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NUISANCE—AS A "TAKING" OF PROPERTY

STANLEY L. LESTER*

*[N]or shall private property be taken for public use without just compensation.*¹

I. INTRODUCTION

The United States Supreme Court has said that the Constitution was created to "preserve practical and substantial rights, not to maintain theories."² Express provisions in the fifth amendment and in similar state constitutions³ recognize the power of a government to take private property,⁴ subject only to the rights of the property owner to compensation. Whether the sovereign's actions are held to be a "taking"⁵ or merely "consequential damages"⁶ thus not compensable, depends upon the well entrenched doctrine of sovereign immunity.⁷ Some courts have mistakenly concerned themselves with the benefit accruing to the government rather than the loss of property rights suffered by the individual.⁸

Until 1870⁹ both federal and state constitutions recognized only property "taken" as compensable. Since then a great many states have added constitutional provisions to compensate for "property damaged."¹⁰

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1. U.S. CONST. amend. V.

2. *United States v. Dickinson*, 331 U.S. 745, 748 (1947).

3. All states but one have a similar provision in their constitutions. North Carolina bases its right to compensation on "natural equity and justice." *Shute v. City of Monroe*, 187 N.C. 676, 683, 123 S.E. 71, 74 (1924).

4. *Scott v. Toledo*, 36 Fed. 385 (N.D. Ohio 1888). See 1 NICHOLS EMINENT DOMAIN § 1.11 (3d ed. 1950).

5. *United States v. Cress*, 243 U.S. 316 (1917); *United States v. Tynah*, 188 U.S. 445 (1903); *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall) 186 (1871).

6. *Rand v. City of Boston*, 164 Mass. 354, 41 N.E. 484 (1895); *City of Crookston v. Erickson*, 244 Minn. 321, 69 N.W.2d 909 (1955).

7. *Langlord v. United States*, 101 U.S. 341 (1878).

8. *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945); *Eaton v. B.C. & M.R.R.*, 51 N.H. 504, 511, 12 Am. Rep. 147, 154 (1872).

9. A constitutional amendment was adopted in Illinois, providing that private property should be neither taken nor damaged for public use without compensation.

10. ALA. CONST. art. XII § 235; ARIZ. CONST. art. II § 17; ARK. CONST. art. II § 22; CAL. CONST. art. I § 14; COLO. CONST. art. II § 15; GA. CONST. art. I § 3; ILL. CONST. art. II § 13; KY. CONST. § 13; LA. CONST. art. I § 2; MINN. CONST. art. I § 13; MISS. CONST. art. III § 17; MO. CONST. art. II §§ 20-21; MONT. CONST. art. III § 14; NEB. CONST. art. I § 21; N.M. CONST. art. II § 20; N.D. CONST. art. I § 14; OKLA. CONST. art. II §§ 23-24; PA. CONST. art. I § 10; S.D. CONST. art. VI § 13; TEX. CONST. art. I § 17; UTAH CONST. art. I § 22; VA. CONST. art. IV § 58; WASH. CONST. art. I § 16; W. VA. CONST. art. III § 9; WYO. CONST. art. I §§ 32-33.

The term "consequential damage" has generally been used when referring to damage to property which has not been physically appropriated by the government.¹¹ The distinction between "taking" and "consequential damage" is in reality no more than a matter of *degree*.¹² Courts considering claims against the United States for a fifth amendment "taking" without a physical appropriation of the property usually resort to a "degree of damage" type of distinction.¹³ Thus, when the degree of damage is too slight to warrant recovery, the damages are called "consequential"¹⁴ and the claimants' loss is held to be *damnum absque injuria*.¹⁵

This article is concerned with the question of whether a nuisance¹⁶ may constitute a sufficient "taking" of property under the fifth amendment so that the property owner may maintain an action for compensation.¹⁷ Some of the problems raised by this question are: Can a nuisance create a servitude sufficient to constitute a "taking" of property in the constitutional sense? Can a nuisance create a lesser estate in the fee holder? What does the federal constitution mean by the words "property" and "taken"?

II. NUISANCE

The concept of nuisance is not susceptible to an exact or simple definition.¹⁸ A private nuisance is generally a continuing act which causes injury to a person in the "use and enjoyment" of his property.¹⁹ It is unaccompanied by actual physical invasion of the property.²⁰ A

11. *In re Soldiers and Sailors Memorial Bridge*, 308 Pa. 487, 162 Atl. 309 (1932).

12. If the damage is severe, a constitutional taking may be upheld; if damages are of a lesser degree, it is merely "consequential damages." See *Eaton v. B.C. & M.R.R.*, 51 N.H. 504, 12 Am. Rep. 147 (1872).

13. *Batten v. United States*, 306 F.2d 580 (10th Cir. 1962), *cert. denied*, 83 Sup. Ct. 506 (1963), *rehearing denied*, 83 Sup. Ct. 718 (1963). Justice Douglas was of the opinion *certiorari* should be granted.

14. *Mitchell v. United States*, 267 U.S. 341 (1925); *Sanquinetti v. United States*, 264 U.S. 146 (1924); *Scranton v. Wheeler*, 179 U.S. 141 (1900); *Northern Transp. Co. v. Chicago*, 99 U.S. 635 (1878).

15. *Richards v. Washington Terminal Co.*, 233 U.S. 546 (1913); *Chicago, B. & Q. Ry. v. Illinois ex rel. Drainage Comm'rs*, 200 U.S. 561 (1906).

16. In its broadest sense, a nuisance includes any act or omission which annoys, injures or endangers the comfort, health or safety of an individual, or in any way renders the individual insecure in life or the use and enjoyment of his property. See *Summers v. Acme Flour Mills Co.*, 263 P.2d 515 (Okla. 1953).

17. *Thornburg v. Port of Portland*, 376 P.2d 100 (Ore. 1962) (held a taking); *Batten v. United States*, 306 F.2d 580 (10th Cir. 1962), *cert. denied*, 83 Sup. Ct. 506 (1963), *rehearing denied*, 83 Sup. Ct. 718 (1963) (held not a taking).

18. "There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word nuisance." PROSSER, *TORTS* § 70 (2d ed. 1955).

19. MERWIN, *PRINCIPLES OF EQUITY* 431 (1895).

20. In *Kellogg v. King*, 114 Colo. 378, 46 Pac. 166 (1896) the court said that trespass means an actual physical or tangible contact or invasion of the property on, above, or below the surface by one not in privity to the owner of the property. The invasion may be by the trespasser personally or by some force projected by him. Blasting—where rocks

private nuisance is an injury to one or more particular individuals, as distinguished from a public nuisance, which affects the public generally and encompasses the protection of public rights of way, navigation, public morals, welfare, health and safety. But a public nuisance especially injurious to one member of a community, causing him a "different degree" of damage²¹ or special damage,²² is actionable by that specific individual.

Actual invasion of airspace above the surface of the land, even if not a physical touching of a building or improvement on the land, was held a trespass in Massachusetts²³ and a nuisance in California.²⁴ Nuisances which have interfered with an individual's "use and enjoyment" of his property are of varied kinds.²⁵ Some illustrations are: noxious or unpleasant odors,²⁶ smoke or dust,²⁷ vibration,²⁸ the escape of percolation or seepage of impounded waters or sewage upon neighboring lands,²⁹ the storage of explosives or the maintenance of other dangerous conditions,³⁰ and noise.³¹

The courts usually take into account various considerations before determining whether a particular use of a property constitutes a nuisance: the character of the neighborhood;³² the nature of the thing complained of;³³ its proximity to those alleging damage;³⁴ the frequency and continuity of its operation,³⁵ and the nature and extent of the injury.³⁶

were hurled on neighboring property—was held to be a trespass in *East v. Socks*, 214 Ala. 58, 106 So. 185 (1925).

21. *Gulf States Steel Co. v. Beveridge*, 209 Ala. 473, 96 So. 587 (1923).

22. *Wesson v. Washburn*, 95 Mass. 95 (1866).

23. *Burnham v. Beverly Airways Inc.*, 311 Mass. 628, 42 N.E.2d 595 (1942).

24. In *Kofka v. Bozio*, 191 Cal. 746, 218 Pac. 753 (1923), the encroachment was in airspace above the land. A building was leaning against the plaintiff's building and court held this a nuisance.

25. *Hurlburt v. McKone*, 55 Conn. 31, 10 Atl. 164 (1886).

26. *Roman v. Birmingham Ry., L. & P. Co.*, 182 Ala. 335, 62 So. 677 (1913); *Martin v. Reynolds Metal Co.*, 221 Ore. 86, 342 P.2d 790 (1959).

27. *Hulbert v. California Portland Cement Co.*, 161 Cal. 239, 118 Pac. 928 (1911); *Steifer v. City of Kansas City*, 175 Kan. 794, 267 P.2d 474 (1954).

28. *Hennessy v. Carmory*, 50 N.J. Eq. 616 (1892); *Dixon v. New York Trap Rock Corp.*, 293 N.Y. 509, 58 N.E.2d 517 (1944).

29. *Nelson v. Robinson*, 47 Cal. App. 2d 520, 118 P.2d 350 (1941); *White v. Howe*, 293 Ky. 108, 168 S.W.2d 28 (1942).

30. *Denney v. United States*, 185 F.2d 108 (10 Cir. 1950); *Peoples Gas Co. v. Tyner*, 131 Ind. 277, 31 N.E. 59 (1891).

31. *Louisville Ref. Co. v. Mudd*, 339 S.W.2d 181 (Ky. 1960); *Assembly of God Church v. Bradley*, 191 S.W.2d 696 (Tex. Civ. App. 1946).

32. *Louisville Ref. Co. v. Mudd*, 339 S.W.2d 181 (Ky. 1960); *Jedneak v. Minneapolis General Electric Co.*, 212 Minn. 226, 4 N.W.2d 326 (1942).

33. *Hofstetter v. Myers, Inc.*, 170 Kan. 564, 228 P.2d 522 (1951); *United Fuel Gas Co. v. Sawyer*, 259 S.W.2d 466 (Ky. 1953).

34. *Batten v. United States*, 306 F.2d 58 (10th Cir. 1962), *cert. denied*, 83 Sup. Ct. 506 (1963); *Hosslinger v. Village of Hartland*, 234 Wis. 201, 290 N.W. 642 (1940).

35. *Supra* note 33.

36. *Schott v. Appleton Brewery Co.*, 205 S.W.2d 917 (Mo. App. 1947).

The courts ask whether there is a feasible method of preventing the damage;³⁷ whether the locality of the operation causing the nuisance may be changed without affecting its success;³⁸ the importance of the defendant's business to the community;³⁹ the amount of investment;⁴⁰ and, the length of time the offending business has existed.⁴¹

Nuisances may be further classified as a nuisance per se or a nuisance per accidens (in fact). A nuisance caused by an act, occupation or structure regardless of its manner of operation, is a nuisance per se.⁴² A nuisance per accidens is an act, occupation or structure which is a nuisance because of its location, surroundings or manner of operation.⁴³ Most nuisance claims fall into the latter category. It has been held to be no defense that a particular use of land is connected with an otherwise lawful business.⁴⁴

An important policy consideration used by the courts is whether the beneficial effects of the authorized activity outweigh its harmful effects.⁴⁵

III. PROPERTY

The term "property," when considered with reference to fifth amendment "taking," should be liberally construed,⁴⁶ and the laws of the individual states should control in local problems when "property" is being defined.⁴⁷ Property should be viewed as both a corporeal object⁴⁸ and a "bundle of rights" the owner possesses relating to the physical object.⁴⁹

37. *Godard v. Babson-Dow Mfg. Co.*, 313 Mass. 280, 47 N.E.2d 303 (1943).

38. *Robinson v. Westman*, 224 Minn. 105, 29 N.W.2d 1 (1947).

39. *Canfield v. Quayle*, 170 Misc. 621, 10 N.Y. Supp. 2d 781 (1939).

40. *San Antonio v. Camp Warnecke*, 267 S.W.2d 468 (Tex. 1954).

41. *Louisville Ref. Co. v. Mudd*, 339 S.W.2d 181 (Ky. 1960); *Woschak v. Moffot*, 173 Pa. Super. 209, 96 A.2d 163 (1953).

42. In *Jones v. Trawick*, 75 So.2d 785 (Fla. 1954), the proposed construction of a cemetery in a residential area was enjoined. See *Perrin's Appeal* 305 Pa. 42, 156 Atl. 305 (1931).

43. *Borgenmouth Realty Co. v. Gulf Soap Corp.*, 212 La. 57, 31 So.2d 488 (1947).

44. *King v. Columbian Carbon Co.*, 152 F.2d 636 (5th Cir. 1945); *British-American Oil Producing Co. v. McClain*, 191 Okla. 40, 126 P.2d 530 (1942).

45. *E.g., compare Fort Smith v. Western Hide & Fur Co.*, 153 Ark. 99, 239 S.W. 724 (1922), with *City of Prichard v. Alabama Power Co.*, 234 Ala. 338, 175 So. 294 (1937). The former case involved a hide and fur business and the court, in rejecting an alleged authorization, dwelt on the odors, fly attraction and danger to health which accompany animal skins. The court in the latter case, however, devoted most of its opinion to a discussion of the terms of the grant to the power company and the legislative power to make such a grant.

46. *Old Colony & Fall River R.R. Co. v. Plymouth*, 14 Gray 155 (Mass. 1883).

47. *Louisville J. & L. Bank v. Radford*, 295 U.S. 555 (1935); *Ford & Son, Inc. v. Little Falls Fibre Co.*, 280 U.S. 369 (1930); *United States v. Cress*, 243 U.S. 316 (1917).

48. *Chicago B. & D. Ry. v. Public Utilities Comm.*, 69 Colo. 275, 193 Pac. 726 (1920); *Bradley v. New York & N.H.R.R.*, 21 Conn. 294 (1874); *Hurt v. Atlanta*, 100 Ga. 274, 28 S.E. 65 (1897); *Less v. Butte*, 28 Mont. 27, 72 Pac. 140 (1903).

49. *United States v. General Motors Corp.*, 323 U.S. 373 (1943); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

Bentham said that the "bundle of rights" pertaining to property as a corporeal object included four particulars:

- (1) Right of occupation;
- (2) Right of excluding others;
- (3) Right of disposition, or the right of transferring the integral right to other person;
- (4) Right of transmission, in virtue of which the integral right is often transmitted after the death of the proprietor, without any disposition on his part, to those in whose possession he would have wished to place it.⁵⁰

Thus, ownership of a corporeal object is the group of rights inherent in the citizen's relation to the physical object, such as the right to possess, use, enjoy and dispose of it to the exclusion of all others.⁵¹

IV. "TAKING"

Prior to 1855⁵² the Federal judiciary lacked a provision which would enable it to hear suits against the United States government. Subsequently, when the Tucker Act was adopted,⁵³ the jurisdiction of the United States Court of Claims⁵⁴ was extended to include:

claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of an Executive Department, or upon any contract, expressed or implied, with the Government of the United States, or for damages liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable⁵⁵

It was not until *United States v. Causby*⁵⁶ that the requirement for a contractual⁵⁷ relationship between the claimant and the Government

50. 3 BENTHAM'S WORKS 182 (1843). See also HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS 29 (1923).

51. *Barley v. People*, 190 Ill. 28, 60 N.E. 98 (1901); *St. Louis v. Hill*, 116 Mo. 527, 22 S.W. 861 (1893).

52. 10 Stat. 612 (1855) created the Court of Claims to hear suits against the United States "founded upon any law of Congress or upon any regulation of an executive department, or upon any contract, express or implied, with the Government of the United States. . . ."

53. 24 Stat. 505 (1887) (codified in various sections of 28 U.S.C.).

54. The district courts were given concurrent jurisdiction under the act on all claims not exceeding \$1,000. 24 Stat. 505 (1887). The present district court limitation is \$10,000. 28 U.S.C. 1346(a)(2) (1958). The Court of Claims has no monetary maximum under the Tucker Act.

55. 24 Stat. 505 (1887).

56. 328 U.S. 256 (1946) Justice Black dissented because there was not a constitutional "taking." He said "noise and glare resulting in damage, constitutes at best an action in tort." *Id.* at 275.

57. *Portsmouth Co. v. United States*, 260 U.S. 327 (1922); *United States v. North Am.*

was extended⁵⁸ and recovery was allowed, based upon a constitutional "taking"⁵⁹ of property. The "taking" in the *Causby* case was not a taking of the owner's fee, but only the taking of an easement in the airspace above the claimant's property. Continued governmental flights over Causby's chicken farm imposed a servitude upon the land, thus creating in Mr. Causby a lesser estate and requiring the payment of just compensation.⁶⁰

Constitutional "takings" advanced in stature when the Supreme Court affirmed a decision for the plaintiffs in *United States v. Dickinson*.⁶¹ The plaintiffs claimed their land was taken by governmental efforts to improve navigation on a West Virginia waterway. Because the river's water level was raised, plaintiff's lands were flooded and erosion occurred. The Court said actions against the government "are authorized by the Tucker Act either as claims 'founded upon the Constitution . . . ' or as arising upon implied contracts with the Government."⁶² The Court then undercut the entire problem by stating that it was unimportant which theory was advanced since, "the claim traces back to the prohibition of the Fifth Amendment"⁶³ The Court noted that "inroads"⁶⁴ had been made upon the plaintiff's property, and that this was not a single trespass but rather a continuous one.

Thus, in both *Causby* and *Dickinson* the Supreme Court granted recovery for a "taking" of property, due to repetitious governmental acts, which interfered materially with the "use and enjoyment" of land. In a later case⁶⁵ the Court of Claims further established the "taking" theory when it said: "Indeed, the first named ground of our jurisdiction is upon claims . . . founded upon the Constitution"⁶⁶

As shown thus far, the decisions have portrayed the willingness of the courts to find a "taking" when the government has committed

Transp. & Trading Co., 253 U.S. 330 (1920); *Hill v. United States*, 149 U.S. 593 (1893); *United States v. Great Falls Mfg. Co.*, 112 U.S. 645 (1884); *Langford v. United States*, 101 U.S. 341 (1879). The jurisdiction extension in 24 Stat. 505 (1887) was not followed here.

58. In *United States v. Causby*, 328 U.S. 256, 267 (1946), the court said "we need not decide whether repeated trespass might give rise to an implied contract. . . . If there is a taking, the claim is 'founded upon the Constitution' and within the jurisdiction of the Court of Claims to hear and determine Thus, the jurisdiction of the Court of Claims in this case is clear."

59. *Id.* at 265. "The superjacent airspace at this low altitude is so close to the land that continued invasions of it affect the use of the surface of the land itself. We think that the landowner . . . has claim to it and that invasions of it are in the same category as invasions of the surface."

60. *Causby v. United States*, 75 F. Supp. 262 (Ct. Cl. 1948).

61. 331 U.S. 745 (1947).

62. *Id.* at 748.

63. *Ibid.*

64. *Ibid.*

65. *Foster v. United States*, 98 F. Supp. 349 (Ct. Cl. 1951).

66. *Id.* at 351.

continuous harmful acts although they may be defined as "sounding in tort."⁶⁷ To keep within the intended purpose of the fifth amendment "taking" provision, the test employed by the courts appears to have been: Has the property owner been denied the reasonable "use and enjoyment" of his land by continuous and harmful acts which are of some benefit to the government?⁶⁸ Of course, a decision denying recovery, by holding there has been no "taking" in the constitutional sense, simply means the government has validly exercised its power and the result suffered by the claimant is merely *damnum absque injuria*.⁶⁹

Two notable exceptions to the Supreme Court's acceptance of the "taking" theory have been the cases of *United States v. Caltex, Inc.*⁷⁰ and *United States v. Central Eureka Mining Co.*⁷¹ In *Caltex* the United States Army destroyed the plaintiffs' real property in the Philippines to keep it from falling into enemy hands. The Army troops did not exercise possession over the property at any time before destroying it. The Court, holding that compensation was not due because there was no "taking," said:

The terse language of the Fifth Amendment is no comprehensive promise that the United States will make whole all who suffer from every ravage and burden of war No rigid rules can be laid down to distinguish compensable losses from noncompensable losses. Each case must be judged on its own facts.⁷²

In his dissent, Justice Black said that any time property is appropriated by the government with the "common good" as its goal, the property owner should receive compensation under the fifth amendment.⁷³

In *Eureka*, the mining company was affected by a War Production Board order in 1942. The order attempted to conserve manpower and equipment for the war effort and the firm was forced to close its mining operation. The plaintiffs claimed the order amounted to a "taking" of their right to mine gold. The Court held this to be a proper exercise of the government's regulatory power. Both cases can be distinguished from prior "taking" decisions because they occurred during the Second World War. The national emergency allowed the government to exercise its war powers⁷⁴ without violating the Constitution. However, similar

67. 24 Stat. 505 (1887) (codified in various sections of 28 U.S.C.). Cases "sounding in tort" are an exception within the Tucker Act. See notes 53-55 *supra* and accompanying text. This exception is further vitalized by the fact that under the Federal Tort Claims Act there is no recognition of a "taking"; provision being made only for torts.

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

69. *Richards v. Washington Terminal Co.*, 233 U.S. 546 (1913).

70. 344 U.S. 149 (1952).

71. 357 U.S. 155 (1958).

72. 344 U.S. 149, 155-56 (1952).

73. *Id.* at 156.

74. U.S. CONST. art. I § 8.

acts during a non-emergency period might well be held to violate the Constitution.⁷⁵

The Supreme Court in *United States v. General Motors Corp.*⁷⁶ stated that it was the rights of the owner that were lost, rather than the accretion of a right or interest to the government, that would constitute a "taking."

Government regulations now define "navigable airspace."⁷⁷ When the defendant county airport operated in strict compliance with these regulations, the Supreme Court held in *Griggs v. Allegheny County*⁷⁸ that this conformity was not a sufficient defense to prevent a finding that the airport had "taken" an air easement over the plaintiff's land. Thus, *Griggs* stands for the proposition that a "taking" of private property can be accomplished by airplanes that take off and land within government-defined "navigable airspace."

Justice Douglas wrote the majority opinion, stating that the glide path over Mr. Griggs' home was a necessary approach to the airport, and was therefore an easement in the airspace over the property. Because the easement had not been purchased or condemned before the institution of air flights, it was a "taking" by the county for the public use without just compensation, and therefore, in violation of the fourteenth amendment.

Whether flights within the public domain of navigable airspace are immune from the "taking" label no matter what damage they might cause is a question which *Griggs* answered in the negative. This question had been subject to speculation since the *Causby* case.⁷⁹ At the time of the *Causby* decision the glide path for take-off and landing was not part of the "navigable airspace."⁸⁰

In his dissent in *Griggs*, Justice Black agreed with the majority that there had been a "taking," but concluded that the United States, not the county airport owner, was the proper defendant. His opinion rested on a federal statute which places navigable airspace in the "public domain,"⁸¹ and defines it to include "airspace needed to insure

75. Compare *Korematsu v. United States*, 323 U.S. 214 (1944).

76. 323 U.S. 373, 378 (1945). The Supreme Court said: "In its primary meaning, the term 'taken' would seem to signify something more than destruction, for it might well be claimed that one does not take what he destroys. But the construction of the phrase has not been so narrow."

77. See 14 C.F.R. § 60.17 (Supp. 1962). "Except when necessary to take-off or landing, no person shall operate an aircraft below the following altitudes:

... (c) Over other than congested areas. An altitude of 500 feet above the surface, except over open waters or sparsely populated areas."

78. 369 U.S. 84 (1962).

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

80. *Id.* at 264.

81. 72 Stat. 743, 49 U.S.C. § 1304 (1958).

safety in the take-off and landing of aircraft."⁸² Justice Black reasoned that if Congress had appropriated the air easement for the public domain, then the United States should pay for the "taking."

V. FEDERAL TORT CLAIMS ACT

The approval by Congress of the Federal Tort Claims Act⁸³ appeared at the time, to be a panacea. The purpose of the Act was to make the Government liable for its torts. This goal was not fully attained because the Act was riddled with exceptions.⁸⁴ For example, jurisdiction is denied under the Act for several common-law torts.⁸⁵ Although the government assumed responsibility for its tortious acts,⁸⁶ an anomaly was created; the Act could exclude possible claimants who suffered severe damage or interference with their property. Thus a label attached to a cause of action becomes more important than the injustice done to a property owner.⁸⁷ Ironically, the Tucker Act, which excludes actions "sounding in tort,"⁸⁸ has afforded jurisdiction for certain tort claims⁸⁹ where the claimant would be denied his day in court under the Federal Tort Claims Act "discretionary function" exception.⁹⁰

VI. NUISANCE AS A "TAKING"

The courts have shown slight respect for the conceptual differences between a nuisance⁹¹ and a trespass.⁹² While nuisance encompasses

82. 72 Stat. 739, 49 U.S.C. § 1301(24) (1958). See also 14 C.F.R. § 60.17 (Supp. 1962).

83. 60 Stat. 842 (1946), as amended, 28 U.S.C. §§ 1291, 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2670-80 (1958) (Supp. III, 1959-1961).

84. 28 U.S.C. § 2680 (1958) (Supp. III, 1959-1961).

85. 28 U.S.C. § 2680(a)(h) (1958) (Supp. III, 1959-1961).

86. *Sickman v. United States*, 184 F.2d 616 (7th Cir. 1950).

87. See, e.g., *Coates v. United States*, 181 F.2d 816 (8th Cir. 1950), where suit under the Federal Tort Claims Act for governmental negligence was dismissed, since the acts alleged fell within the "discretionary function exception of the Tort Claims Act" (28 U.S.C. § 2680(a)(1958) (Supp. III, 1959-1961)). This is a "label" given to an "act" performed by a governmental employee when the courts are reluctant to impose liability upon the government. It may be compared to the concept that an agent is acting "out of the scope" of his employment. The same plaintiff brought suit under the Tucker Act for a Constitutional "taking" in *Coates v. United States*, 93 F. Supp. 637 (Ct. Cl. 1950), and the court found an implied promise by the Government to pay compensation for the taking.

88. 24 Stat. 505 (1887).

89. *Coates v. United States*, 93 F. Supp. 637 (Ct. Cl. 1950).

90. In *Sickman v. United States*, 184 F.2d 616, 620 (7th Cir. 1950), the Court said that the "discretionary function" exception of the Federal Tort Claims Act was applicable and the district court was without jurisdiction to hear the case. 28 U.S.C. § 2680(a) (1958). See note 87 *supra*.

91. *Swetland v. Curtis Airports Corp.*, 55 F.2d 201 (6th Cir. 1932); *Nelson v. Robinson*, 47 Cal. App. 2d 520, 118 P.2d 350 (1941); *Vanderslice v. Shawn*, 26 Del. Ch. 225, 27 A.2d 87 (Ch. 1942); *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); *Smith v. New England Aircraft Co.*, 270 Mass. 511, 170 N.E. 385 (1930); *Martin v. Reynolds Metals Co.*, 221 Ore. 86, 342 P.2d 790 (1959).

92. *Swetland v. Curtis Airports Corp.*, 55 F.2d 201 (6th Cir. 1932); *Capital Airways*

interference with the "use" and "enjoyment" of land, trespass demands an actual "physical invasion."⁹³ Consequently, the two theories have been blended to shape a theory called a "taking"⁹⁴ which is usually expressed in terms of a nuisance,⁹⁵ although the servitudes imposed upon the landowners in "taking" cases have been created by acts of trespass.⁹⁶ The property rights of the claimants in these cases have been impaired by acts of nuisance that are either unpleasant, unhealthful, create dangerous conditions, or interfere with an easement or other incorporeal right of the property owner.

Because real property was a prime source of wealth and power, early English law gave great protection to the property owner's land and his rights therein. The torts of trespass and nuisance grew in favor as a means of protecting these corporeal and incorporeal objects. *Causby*⁹⁷ and *Griggs*⁹⁸ have resolved the question of the extent of the landowner's interest in the airspace directly above their land.

An investigation of earlier cases shows a breakdown of airspace rights into five theories.⁹⁹

(1) The landowner owns all of the airspace above his property without limit. This is called the "ad coelum" doctrine¹⁰⁰ and was overruled by *Causby*, when Justice Douglas said that the doctrine has no place in the modern world.

(2) The landowner owns the airspace above his property to an unlimited extent subject only to an "easement" or "privilege" of flight by the public. This theory was followed in *Vanderslice v. Shawn*,¹⁰¹

v. Indianapolis Power & Light, 215 Ind. 460, 18 N.E.2d 776 (1939); *Burnham v. Beverly Airways*, 311 Mass. 628, 42 N.E.2d 575 (1942); *Rueckert v. Sicking*, 20 Ohio App. 162, 153 N.E. 129 (1923); *Martin v. Reynolds Metals Co.*, 221 Ore. 86, 342 P.2d 790 (1959).

93. PROSSER, *TORTS* § 72 (2d ed. 1955).

94. *Griggs v. County of Allegheny*, 369 U.S. 84 (1962); *United States v. Causby*, 328 U.S. 256 (1946); *United States v. Cress*, 243 U.S. 316 (1917); *Batten v. United States*, 306 F.2d 580 (1962), *cert. denied*, 83 Sup. Ct. 506 (1963) (held not a taking but Justice Douglas would have granted certiorari); *Matson v. United States*, 171 F. Supp. 283 (Ct. Cl. 1959); *Highland Park, Inc. v. United States*, 161 F. Supp. 597 (Ct. Cl. 1958); *Thornburg v. Port of Portland*, 376 P.2d 100 (Ore. 1962); *Ackerman v. Port of Seattle*, 55 Wash. 2d 400, 248 P.2d 664 (1960).

95. See note 94 *supra*.

96. The courts have looked for a physical trespass or invasion by some instrumentality put in motion by the sovereign to justify the taking; but the underlying reason in the cases can be traced to a nuisance element.

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

98. *Griggs v. Allegheny County*, 369 U.S. 84 (1962).

99. Rhyne, *Airport Legislation and Court Decisions*, 14 J. AIR L. & COM. 289, 295 (1947).

100. The complete maxim is "cujus est solum ejus est usque ad coelum" or, he who owns the soil owns the airspace above it to the heavens. 2 BLACKSTONE COMMENTARIES 18; 1 COKE ON LITTLETON bk. I, ch. I, § 1, 4a. See Klein, *Cujus Est Solum Ejus Est. . . Quousque Tandem?* 26 J. AIR L. & COMM. 237 (1959).

101. 26 Del. Ch. 225, 27 A.2d 87 (Ch. 1942). See also RESTATEMENT, TORTS § 194 (1934).

where the court found a nuisance, but it has not been accepted generally by the courts.

(3) The landowner owns the airspace above his property to the limits set by statute with flights below this minimum constituting a trespass. Massachusetts¹⁰² has followed this theory (which sounds more like an administrative regulation than a rule of property).

(4) The landowner owns the airspace above his land, only so far up as it is possible for him to take "effective possession," but beyond this area he has no ownership of the airspace. This theory has received approval in both state and federal courts.¹⁰³

(5) The landowner owns the airspace he "actually occupies" and can only object to the use of airspace when there is actual damage. This theory was followed in the *Hinmann*¹⁰⁴ case, where flights as low as five feet above claimant's barren land were not enjoined because the plaintiff was not using the land.

Recent cases¹⁰⁵ have raised the question of whether an aerial nuisance can constitute a "taking," thus eliminating the need to find a "physical invasion" of the property owner's land or the airspace above it.

A similar rejection of the requirement of an actual invasion was made in *Martin v. Reynolds Metal Co.*,¹⁰⁶ a well reasoned decision written by the Oregon Supreme Court, wherein the significance of scientific advancements was expressly recognized. The plaintiff alleged that the Reynolds Company, in operation of its aluminum plant, caused fluoride compounds in the form of gases and particulates to become airborne and settle upon the plaintiff's land, rendering it unfit for raising livestock from 1951 through 1956. The plaintiff sought damages for the deterioration of his land resulting from disuse. Reynolds claimed the gases were a nuisance and that the two-year statute of limitations for non-trespassory injuries to land should apply. If this were so, Reynolds would be liable only for such damages as resulted from its conduct during a two-year period immediately preceding the date of plaintiff's suit. However, if the defendant's actions resulted in a trespass, then the Oregon statute of limitation would apply for the preceding six years.

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

103. *Swetland v. Curtis 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); *Ackerman v. Port of Seattle*, 55 Wash. 2d 400, 348 P.2d 664 (1960).

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

105. *Batten v. United States*, 306 F.2d 580 (1962), *cert. denied*, 83 Sup. Ct. 506 (1963), *rehearing denied*, 83 Sup. Ct. 718 (1963) (Held not a taking but Justice Douglas was of the opinion certiorari should be granted); *Thornburg v. Port of Portland*, 376 P.2d 100 (Ore. 1962).

106. 221 Ore. 86, 342 P.2d 790 (1959), *cert. denied*, 362 U.S. 918 (1960).

The defendant company contended that a trespass arises only when there has been a "breaking and entering upon real property," constituting a "direct," as distinguished from "consequential," invasion of the possessor's interest in the land. Therefore, the defendant contended, the settling on the land of fluoride compounds consisting of gases, fumes and particulates was not sufficient to constitute a trespass.

The court concluded that a trespass was an "actionable invasion of a possessor's interests in the exclusive possession of land," whereas a nuisance is an "actionable invasion of a possessor's interest in the 'use and enjoyment' of his land."¹⁰⁷ It is therefore possible for a single act to result in the invasion of both of these landowner interests.

Courts for years have held that gases escaping onto neighboring land were either a nuisance or were non-trespassory in nature. However, gases are composed of separate particles minute in size, but collectively sufficient to constitute a physical invasion that gives rise to a trespass. Reynolds claimed that the minute size of the "physical agency" causing the invasion warranted, at best, an action in nuisance, since the size of the particles did not meet a "dimensional test."¹⁰⁸

Justice O'Connell, representing the majority, said many cases have held that a trespass occurs from the "movement" or "deposit" upon a possessor's land of many "small objects" such as pellets from an air gun,¹⁰⁹ shots from shotgun shells,¹¹⁰ particles of molten lead¹¹¹ and spray from a cooling tower.¹¹² Soil "vibration" and "concussion" of the air caused by molecules moving against each other can be as much an invasion of a property owner's rights as the propulsion of a rock or the dropping of a missile upon or over the land.¹¹³

The court struck directly at the heart of the problem when it said:

It is quite possible that in an earlier day when science had not yet peered into the molecular and atomic world of small particles the courts could not fit an invasion through unseen physical instrumentalities into the requirements that a trespass can result only from a *direct* invasion. But in this atomic age even the uneducated know the great and awful force contained in the atom and what it can do to a man's property if it is re-

107. *Id.* at 792.

108. *Ibid.* The court commenting said: "whatever that is."

109. *Munro v. Williams*, 94 Conn. 377, 109 Atl. 129 (Conn. 1920).

110. *Herrin v. Sutherland*, 74 Mont. 587, 241 Pac. 328 (1925).

111. *Van Alstyne v. Rochester Telephone Corp.*, 163 Misc. 258, 296 N.Y. Supp. 726 (1937).

112. *B. & R. Luncheonette Inc. v. Fairmont Theatre Corp.*, 278 App. Div. 133, 103 N.Y. Supp. 2d 747 (1951).

113. *Parcell v. United States*, 104 F. Supp. 110 (S.D. W. Va. 1951); *McNeill v. Redington*, 67 Cal. App. 2d 315, 154 P.2d 428 (1945); *Louden v. City of Cincinnati*, 90 Ohio St. 144, 106 N.E. 970 (1914); *Bedell v. Goulter*, 199 Ore. 344, 261 P.2d 842 (1953).

leased. In fact, the now famous equation $E = mc^2$ has taught us that mass and energy are equivalents and that our concept of "things" must be reframed. If these observations on science in relation to the law of trespass should appear theoretical and unreal in the abstract, they become very practical and real to the possessor of land when the unseen force cracks the foundation of his house. The force is just as real if it is chemical in nature and must be awakened by the intervention of another agency before it does harm Viewed in this way we may define trespass as any intrusion which invades the possessor's protected interest in exclusive possession whether that intrusion is by visible or invisible pieces of matter or by energy which can be measured only by the mathematical language of the physicist.¹¹⁴

Thus, as pointed out in the *Reynolds Metal* case, the importance of looking directly at the energy or force that causes the injury to the landowner, rather than its size, would result in justice based on scientific certainty. This is an improvement over outmoded theories based upon fictions that produce injustice. The importance of determining whether the property owner has an "interest to be protected" is far greater than that of deciding if the rights violated are in "exclusive possession" or "exclusive use and enjoyment."¹¹⁵ Once the court determines there are "interests to be protected," an invasion of these interests by anyone or anything can be dealt with justly. If a nuisance has caused the injury and the plaintiff's "use and enjoyment" in his land has been denied him, then logically something has been "taken," and the "bundle of rights" in his property has been diminished. The fifth amendment meant to protect these rights by requiring compensation for a "taking." A denial of compensation is a denial of one's rights under the Constitution.

In the *Reynolds Metal* case it was found that the invasion of the gases was a trespass and that the plaintiff was entitled to the advantage of the six-year statute of limitations applicable to trespass. More significantly, however, the court intelligently reasoned that a commonly accepted nuisance claim was in fact a trespass in terms of conclusive scientific data; and thereby was able to fully protect the injured claimant.

The antithesis of the *Reynolds Metal* case appeared in *Batten v. United States*.¹¹⁶ In denying recovery, Judge Breitenstein of the Tenth Circuit said the question involved in the case was "novel":

114. *Martin v. Reynolds Metals Co.*, 221 Ore. 86, 93-94, 342 P.2d 790, 793-94 (1959) (Emphasis added.).

115. 4 RESTATEMENT, TORTS § 224 (1934). (Even when the "theory" of the case is trespass the courts look at the interference with the claimant's "use and enjoyment" of the land, thus merging trespass and nuisance.)

116. 306 F.2d 580 (10th Cir. 1962), *cert. denied*, 83 Sup. Ct. 506 (1963), *rehearing denied*, 83 Sup. Ct. 718 (1963) (Justice Douglas was of the opinion that certiorari should be granted).

Whether a taking of property, compensable under the Fifth Amendment, occurs when there is no physical invasion of the affected property but the operation and maintenance of military jet aircraft on an Air Force Base of the United States produce noise, vibration, and smoke which interfere with the use and enjoyment of the property.¹¹⁷

The plaintiffs owned ten homes adjoining Forbes Air Force Base in Kansas. They sued the United States under the Tucker Act,¹¹⁸ for a "taking." Recovery was denied¹¹⁹ because the court found no "taking" of property under the fifth amendment.

The base was deactivated prior to 1948, the year plaintiffs' residential subdivision was platted. Between 1949 and 1955 all the plaintiffs acquired their homes. The United States purchased some land adjacent to the subdivision during the Korean War so that longer runways could be built to accommodate jet aircraft. Ramps, a parking area, and warmup pads were constructed and used beginning in 1956. Approximately ninety jets and forty propeller planes per day, five days per week, used these facilities. Occasionally weekend and night flights took place. The flight patterns were not over the plaintiffs' property as in *Causby* and *Griggs*. Scattered aircraft on occasion did fly directly over plaintiffs' homes, but not with any degree of consistency. The closest point of warmup to the plaintiffs' property was 650 feet, where a preliminary ten-minute warmup took place. Thereafter, planes were moved from two thousand feet to three thousand four hundred and twenty feet away from the property. In 1960 maintenance work was moved to a point one and a half miles from plaintiffs' homes. Four to ten jet engines ran between eight to ten hours per day at one time in the maintenance area. In an average month the shop ran the engines eighty-four hours in the hundred per cent RPM range and two hundred and eleven hours in less than that RPM range. The court said:

The mentioned activities produce sound and shock waves¹²⁰ which cross the plaintiffs' properties and limit the use and enjoyment thereof. Strong vibrations cause windows and dishes to rattle. Loud noises frequently make conversation and the use of the telephone, radio and television facilities impossible and also interrupt sleep. During engine operation in the 100%

117. *Id.* at 581.

118. See notes 54 and 55 *supra*, and accompanying text.

119. 28 U.S.C. § 1346(a)(c) (1958). Plaintiffs were denied recovery in the United States District Court because each claim was for less than the \$10,000 jurisdictional minimum.

120. Compare these waves to unseen ocean waves. Sound is the transmission of energy in the form of sound waves. The energy is imparted to particles that cannot be seen by the naked eye. See the logic and reasoning in *Martin v. Reynolds Metal Co.*, 221 Ore. 86, 342 P.2d 790 (1959), *cert. denied*, 362 U.S. 918 (1960), where gas particles were held to be a trespass.

range the sound pressure level measured in decibels varies from 90 to 117 decibels on the plaintiffs' properties. Ear plugs are recommended¹²¹ for Air Force personnel when the sound pressure level reaches 85 decibels and are required at or above 95 decibels.¹²²

In addition, black smoke occasionally developed during jet takeoffs, leaving an oily black deposit on the plaintiffs' homes and laundry. The court found that the value of the properties decreased between 40.8 per cent and 55.3 per cent. The alleged "taking" was not due to overflights, but rather to noise, vibration and smoke.

The *Batten* court cited an 1878 case, *Transportation Company v. Chicago*,¹²³ for the principle that governmental activities must "directly encroach" on private property to cause a "taking"; otherwise the damages are "consequential." The *Transportation* case involved the city of Chicago acting as agent for the state of Illinois in building a tunnel under the Chicago River. The city blocked the plaintiff Company's warehouse door while excavating the street. The company suffered some damage to its warehouse walls, but there was no actual invasion of its property. Public improvements made to highways and roads authorized by the Illinois legislature were held to be for the public good. The work was not done negligently and since the legislature had sanctioned the improvements, the Illinois constitutional provision for property "taken" or "damaged" did not apply. This was a case of necessary public improvement by way of temporary construction, whereas *Batten* was a continuing mode of operation with no chance for improvement in the future. Further, in *Transportation*, although the question of the cracked walls and the right of lateral support was raised, the jury found that the sinking was caused by the weight of the plaintiff's walls rather than the loss of lateral support due to the defendant's acts.

Thus, we find an 1878 case, presenting no true analogy to the *Batten* problem, being cited for the principle that if there is no "physical invasion," there are only "consequential damages." A quick reading of *Martin v. Reynolds Metals Co.*¹²⁴ should have convinced the *Batten* court that there had been a "physical invasion" or a "direct encroachment" or whatever else the court might have felt necessary to make the United States liable for a "taking." When property values are reduced by forty to fifty per cent because of the Air Force's activities directly affecting the property, it is difficult to see how that differs from the

121. *TIME*, January 2, 1961, at 29. Noises consistently above 85 decibels can seriously and permanently damage the ear. Lower noise levels can impair efficiency and do physiological damage.

122. *Batten v. United States*, 306 F.2d 580, 582 (10th Cir. 1962).

123. 99 U.S. 635, 642 (1878).

124. 221 Ore. 86, 342 P.2d 790 (1959).

government sending troops to occupy half of Mr. Batten's home in peacetime.¹²⁵ One case is as much of a "taking" of property under the fifth amendment as the other. The *Batten* court cited other cases which attempted to distinguish between "damage" and "taking."

One of these was *Nunnally v. United States*,¹²⁶ wherein recovery was denied. The plaintiffs' property lay near a practice bombing location on a federal proving ground. The question before the court was whether sound and shock waves, which constituted a "taking" when traveling vertically as in *Causby*, should be extended to include a claim if the waves traveled laterally. However, the court held that there was no "physical invasion" with a lateral sound wave and therefore, no "taking" of property. Once again, as in *Batten*, a court refused to accept conclusive scientific data. Of course, in *Nunnally*, the plaintiff ceased continual use of the cottage in 1950, and when he did reside there it was only as an occasional weekend retreat.

The *Batten* court also cited *Freeman v. United States*,¹²⁷ and *Pope v. United States*,¹²⁸ as standing for the principle that "absent 'physical invasion,' recovery will be denied." But in *Freeman* the plaintiff, under cross-examination concerning the frequency of the flights alongside his property, admitted his prior testimony was in error. In *Pope* the court held that an adjacent "test call" did not "encroach" upon his land, but compensation was paid for the damage caused by overflights.

The *Batten* court then said that the test it would use to determine whether there had been a "taking" would be the same as that used in *United States v. General Motors Co.*,¹²⁹ decided prior to the *Freeman* and *Pope* cases, wherein governmental action short of occupancy was held a taking "if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter. . . ."¹³⁰ In applying this test, the court said "there is no total destruction and no deprivation of 'all or most' of the plaintiffs' interests The record shows nothing more than an interference with use and enjoyment."¹³¹

Then, the court in obvious disregard of the facts in *Batten*, said that sound waves, shock waves and smoke were only a "neighborhood inconvenience," common to all the property surrounding the base. Reasoning

125. Compare U.S. CONST. amend. III.

126. 239 F.2d 521 (4th Cir. 1956).

127. 167 F. Supp. 541 (W.D. Okla. 1958).

128. 173 F. Supp. 36 (N.D. Tex. 1959).

129. 323 U.S. 373 (1945). The government took over General Motors' leased warehouse space and the question was raised whether certain expenses and rental payments should be made by the United States. Held, a "taking."

130. *Id.* at 378. This is a subjective test, wherein the thoughts of the individual actor are considered. Thus, the facts in any given situation may be interpreted as a "taking" or not, depending upon the court's application of this subjective criterion.

131. *Batten v. United States*, 306 F.2d 580, 585 (10th Cir. 1962).

such as this can only have one basis, that of a public policy of not subjecting the government to numerous¹³² suits.

But in other areas courts have opened the gates to a "flood" of litigation. *MacPherson v. Buick*¹³³ was a classic example of a court opening the "flood gates" when the automobile manufacturer's "duty" was extended to the ultimate purchaser. It appears that the courts have been able to absorb this "flood" without disrupting the administration of justice.

This same reasoning could apply to *Batten*. All airports are part of a nationwide chain of both transportation and defense links. All taxpayers should pay for the system rather than just the handful who have been damaged because of the servitudes placed upon their lands. The property rights of injured individuals should never yield to public convenience in cases based upon similar fact patterns.

In a strong dissent in *Batten*, Chief Judge Murrah said that a "constitutional taking" does not necessarily depend upon whether the government "physically invaded the property damaged" because the government may surely accomplish, by indirect interference, the equivalent of an outright "physical invasion." The test for a "taking" suggested in the dissent was:

[W]hether the asserted interest is one which the law will protect; if so, whether the interference is sufficiently direct, sufficiently peculiar and of sufficient magnitude to cause us to conclude that fairness and justice as between the State and the citizen, requires the burden imposed to be borne by the public and not by the individual alone.¹³⁴

The majority of the court followed this theory, but held that the interference had not rendered the homes sufficiently uninhabitable to qualify as a "taking." Once again it was merely a "matter of degree" of interference that determined whether the "taking" had occurred. Is it a "taking" when the property is destroyed, or when the owner's rights are substantially diminished? The latter would appear to be the better view. Otherwise the amount of loss between "substantial" and "complete" would be too oppressive a burden for an individual to carry alone. If the

132. TIME, March 16, 1962, p. 65. "Immediately after the *Griggs* case . . . hit the wires, the sound wave that reverberated most across the U.S. was the tinkling of telephones as housewives called their lawyers and ordered them to start suing . . . In New York alone, 809 Long Island property owners are waiting to go to court against 40 Airlines and the Port of New York Authority. . . . In Seattle, 250 homeowners are suing the Port of Seattle for millions. Los Angeles International Airport will soon be slapped with claims from 3,000 residents. . . . In Dallas 35 citizens are pressing suits for \$10,000 to \$12,000 apiece."

133. 217 N.Y. 382, 111 N.E. 1050 (1918).

134. *Batten v. United States*, 306 F.2d 580, 586 (10th Cir. 1962).

courts require a complete destruction, the fifth amendment becomes a nullity for a partial "taking." However, it appears that the reasoning of the court in *Batten* is faulty, since a fifth amendment "taking" of property requiring compensation can apply to a portion of the property, as well as to the entire fee.¹³⁵

To lay to rest the idea that a "physical invasion" is necessary for a "taking," assume that in *United States v. Causby*¹³⁶ a silent jet plane continually flew over the chicken farm. Without any noise to disturb either Mr. Causby or his chickens, there would have been no "taking" of an easement in the airspace, because there would have been no disturbance by the "physical invasion." Therefore, the courts are not talking about "physical invasion" of the property by the overflights. They are simply talking about sound waves and oppressive noises which cause injury and impose a servitude upon the property owner. How then, could it possibly make any difference whether the noise comes from a vertical or a horizontal direction?

It does not make a particle of difference what direction the sound waves come from. The questions to be answered must be: What damage has the noise done? What interest does the property owner have which must be protected? The proper title for the cause of action should not matter. If a "taking" is alleged, the acts which constitute the "taking," if substantial, direct and peculiar to the claimant, can either be a nuisance or a trespass; both torts become practically synonymous.

Today's courts should consider the words of Justice Holmes:

[T]he protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions upon the Fourteenth Amendment . . . [citing cases]. When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But this cannot be accomplished in this way under the Constitution of the United States We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the Constitutional way of paying for the change. . . .¹³⁷

The question of whether a noise nuisance can amount to a "taking" of property was resolved affirmatively by the Oregon Supreme Court in the case of *Thornburg v. Port of Portland*.¹³⁸ The defendant owned and

135. See note 130 *supra*.

136. 328 U.S. 256 (1946).

137. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415-16 (1922).

138. 376 P.2d 100 (Ore. 1962).

operated an airport but the aircraft involved belonged to third parties. The plaintiffs' principal complaint was that the jets made so much noise that their land was rendered unusable. In an action for "inverse condemnation"¹³⁹ the lower court held that there had been no "taking." The supreme court reversed and remanded, saying that the plaintiffs' proffered testimony concerning jet flights near their land was admissible. The plaintiffs' complaint was based upon a nuisance theory and the defendants answered, curiously, that there was no trespass. The flights passed about one thousand feet to the side of the plaintiffs' property. The lower court adopted the view that if a nuisance was proved it would not constitute a "taking." The Oregon Constitution required the plaintiff to show that his property had been "taken" and that the situation must involve more than "some" damage. A "taking" in Oregon is defined as "any destruction, restriction or interruption of the common and necessary 'use' and 'enjoyment' of the property"¹⁴⁰ of a person for a public purpose.

The court had to balance the constitutional protection of private property against the policy considerations involved when the government is a defendant. The most valued right a possessor of property has is his ability to "use and enjoy" his land. Thus, the tort committed must substantially deprive the owner of the "use and enjoyment" in his property.

The defendant claimed that the plaintiff was in no better a position than property owners who are next to highways and railroads. The court said the matter was one of "degree" of interference. Here, the nuisance was so aggravated as to amount to a deprivation of the beneficial "use" of the property. There has never been a case which has said that all governmentally approved activities except trespass must be endured without compensation. The "degree" of interference must control when a question of a constitutional "taking" is raised. In cases where an injunction would be against public policy and not in the interest of society, continued interference with the owner's property constitutes a "taking" and compensation should be made.

The court summed up the case with a logical hypothesis of law and fact when it said:

If we accept, as we must upon established principles of the law of servitudes, the validity of the proposition that a noise can be a nuisance; that a nuisance can give rise to an easement; and that a noise coming straight down from above one's land can ripen into a taking if it is persistent enough and aggravated

139. "Inverse condemnation" is a cause of action against a governmental defendant to recover the value of property which has been "taken" in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency.

140. ORE. CONST. art. I, § 18.

enough, then logically the same kind and degree of interference with the use and enjoyment of one's land can also be a taking even though the noise vector may come from some direction other than the perpendicular.¹⁴¹

The court believed that the government, in simple fairness and reasonableness to its neighbors, should have acquired more land so that the burdens of its activities would have fallen upon public property, rather than the involuntary contributions¹⁴² of the plaintiffs' property rights.

VII. CONCLUSION

Other jurisdictions and the federal courts will be called upon to resolve these "taking" problems with increasing frequency. To deny the claimant compensation because his theory of the cause of action does not conform to absolute standards, *i.e.*, the obsolete requirement of a "physical invasion" for a constitutional "taking," would be to deny the existence of atomic energy or our space program. Justice Douglas seems aware of the problems in the area of "takings." In *United States v. Caltex, Inc.*¹⁴³ his dissent called the government's actions a "taking." The same result was reached by him in *United States v. Causby*¹⁴⁴ and *Griggs v. Alleghany County*.¹⁴⁵ When the Supreme Court denied certiorari in *Batten v. United States*,¹⁴⁶ Justice Douglas said he thought certiorari should be granted.¹⁴⁷ Advances will no doubt come slowly in this area of the law, but come they must, because the fifth amendment of the Constitution calls for this result.

141. *Thornburg v. Port of Portland*, 376 P.2d 100, 106 (Ore. 1962).

142. The involuntary contribution spoken of refers to the government's interference with the plaintiff's "use" and "enjoyment" of his property.

143. 344 U.S. 149 (1952).

144. 328 U.S. 256 (1946).

145. 369 U.S. 84 (1962).

146. 306 F.2d 580 (10th Cir. 1962).

147. *Batten v. United States*, 83 Sup. Ct. 506 (1963).