COMMENT
*CITY OF BURBANK V. LOCKHEED AIR TERMINAL, INC.**: FEDERAL PREEMPTION OF AIRCRAFT NOISE REGULATION AND THE FUTURE OF PROPRIETARY RESTRICTIONS

I. INTRODUCTION

As a result of recent clinical studies which have revealed the adverse effects exposure to excessive noise may have on human physiology,[1] there has been a professional and public outcry for noise pollution regulation.[2] The need to reduce noise pollution is particularly acute in communities adjacent to airports. However, local regulatory schemes which might have proved effective have been held to be unlawfully restrictive,[3] while federal legislation has not been effectively implemented. At the possible expense of leaving localities with virtually no protection, a court could hold that unenforced federal legislation is exclusive in the area of noise pollution regulation. Conversely, localities could be found to have a concurrent regulatory power or explicit police powers to regulate for health. Confronted with these legal alternatives, how is a court to determine whether local regulatory schemes should be upheld?

In the recent case of *City of Burbank v. Lockheed Air Terminal, Inc.*,[4] the Supreme Court reviewed a municipal curfew ordinance which sought to prevent noise pollution during certain hours of the night by prohibiting the use of the landing or takeoff facilities at Hollywood-Burbank Airport between 11:00 p.m. and 7:00 a.m.[5]

---

* 411 U.S. 624 (1973). The author wishes to express his appreciation to Professors John Johnston and Andreas Lowenfeld, New York University School of Law, for their assistance in the preparation of this article.

1 How Today's Noise Hurts Body and Mind, Medical World News at 42 (June 13, 1969); Abey-Wickrama, a'Brook, Gattoni & Herridge, Mental Hospital Admissions and Aircraft Noise, The Lancet at 1275 (Dec. 13, 1969); Merklin, It's Time to Turn Down All That Noise, Fortune at 130 (Oct., 1969).

2 See, e.g., A. Hailey, Airport (1968), a dramatic illustration of the effects of aircraft noise on an adjacent community; 113 Cong. Rec. 27, 235-37 (daily ed. Sept. 28, 1967).

3 See, e.g., Allegheny Airlines, Inc. v. Village of Cedarhurst, 238 F.2d 812 (2d Cir. 1956); American Airlines, Inc. v. City of Audubon Park, 297 F. Supp. 207 (W.D. Ky. 1968), aff'd per curiam, 407 F.2d 1306 (6th Cir. 1968), cert. denied, 396 U.S. 845 (1969); American Airlines, Inc. v. Town of Hempstead, 272 F. Supp. 226 (E.D.N.Y. 1967), aff'd, 398 F.2d 369 (2d Cir. 1968), cert. denied, 393 U.S. 1017 (1969); City of Newark v. Eastern Air Lines, 159 F. Supp. 750 (D. N.J. 1958).

4 411 U.S. 624 (1973).

5 Burbank, Cal., Municipal Code § 20-32.1 (1970):

Aircraft Take-Offs.

(a) Pure Jets Prohibited from Taking Off Between 11:00 P.M. and 7:00 A.M.

It shall be unlawful for any person at the controls of a pure jet aircraft to take off from the Hollywood-Burbank Airport between 11:00 P.M. of one day and 7:00 A.M. the next day.

(b) Airport Operator Prohibited from Allowing Take-Offs.

It shall be unlawful for the operator of the Hollywood-Burbank Airport to allow a pure jet aircraft to take off from said airport between 11:00 P.M. of one day and 7:00 A.M. the next day.

(c) Exception: Emergencies.

This section shall not apply to flights of an emergency nature if the City's Police Department is contacted and the approval of the Watch Commander on duty is obtained before take-off.

The City of Burbank promulgated this curfew restriction under its police powers to protect the health and safety of its citizens.[6] It considered the ordinance to be a proper land use regulation because it affected land located within the city's boundaries.[7] Lockheed Air Terminal, Inc., the corporate owner and operator of the Hollywood-Burbank Airport, and Pacific Southwest Airlines, which scheduled the only flight affected by the Burbank ordinance,[8] filed suit in Federal District Court for the Central District of California seeking injunctive relief and a declaratory judgment invalidating the Burbank ordinance.[9] The district court found the ordinance to be unconstitutional on both supremacy clause and commerce clause grounds.[10] The court of appeals affirmed on supremacy clause grounds.[11] The Supreme Court affirmed, five to four, basing its decision on preemption grounds.[12]

The *Burbank* case arose as the logical sequel to a series of noise pollution decisions which fall into two categories. The first category of cases involves the situation in which an individual, residing adjacent to an airport, has sought to collect damages from airports, operators of aircraft or both, either for the easement to airspace taken by frequent and regular flights over his land,[13] or for the decline in value of his property under the doctrines of nuisance and trespass.[14] The cases in this area represent the landowner's initial response to noise pollution. The second category involves attempts by municipalities to protect the health and safety of their citizens by enacting, pursuant to their polic powers, curfew ordinances designed to restrict the hours during which aircraft may take off and land at airports located adjacent to, but outside of the municipality.[15]

---

6 See, e.g., Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926). A court should not set aside a local ordinance unless "such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."

7 "Hollywood-Burbank Airport occupies approximately 535 acres, approximately 128 of which are owned by the United States Government. The Airport lies mainly in the City of Burbank and partially in the City of Los Angeles." Lockheed Air Terminal, Inc. v. City of Burbank, 318 F. Supp. 914, 916 (C.D. Cal. 1970).

8 Only one regularly scheduled flight was affected by the ordinance – a Pacific Southwest Airlines intrastate flight which originated in Oakland, California with its final destination San Diego, California. This flight was scheduled to depart Hollywood-Burbank Airport at 11:30 each Sunday night. It was discontinued on July 12, 1970. Id. at 920.

9 The State of California filed an amicus curiae brief in support of the Burbank ordinance. Air Transport Association of America, an unincorporated trade organization, was joined as intervening plaintiff. An amicus curiae brief was filed by the Federal Aviation Administration in opposition to the Burbank ordinance. However, on appeal before the Supreme Court, the FAA filed an amicus curiae brief urging reversal on the ground that localities had not been preempted from thier regulatory powers.

10 318 F. Supp. at 914.

11 457 F.2d 667 (1972); U.S. Const. art. VI, cl. 2: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." The supremacy clause may be employed to invalidate an ordinance only if the federal power has been exercised in a way that reflects a congressional determination to oust state or local governments of their normal regulatory authority. Slaughter-House Cases, 16 Wall. 36 (1873). Even when Congress has not legislated in an area, the Supreme Court may invalidate state or local ordinances which regulate those phases of national commerce which, because of the need for uniformity, require a single scheme devised by a national authority. Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945). Conversely, state or local regulations which neither discriminate against federally protected interests nor operate to disrupt national uniformity may be upheld. Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 448 (1960).

12 411 U.S. 624 (1973).

13 Griggs v. Allegheny County, 369 U.S. 84 (1962); United States v. Causby, 328 U.S. 256 (1946).

14 Thornburg v. Port of Portland, 233 Or. 178, 376 P.2d 100 (1962). But see Batten v. United States, 306 F.2d 580 (10th Cir. 1962).

15 Allegheny Airlines, Inc. v. Village of Cedarhurst, 238 F.2d 812 (2d Cir. 1956); American Airlines, Inc. v. Town of Hempstead, 272 F. Supp. 226 (E.D.N.Y. 1967).

Burbank itself denotes a third category: a municipality attempting, under its police powers, to restrict the land use of an airport located within the jurisdiction of that municipality by prescribing the hours during which the airport may operate. A fourth and final category of cases would involve a municipality in its role as both the proprietor of an airport and the government-protector of its citizens. This situation would encompass a combination of those powers present in the first three (e.g., proprietary and police); ordinances passed by such municipalities would therefore come before the courts with the highest probability for constitutional validity. As yet, no restrictive ordinances have been promulgated by proprietary municipalities and no court has ruled on the validity of an ordinance of this type.

II. JUDICIAL BACKGROUND

A. Damages

Several federal and state decisions established criteria for damages resulting from low-flying aircraft and for the responsibilities of federal, state and local governments for controlling aircraft noise pollution. These cases comprise the first category of judicial decisions which have led to *Burbank*.

United States v. Causby[16] was the first case in which the Supreme Court delineated standards for a compensable "taking" of property owing to the noise of aircraft overflights. Causby alleged that his property, which was contiguous to an airport, was "taken"[17] by "frequent and regular flights of army and navy aircraft over [his] land at low altitudes."[18] Although acknowledging that the United States has "'complete and exclusive sovereignty in the air space' over this country,"[19] the Court, in an opinion written by Justice Douglas, held that where flights over private land "are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land",[20] they constitute a taking compensable under the fifth amendment.[21]

The landowner's remedy of damages for flights directly over his property was expanded by the Court in *Griggs v. Allegheny County*.[22] Griggs' house was located 3250 feet from the end of a runway of the Greater Pittsburgh Airport; aircraft using that runway sometimes passed as close as 11.36 feet above his chimney. Plaintiff alleged that the resulting noise frequently prevented his family from speaking or sleeping, and that the flights were a direct and immediate interference with the enjoyment and use of his land, thereby diminishing its value. Under the test

---

16 328 U.S. 256 (1946).

17 328 U.S. at 262 n.7:

> It was stated in United States v. General Motors Corp., 323 U.S. 373, 378, "The courts have held that the deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking. Governmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking."

18 328 U.S. at 258.

19 Id. at 260 (citing 49 U.S.C. § 176(a)).

20 Id. at 266.

21 Id. Justice Black, in his dissent in *Causby*, argued that a fifth amendment taking should not be implied in a situation clearly grounded in tort. He urged that since the Federal Government had passed legislation controlling the use of "navigable airspace," Congress should have the responsibility for supplying a remedy if damages for aircraft noise are deemed to be compensable. Id. at 267.

22 369 U.S. 84 (1962).

formulated in *Causby*, Griggs claimed that he was entitled to compensation. The defendant, Allegheny County, maintained that if plaintiff's claim were valid, it was the Federal Government and not the county which should be held liable because the county operated the airport within the scope of the National Airport Plan in conformity with the regulations of the Civil Aeronautics Adminstration.[23] Justice Douglas, again writing for the Court, concluded that an easement for public use had been taken to a part of plaintiff's airspace. This proprietary airspace was defined as a finite area, varying for every piece of property in accordance with such factors as location and use.[24] Since the federal regulations specifically authorized airport owners to obtain necessary easements, the county and not the Federal Government was liable to the landowner for the price of the easement.[25]

The *Griggs* decision stands for the two principles that direct overflights below a certain height constitute a taking and that local governments have the responsibility for obtaining easements necessary to assure the proper approaches for aircraft taking off and landing at an airport. The question of damages resulting from aircraft *not* in direct overflight is a separate issue, and is often analyzed by analogy to the doctrine of indirect and nonnegligent nuisance as developed in *Richards v. Washington Terminal Co.*[26] There the plaintiff alleged damages for nusiance and trespass resulting from the venting of smoke and soot from defendant's railroad tunnel which had been constructed under a federal permit. The Court held that nuisance and trespass could rise to the level of a compensable fifth amendment taking and that, therefore, sovereign immunity did not constitute a defense.[27]

Federal courts have not accepted the analogy to *Richards* in litigation involving aircraft noise pollution.[28] The leading federal case in this area, *Batten v. United States*,[29] refused recovery "absent . . . physical invasion" (e.g., direct overflight).[30] A majority of state courts,[31] on the other hand, have adopted the view taken by the Oregon Supreme Court in *Thornburg v. Port of Portland*.[32] The court in *Thornburg* adopted the nuisance analogy first stated in *Richards*, and the theory of a balancing of interests enunciated by Chief Judge Murrah in his dissent in *Batten*.[33] The court held that a "nuisance can be such an invasion of the rights of a possessor as to amount to a taking . . . any time a possessor is in fact ousted from the enjoyment of his land."[34] Whether or not the plaintiff has been ousted is a question for the jury.[35] The court felt that the important distinction was not whether the flights were directly overhead, but whether the wrongs were single-instance or the type of continuing and substantial

---

[23] See, e.g., 25 Fed. Reg. 8538 (1960) (New York Air Traffic Rules); 24 Fed. Reg. 9020 (1959) (denying curfew restrictions on the use of Los Angeles International Airport).

[24] See Aaron v. United States, 311 F.2d 798 (Ct. Cl. 1963).

[25] 369 U.S. at 89-90; 49 U.S.C. § 1348 (1958). Justice Black dissented on the sole issue of liability. While agreeing with the majority as to the existence of a compensable taking, Justice Black argued that federal regulation of take-off and approach areas under the supervision of the Civil Aeronautics Administrator constituted preemption of local authority. Therefore, local governments should not be held responsible for damages resulting from the use of airport facilities. 369 U.S. at 91.

[26] 233 U.S. 546 (1914). See also Boomer v. Atlantic Cement Co., 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S. 2d 312 (1970).

[27] 233 U.S. at 556-57.

[28] See Town of East Haven v. Eastern Airlines, Inc., 331 F. Supp. 16, 32 (D. Conn. 1971). See also Kirk v. United States, 451 F.2d 690, 694 (1971). Katz v. Connecticut, 307 F. Supp. 480, 482 (D. Conn. 1969).

[29] 306 F.2d 580 (10th Cir. 1962) [hereinafter *Batten*].

[30] Id. at 583.

[31] See, e.g., City of Jacksonville v. Schumann, 199 So. 2d 727 (Fla. App. 1967); Johnson v. City of Greeneville, 222 Tenn. 260, 435 S.W.2d 476 (1968).

[32] 233 Or. 178, 376 P.2d 100 (1962).

[33] 306 F.2d at 585-87. Judge Murrah advocated a balancing test, i.e., a taking occurs when the property interest is substantially diminished, not completely destroyed.

[34] 233 Or. at 190, 376 P.2d at 105.

[35] Id. at 193, 376 P.2d at 106.

interference with property interests which is present in aircraft "inverse condemnation" cases.[36]

Later cases have allowed recovery for overflights over an entire community[37] and for a further taking after the initial easement.[38] However, as the above cases illustrate, recovery can only be awarded where concrete damages are shown[39] or where there is an actual physical invasion of a property right. The cases from *Causby* through *Thornburg* have allowed recovery only for property loss, not for damage to humans. Thus defendants, after payment of their due damages, have no incentive to reduce their interference thereafter. Plaintiffs are able to collect damages, but are not able to gain relief. This restriction on recovery has led to the second area of noise pollution litigation: attempts by municipalities, using their police powers to protect the public health and safety, to prevent or restrict aircraft overflights.

B. Municipal Police Power Regulations

The first major case in this area is *Allegheny Airlines, Inc. v. Cedarhurst*.[40] The Village of Cedarhurst passed an ordinance prohibiting overflights during certain hours of the night.[41] The Second Circuit found that the local power to regulate had been preempted by the Federal Government's control of the nation's airspace.[42] Following this decision, the Town of Hempstead, which encompasses Cedarhurst, attempted to circumvent federal preemption by regulating noise levels rather than air traffic. Experts in the field of noise measurement were hired to ascertain the precise point at which aircraft noise becomes detrimental to health and safety and to discover if such limits were surpassed in Hempstead.[43] On the basis of this study, Hempstead enacted a curfew ordinance based on decibel levels.[44]

A challenge to the Hempstead ordinance was sustained by the district court in *American Airlines, Inc. v. Hempstead*.[45] "In a word," reasoned the court, "the Ordinance does not forbid noise except by forbidding flights and it is, therefore, the legal equivalent of the invalid Cedarhurst Ordinance."[46] The court also held the ordinance unconstitutional as an undue burden on interstate commerce. The court argued that if all municipalities located adjacent to an airport adopted ordinances prohibiting overflying aircraft, then that airport could be closed down at the whim of contiguous municipalities. Such a closing of John F. Kennedy International

---

36 Id. at 188, 376 P.2d at 108. "Inverse condemnation is the popular description of 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." A. Lowenfeld, Aviation Law, V-44 n.1 (1972).

37 See, e.g., Martin v. Port of Seattle, 64 Wash. 2d 309, 391 P.2d 540 (1964), cert. denied, 379 U.S. 989 (1965).

38 See Avery v. United States, 330 F.2d 640 (Ct.Cl. 1964).

39 See City of Los Angeles v. Mattson, 10 Av. Cas. 17,632 (1967), holding that actual, depreciable damages must be proven.

40 238 F.2d 812 (2d Cir. 1956).

41 Ordinance dated March 31, 1952.

42 238 F.2d at 815-17.

43 See American Airlines, Inc. v. Hempstead, 272 F. Supp. 226 (E.D.N.Y. 1967).

44 Town of Hempstead Unnecessary Noise Ordinance (No. 25), art. II (March 10, 1964). This restriction stated that decibel levels from aircraft overflying the Town of Hempstead during certain hours could not exceed health levels. The assumption was that an overall reduction in quantity would bring an end to the health hazard.

45 272 F. Supp. 226 (E.D.N.Y. 1967), aff'd, 298 F.2d 369 (2d Cir. 1968), cert. denied, 393 U.S. 1017 (1969).

46 Id. at 230. Although this conclusion seems obvious in retrospect, at the time the Hempstead ordinance was promulgated, regulating decibel levels offered municipalities a promising means for "outflanking" preemption. See Note, Airplane Noise: Problem in Tort Law and Federalism, 74 Harv. L. Rev. 1581 (1961).

Airport, which was the airport affected by the Hempstead ordinance, would result in a major disruption in the interstate flow of goods through that airport. The court could not countenance such a result.[47]

III. THE *BURBANK* CASE

It was in the context of the *Cedarhurst* and *Hempstead* holdings that the City of Burbank sought to circumvent federal preemption of airspace regulation by focusing on the land use aspect of airport facilities. While the ordinance it promulgated placed a curfew on flights taking off and landing at Hollywood-Burbank Airport, the city hoped that by addressing the "land use aspect," the ordinance would avoid the pitfall of federal preemption in the area of "airspace control."[48] In short, by attempting to regulate flights by legislating the proper hours of airport land use under its police powers, the City of Burbank hoped to distinguish its ordinance from those of Cedarhurst and Hempstead, which had regulated the flights of aircraft themselves. While conceding that the Burbank ordinance might not be preempted in the area of airspace control, the majority of the Court nevertheless ruled that it was preempted in the area of "airspace management."[49]

A. The Majority Opinion

Justice Douglas, writing for the majority in this five to four decision, based the Court's holding primarily on grounds of federal preemption of the entire area of civil aeronautics. The Court reasoned that if local "airspace management" were preempted by the Federal Aviation Act of 1958, as amended by the Noise Control Act of 1972, then by definition local noise pollution regulation had also been preempted.[50] "Airspace management" was defined as the complete and ultimate regulation of flights and of the use of navigable airspace.[51] As support for the premise that "airspace management" had been preempted, the Court cited previously enforced FAA regulations[52] which were found to be apposite and quoted from the *Hempstead* opinion with approval: "The aircraft and its noise are indivisible."[53]

In affirming the district court and court of appeals decisions on the interpretation of the Federal Aviation Act of 1958 and the 1968 amendments under it, the Court found that the 1972 Act, passed subsequent to the lower court rulings, had affirmed and reinforced "the conclusion that the FAA, now in conjunction with EPA, has full control over aircraft noise, pre-empting state and local control."[54] Although conceding that no express language for preemption exists in the 1972 Act, Justice Douglas, employing one of several tests for preemption enunciated in *Rice v. Santa Fe Elevator Corp.*,[55] found that "the pervasive nature of the scheme of federal

---

47 272 F. Supp. at 233.

48 See 49 U.S.C. § 1431 (Supp. II, 1972).

49 411 U.S. at 627. The distinction between airspace control and airspace management is not clear. Although these two phrases have meaning, nowhere in congressional discussions was an intent manifested to ascribe such probative force to this distinction. As such, the majority's reliance on this distinction is questionable.

50 411 U.S. at 626-27.

51 See 49 U.S.C. § 1348 (1958).

52 See, e.g., 25 Fed. Reg. 1764-65 (1960).

53 411 U.S. at 628.

54 Id. at 633.

55 331 U.S. 218, 230 (1947); see text accompanying note 67 infra.

regulation of aircraft noise . . . leads us to conclude that there is pre-emption."[56] This, Justice Douglas posited, is the clear intent of Congress as inferred from the broad language of the Act. In support of this position, the majority cited the legislative history of the 1972 Act in committee and on the floor of Congress,[57] as well as certain regulations passed pursuant to the FAA's power to regulate for safety, which prescribed procedures for landing and runway use.[58]

Although relying on preemption grounds, the majority implied that it could have based its decision on the commerce clause.[59] Employing the same language used by the court in *Hempstead*[60] and citing the same hypothetical situation discussed in the district court's opinion,[61] the majority expressed concern over the intolerable burden which would be placed on interstate commerce if all airports adopted similar curfews.[62] In fact, the Court noted that even this one curfew ordinance would "severely limit the flexibility of the FAA in controlling air traffic flow."[63]

B. The Dissent

Justice Rehnquist's dissent[64] was premised on two points of legislative history: the lack of explicit preemptive language in the 1972 Act, and the failure of Congress to indicate an intent to preempt state and local action affecting noise pollution regulation. Citing *Rice v. Santa Fe Elevator Corp.*,[65] he stated that preemption may not be determined on the basis of an implied pervasive scheme; rather "we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest intent of Congress."[66]

Turning to the 1972 Act, Justice Rehnquist quoted extensively from its legislative history in an effort to show that there was no evidence of a clear and manifest congressional intent to preempt local regulatory schemes.[67] He then proceeded to examine the scope and purposes of the 1958 Act and 1968 amendments and concluded that "[w]hile the Act might be broad enough *to permit* the Administrator to promulgate take-off and landing rules to avoid excessive noise at certain hours of the day . . . , Congress was not concerned with the problem of noise created by aircraft and did not intend to pre-empt its regulation."[68] Justice Rehnquist argued that Congress more likely legislated toward solving the problem at its "source" — by regulating the structural design and mechanical aspects of aircraft engines and of aircraft themselves.[69] The dissent concluded that without the specific intent required

---

56 411 U.S. at 633.

57 Senate Committee on Public Works and House Committee on Interstate and Foreign Commerce.

58 49 U.S.C. § 1348 (1958); see note 23 supra.

59 U.S. Const. art. I, § 8, cl. 3.

60 272 F. Supp. at 230.

61 318 F. Supp. at 927.

62 411 U.S. at 639.

63 Id.

64 Justices Stewart, White and Marshall joining.

65 331 U.S. 218 (1947).

66 411 U.S. at 643.

67 "No provision of the bill is intended to alter in any way the relationship between the authority of the Federal government and that of State and local governments that existed with respect to matters covered by . . . the Federal Aviation Act of 1958 prior to the enactment of the bill." 411 U.S. at 642.

68 411 U.S. at 644.

69 Id. at 650.

by *Rice* for federal preemption, no authority existed for the majority's decision. In addition, the dissent briefly noted that the commerce clause did not afford grounds for invalidating the ordinance.

IV. ANALYSIS

Close analysis of *Burbank* reveals that the Supreme Court opinion bears scrutiny not only because of several flaws in its reasoning, but also because of its implications concerning future noise pollution litigation.

A. Legislative Intent

The leading case on preemption, cited in both the majority and dissenting opinions, is *Rice v. Santa Fe Elevator Corp.*[70] In *Rice* Justice Douglas stated:

> ... [W]e start with the assumption that the historic police powers of the states were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress. Such a purpose may be evidenced in several ways. [1] The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the State to supplement it. [2] Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. [3] Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose. [4] Or the state policy may produce a result inconsistent with the objective of the federal statute.[71]

What, then, is required for a court to impute preemption? The *Rice* test demands a congressional "intent," evidenced in any of four possible forms, to displace local autonomy. Did Congress in fact manifest such an intent in the Noise Control Act of 1972?[72]

Sections 611(b)(1) and 611(b)(2) of the Federal Aviation Act, as amended by the Noise Control Act of 1972, authorize the Administrator of the FAA to "prescribe standards and regulations ... which protect the public from aircraft noise," but limit his explicit mandate to the promulgation of standards for aircraft, not airports.[73] Although it may be within the Administrator's power to go beyond the literal meaning of section 611 by inferring the necessary authority to protect the public from aircraft noise, examination of the Congressional Record and committee reports yields inconclusive evidence that Congress intended to preempt local action. The majority and dissent in *Burbank* relied on conflicting statements made on the floor of Congress to support their respective interpretations of the Act.[74] An evaluation of these congressional discussions leads to the conclusion that ample authority exists for each view.[75] Furthermore, the report of the Senate Committee on Public Works itself

---

70 331 U.S. 218 (1947).

71 Id. at 230 (citations omitted).

72 Pub. L. No. 92-574, § 611, 86 Stat. 1234.

73 49 U.S.C. § 1431 (Supp. II, 1972); Pub. L. No. 92-574, § 611, 86 Stat. 1234.

74 411 U.S. at 636, 637, 641, 642, 644-50.

75 See, e.g., 118 Cong. Rec. S. 17989, S. 18007 (daily ed. Oct. 13, 1972); 118 Cong. Rec. H. 10287, H. 10294, S. 18644 (daily ed. Oct. 18, 1972); H.R. Rep. No. 842, 92d Cong., 2d Sess. (1972).

contains language which both the majority and the dissent would find useful.[76] The final paragraphs of that report are contradictory and can be interpreted as support for both views.[77]

Although some legislators intended the Act to provide for exclusive federal control of matters covered by section 611,[78] it is difficult to see where the majority found an implied intent of Congress as a whole or of a majority of congressmen to preempt local regulation. Yet the dissent's conclusion that Congress specifically intended *not* to preempt local regulation is equally perplexing.[79] As is true with most legislation, congressmen with disparate understandings of a bill often predicate their vote upon an interpretation or belief which is entirely different from that of other congressmen who may cast concurring votes. The Noise Control Act of 1972 had its genesis in precisely this type of interpretive morass. Why then did the majority choose to construct its decision on such tenuous grounds as an implied pervasive preemptive intent?

B. Effects and Implications of *Burbank*

In order more clearly to understand the Supreme Court's decision to rely on a flexible statutory construction-preemption standard, it is necessary to examine the framework in which the Burbank ordinance was conceived. *Burbank* is the first case in which a municipality attempted to restrict airflight by resorting to its police powers to regulate the land use of an airport located within its boundaries. But *Burbank* is also unique because the Hollywood-Burbank Airport appears to be the only major commercial airport in the United States which is privately owned[80] – all others are owned by municipalities. If, in the future, another municipality establishes a restrictive curfew, it could reject the now discredited police powers approach of *Burbank* and rely instead on the proprietary right freely to use and control land. Thus *Burbank* serves as the bridge between police power regulation by a municipality seeking to restrict the activities of an airport and the anticipated case in which a municipality as a proprietor will seek to regulate the use of its airport. Both the majority and the dissent foresee that such a case may confront the Court in the future.[81] While neither opinion reaches this specific question, the probable outcome of such a case is strongly implied by the Court.

In a footnote to its decision, the majority states:

> "Airport owners *acting as proprietors* can presently deny the use of their airports to aircraft on the basis of noise considerations so long as such exclusion is nondiscriminatory." This portion [of the opinion letter from the Secretary of Transportation] was quoted with approval in the Senate Report.

---

76 S. Rep. No. 1160, 92d Cong., 2d Sess., 7. 10-11 (1972).

77 One paragraph seems to give the FAA authority to utilize "operational changes, adjustment of take off, approach and flight paths" and, impliedly, all other measures to reduce aircraft noise. The conclusion, on the other hand, stipulates that no explicit mandate is given to the FAA to control aircraft noise from take off and landing, and Congress has stated that it does not wish to alter "the relationship between the authority of the Federal Government and that of state and local governments that existed with respect to matters covered by section 611 of the Federal Aviation Act of 1958 prior to the enactment of the bill." S. Rep. No. 1160, 92d Cong., 2d Sess, 10-11 (1972).

78 See, e.g., 118 Cong. Rec. S. 18644 (daily ed. Oct. 18, 1972) (remarks of Senator Tunney, member of the Senate Committee on Public Works); 118 Cong. Rec. H. 10287 (daily ed. Oct. 18, 1972) (remarks of Congressman Staggers, Chairman of the House Committee on Interstate and Foreign Commerce).

79 411 U.S. at 640-50.

80 Id. at 635-36 n.14, 651-52 n.4.

81 Id.

> Appellants and the Solicitor General submit that this indicates that a municipality with jurisdiction over an airport has the power to impose a curfew on the airport, notwithstanding federal responsibility in the area. But, we are concerned here not with an ordinance imposed by the City of Burbank as "proprietor" of the airport, but with the exercise of police power. While the Hollywood-Burbank Airport may be the only major airport which is privately owned, many airports are owned by one municipality yet physically located in another. . . . Thus, authority that a municipality may have as a landlord is not necessarily congruent with its police power. We do not consider here what limits if any apply to a municipality as a proprietor.[82]

It is important to note that while Congress, the Secretary of Transportation and the dissent all agree that a proprietary municipality would have the unpreempted authority to impose curfew restrictions, the majority opinion does not address itself to this issue. This omission is significant in light of the seemingly universal acceptance of a municipality's right as proprietor freely to control the use of its land.

The dissent argues that since Hollywood-Burbank Airport is probably the only airport in the country not owned by a state or local government,[83] and since Congress has agreed that a municipality as proprietor could enact a restrictive curfew ordinance,[84] then "[i] t simply strains the credulity to believe that the Secretary, the Senate Committee, or Congress intended that all airports except the Hollywood-Burbank Airport could enact curfews."[85] The dissent's argument is convincing: it is unlikely that a statute could be so severely limited in scope. However, it is even more improbable that the majority, cognizant of the argument propounded by the dissent, could have intended such an anomalous result. If the intent of Congress and of the Supreme Court is for proprietors to be exempt from federal control, then the City of Burbank would be the only municipality in the nation unable to regulate the flight of aircraft into and out of an airport over which it has sovereignty. The inference must therefore be that the majority, fully aware of this flaw in the decision, is prepared to extend the *Burbank* holding to include the future case of a proprietor attempting to regulate the use of his airport! This conclusion must follow if this otherwise severely limited holding is to serve as precedent for future cases: *Burbank* stands for the doctrine that a municipality using its police powers may not regulate the use of its airport where such use has been preempted by federal airspace management; the City of Burbank is the only municipality which has the authority to regulate the land use of its airport without having a concurrent proprietary power; therefore, if *Burbank* is to have any relevance in future cases, the majority must intend the holding to apply to proprietary municipalities.

C. Preemption: A Policy Determination

This conclusion explains the majority's reliance on preemption. In fact, the Supreme Court has recently demonstrated a propensity to rely increasingly on preemption as the determinative factor in cases which would have rested on commerce clause grounds only a few years ago.[86] The Court's formula for preemption is based

---

82 Id. at 635-36 n.14.

83 Id. at 651-52 n.4. Local governments are precluded from restricting aircraft flight in airports located adjacent to a municipality. See text accompanying notes 40-47 supra.

84 411 U.S. at 653.

85 Id. at 652.

86 See Note, Pre-emption as a Preferential Ground: A New Canon of Construction, 12 Stan. L. Rev. 208 (1959) [hereinafter Note, Pre-emption].

upon the same weighing of interests approach previously employed in deciding traditional commerce clause cases.[87]

The Court's proclivity for choosing preemption rather than the commerce clause is founded on several policy considerations. First, by deciding the *Burbank* case on the basis of a well-documented, though largely inferred interpretation of congressional intent, the Court has effectively notified Congress that it will treat future federal preemption of all facets of airspace management in accordance with this interpretation of legislative intent. Therefore, Congress can either tacitly acquiesce in the Court's approach, or it can legislate further to clarify its current intentions regarding the 1972 Noise Control Act. This would remove any grounds for objecting to the decision as "judicial legislation." Once it is clear that Congress has not disapproved of the Court's interpretation, future litigation in the fourth category[88] - that of a proprietary municipality attempting to regulate some facet of airspace management — could be decided on additional constitutional grounds, to wit, the commerce clause.

Second, it has been suggested that the Court is aware that basing a decision on preemption results in the avoidance of separation of powers problems, since to some degree it shifts to Congress the onus of declaring state laws unconstitutional.[89] For this reason, the Court in some of the very close cases[90] prefers to avoid constitutional interpretations where the alternative basis of statutory construction is available.[91]

Finally, in cases involving statutes with marginally restrictive effects on interstate commerce, the Court may choose to rest its decision on preemption grounds rather than determine whether a state or local law unjustifiably burdens interstate commerce so that the Court may base its eventual decision in a more important controversy upon firmer constitutional grounds.[92] Of course, the question remains whether the federal government should, in fact, be given plenary power to regulate noise pollution without any supplemental regulation from state or local authorities.

V. THE NEED FOR UNIFORM REGULATION

The 1966 report of the Jet Aircraft Noise Panel reviewed this question of exclusive federal jurisdiction and firmly concluded that the federal government is the only body which can effectively implement useful noise pollution regulations.[93] Although the Panel agreed that the FAA did not have the explicit power to issue sufficient regulations at that time, it did recommend the legislation ultimately adopted by Congress in 1968 and 1972, and it urged the FAA to utilize the mandate impliedly contained in the legislation.

Two states have recognized and by their actions have accelerated the trend toward federal regulation in this area.[94] In 1971, the Governor of Rhode Island vetoed

---

87 Id.

88 See text accompanying notes 13-15 supra.

89 See Note, Pre-emption, supra note 86.

90 See, e.g., Greene v. McElroy, 360 U.S. 474 (1959) (narrow reading of authority of Secretary of Defense to promulgate regulations); Watkins v. United States, 354 U.S. 178 (1957) (narrow reading of congressional power to conduct investigations); Pennsylvania v. Nelson, 350 U.S. 497 (1956) (broad interpretation of Smith Act to supercede all state acts in same area). See generally Note, Supreme Court Interpretation of Statutes to Avoid Constitutional Decisions, 53 Colum. L. Rev. 633 (1953).

91 See Ashwander v. TVA, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring). See note 108 infra.

92 See Note, Pre-emption, supra note 86.

93 Jet Aircraft Noise Panel, Science and Technology Office, Executive Office of the President, Alleviation of Jet Aircraft Noise Near Airports, 3-7 (1966).

94 See, e.g., note 24 supra; 34 Fed. Reg. 18355-56 (1969).

a bill which would have established a curfew at the Providence Airport on the grounds that it was unconstitutional under both the supremacy clause and the commerce clause.[95] A similar bill was proposed in the Massachusetts legislature during 1971.[96] The Massachusetts Supreme Court in a unanimous opinion[97] advised the legislature that such an action by a state government had been preempted (under the first and second *Rice* tests[98]) by the Federal Aviation Act of 1958 and the 1968 amendments under it. Furthermore, the court cautioned that such legislation would create an intolerable, impermissible burden on interstate and international commerce. In fact, the court indicated in dictum that the burden on interstate commerce created by state or local legislation was so unjustifiable, when viewed in relation to the corresponding scheme of federal regulation, that even airport proprietors should be precluded from establishing any restrictions on the use of their airports.[99]

Nevertheless, when Congress enacted the 1972 Noise Control Act, it refused to enumerate the definite standards for preemption endorsed both by the aviation experts and state governments. If Congress now accepts the formulation of intent which was adduced by the Supreme Court and refrains from reconsidering the 1972 Act, then on what grounds should the Court decide the case in which a municipal proprietor establishes a restrictive curfew?

VI. ATTEMPTED REGULATION BY THE PROPRIETARY MUNICIPALITY: A COMMERCE CLAUSE SOLUTION

Of course, the Court may rely on the precedent of preemption enunciated in *Burbank*. However, in the case in which a proprietor imposes restrictions on airport use, the Court will be confronted with a more difficult problem than that of police power regulation by a municipality. The proprietor's efforts *qua* proprietor to regulate the use of his land is intrinsically the more compelling situation, and a judicial attempt to balance countervailing interests might not result in the clear-cut affirmation of preemption which would be desirable. Indeed, Justice Rehnquist persuasively argued, in the dissent in *Burbank*, that if a proprietor has the inherent right to decide whether or not an airport may be built and whether or not an airport once built should remain open, then he must necessarily have the discretion to determine the hours of operation.[100] However, although this argument may be widely accepted and thus pose difficulties in a future proprietary municipality case, the reasoning may be analogized to a situation in which a licensed hotel operator, having the option of opening his hotel and closing it down, also has the option of opening it to some and closing it to others. Clearly, once the decision is made to operate under the existing statutes and regulations imposed upon a proprietor's right freely to control his land, then that proprietor must conform his operation to those restrictions. Since, under *Causby* and *Griggs*, a municipal airport proprietor is required to agree to certain restrictions before he opens his airport and must operate the facility under the National Airport Plan in conformity with FAA regulations,[101] his proprietary discretion to determine the hours of operation must likewise be limited. Thus, while federal agencies do not have

---

95 Message of Governor Frank Licht dated June 22, 1971.

96 Mass. S 1161 (1971).

97 Opinion of the Justices, 271 N.E.2d 354 (Mass. 1971).

98 See text accompanying note 71 supra.

99 Id. at 358-59. See also Port of New York Authority v. Eastern Air Lines, Inc., 259 F. Supp. 745 (E.D.N.Y. 1966).

100 411 U.S. at 653.

101 See 328 U.S. at 266; 369 U.S. at 89-90; note 23 supra.

exclusive authority over the operation of local airports, federal control of airspace management has surely foreclosed local governmental bodies from dealing with noise pollution in this manner.

Although the Court may decide this future proprietor interest case on the basis of the preemption doctrine as expressed in *Burbank*, the greater difficulties posed by a proprietary municipality should force the Court to rely additionally on analogous cases such as *Bibb v. Navajo Freight Lines, Inc.*[102] and *Southern Pacific Co. v. Arizona*,[103] which held that similar local regulations are in violation of the commerce clause. The Court in *Burbank* did not base its decision on the theory that regulation of noise pollution was an area of strictly federal determination under the supremacy clause, precluding local restrictions once Congress has exercised its lawmaking right. The Court reasoned instead that Congress, through proper legislation pursuant to the commerce clause, had promulgated a "pervasive scheme" of "airspace management" which, of necessity, included noise pollution regulation.

However, even without congressional action to oust a locality of its normal police power authority, the commerce clause protects interstate commerce from parochial actions of state and local governments.[104] Consideration of national effects would become particularly important were local regulations enacted with requirements for interstate carriers so inconsistent as to impose a burden upon the efficient use of the channels of commerce; this could be the case if various municipalities were free to enforce their own curfew ordinances.[105] Nevertheless, a commerce clause approach was abandoned by the Supreme Court even though the district court had based its decision in part on the probability that such curfew restrictions would place an intolerable burden on interstate commerce[106] and despite the fact that lower courts have been employing this constitutional proscription as a primary barrier to local regulation.[107]

In short, owing to the greater problems posed in a proprietary interest case, it would seem reasonable to expect the Supreme Court to base its decision in such a case on more viable and precedentially more consequential grounds. Curfew restrictions create conditions affecting the control of aircraft flight and, therefore, they ultimately infringe upon federal airspace management. The availability of an applicable statutory interpretation of the Federal Aviation Act in *Burbank* avoided the problem of grounding the decision on a constitutional interpretation, thus permitting the Court to follow its self-imposed rule first stated in *Ashwander v. TVA*.[108] However, as the majority stated, Congress operated under the assumption that proprietors, by their

---

102 359 U.S. 520 (1959).

103 325 U.S. 761 (1945).

104 See Southern Pacific Co. v. Arizona, 325 U.S. 761, 767-69 (1945); Morgan v. Virginia, 328 U.S. 373, 378-79 (1946).

105 See Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960), where the Court affirmed the constitutionality of a Detroit ordinance placing restrictions on the amount of pollution which a ship's boiler could emit into the air. Although there was a federal statute prescribing safety requirements for ships' boilers, the Court determined that the particular Detroit ordinance did not conflict with the federal statute and accordingly held that Congress had not intended its safety requirements to occupy the entire area of boiler regulation. Significantly, the Court emphasized that if a sufficient number of local governments promulgated inconsistent ordinances of this nature, an intolerable burden would be imposed on interstate commerce, rendering these ordinances unconstitutional. Such an intolerable burden is similarly foreseeable if numerous municipalities are free to enact airport curfew restrictions. Citing *Huron*, the Court in *Burbank* stated: "Our prior cases on pre-emption are not precise guidelines in the present controversy, for each case turns on the peculiarities and special features of the federal regulatory scheme in question." 411 U.S. at 638.

106 318 F. Supp. 914, 926-30 (1970).

107 See note 3 supra.

108

> ... The Court will not "anticipate a question of constitutional law in advance of the necessity of deciding it." ...

nature, were excluded from the full impact of the federal regulatory scheme.[109] Therefore, any attempt to apply the preemption ground used in *Burbank* to a future proprietor case would entail a strained interpretation of congressional intent. Since any local restrictive curfew ordinance would be potentially inimical to the flow of interstate commerce, the Court would be on firmer ground if it based its invalidation of such an ordinance on the commerce clause.

The test as to what may constitute a burden on interstate commerce was stated in *Southern Pacific Co. v. Arizona*:[110]

> The decisive question is whether in the circumstances the total effect of the law as a safety measure ... is so slight or problematical as not to outweigh the national interest in keeping interstate commerce free from interferences which seriously impede it and subject it to local regulation which does not have a uniform effect on the interstate [transportation] which it interrupts.[111]

In *Burbank*, only one scheduled intrastate flight was affected by the restrictive ordinance. However, the majority noted that

> [t]he interdependence [of control under the 1972 Act] requires a uniform and exclusive system of federal regulation if the congressional objectives underlying the Federal Aviation Act are to be fulfilled.
>
> If we were to uphold the Burbank ordinance and a significant number of municipalities followed suit, it is obvious that fractionalized control of the timing of take-offs and landings would severely limit the flexibility of the FAA in controlling air traffic flow. The difficulties of scheduling flights to avoid congestion and the concomitant decrease in safety would be compounded.[112]

Moreover, as the district court pointed out concerning the one restricted flight, even this minor effect could substantially burden interstate commerce.[113] The district court opinion cited testimony by officers of Continental Airlines and other experts[114] supporting the contention that a series of ordinances enacted by airports across the nation would have the effect of eliminating at least 1009 regularly scheduled flights.[115] Since approximately 48 percent of air mail and 42 percent of air freight is carried at night, interstate transportation of the federal postal system also would be disrupted.[116] In general, national costs for interstate carriers would increase approximately 25 percent.[117] Finally, because of the differences in time zones, flights leaving

---

> ... The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.... Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter.

297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring) (citations omitted).

109 411 U.S. at 635-36 n.14.

110 325 U.S. 761 (1945).

111 Id. at 775-76.

112 411 U.S. at 639.

113 318 F. Supp. at 926-30.

114 Mr. Mitchell, Vice-President of Continental Airlines in charge of corporate planning. Mr. Pyle, Director of Aviation Development Council at La Guardia Airport, New York, and General Von Kann, Vice-President, Operations and Engineering, Air Transport Association of America. 318 F. Supp. at 927.

115 318 F. Supp. at 927.

116 Id.

117 Id.

Los Angeles for New York, for example, could leave no later than 3:00 p.m. Los Angeles time if they wished to land in New York before an 11:00 p.m. curfew. Likewise, flights leaving from foreign airports and those scheduled to depart from domestic points would also be adversely affected by restrictive curfews, thus imposing a burden on international commerce. In short, the whole scheme of air commerce would be significantly and adversely affected by local curfew regulations.

VII. CONCLUSION

Although the Supreme Court could rely on the preemption precedent established in *Burbank* if it is faced with a curfew ordinance based on a municipality's proprietary interest in its airport, if the Supreme Court chooses to rely instead on interstate commerce grounds it would effectively preclude any future attempts by municipalities to regulate in the area of airspace management. Despite the Court's exclusive reliance in *Burbank* on preemption, it has left open several options by giving Congress an opportunity to reconsider and relegislate. If Congress chooses not to do so, then the Court will be mandated to decide its next case in conformity with the implications of *Burbank*.

The principles delineated by the Supreme Court's decisions in *Causby*, *Griggs* and *Burbank*, and the analysis projected in this Comment for the anticipated proprietary interest case, form a cohesive body of law in the area of noise pollution regulation. The Court's finding of a pervasive federal scheme places complete authority for airspace management and air traffic control in the hands of the appropriate national agency, while delegating to state and local governments the responsibility for deciding whether airport facilities are necessary to service their local needs and, if such a determination is made, for obtaining the necessary land use easements so as to avoid major noise pollution difficulties.[118] The single national authority envisioned by the Jet Aircraft Noise Panel in 1966[119] would thus function as the only body which could effectively implement useful noise pollution regulations on a uniform national scale without adversely affecting the movement of goods in commerce or the flexibility necessary in controlling air traffic flow.

WILLIAM NATBONY

---

[118] See Griggs v. Allegheny County, 369 U.S. 84 (1962); United States v. Causby, 328 U.S. 256 (1946).

[119] Jet Aircraft Noise Panel, supra note 93, at 3-7.