for public use, without just compensation." The Court holds today that the Government has "taken" respondents' property by repeatedly flying Army bombers directly above respondents' land at a height of eighty-three feet where the light and noise from these planes caused respondents to lose sleep, and their chickens to be killed. Since the effect of the Court's decision is to limit, by the imposition of relatively absolute Constitutional barriers, possible future adjustments through legislation and regulation which might become necessary with the growth of air transportation, and since, in my view, the Constitution does not contain such barriers, I dissent.

. . . The Court's opinion presents no case where a man who makes noise or shines light onto his neighbor's property has been ejected from that property for wrongfully taking possession of it. Nor would anyone take seriously a claim that noisy automobiles passing on a highway are taking wrongful possession of the homes located thereon, or that a city elevated train which greatly interferes with the sleep of those who live next to it wrongfully takes their property. . . .

I am not willing, nor do I think the Constitution and the decisions authorize me, to extend that phrase so as to guarantee an absolute Constitutional right to relief not subject to legislative change, which is based on averments that, at best, show mere torts committed by Government agents while flying over land. The future adjustment of the rights and remedies of property owners, which might be found necessary because of the flight of planes at safe altitudes, should, especially in view of the imminent expansion of air navigation, be left where I think the Constitution left it—with Congress.

. . . It is inconceivable to me that the Constitution guarantees that the airspace of this Nation needed for air navigation is owned by the particular persons who happen to own the land beneath to the same degree as they own the surface below. No rigid Constitutional rule, in my judgment, commands that the air must be considered as marked off into separate compartments by imaginary metes and bounds in order to synchronize air ownership with land ownership. I think that the Constitution entrusts Congress with full power to control all navigable airspace.

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