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Case Notes

James H. Moody III

Randy S. Brooks

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REMEDIES—IMPLIED PRIVATE ACTION—An Implied Private Action Exists For A Violation Of The Safety Regulation Promulgated By The Federal Aviation Administration Pursuant To The Authority Contained In 49 U.S.C.A. Section 1421.[1] *Rauch v. United Instruments, Inc.*, 405 F. Supp. 435 (E.D. Pa. 1975).

Plaintiffs, owners of allegedly defective aircraft altimeters were required by Airworthiness Directive No. 74-24-13, issued by the Federal Aviation Administration (FAA), to expend approximately seventy-five dollars each to have their defective altimeters serviced and repaired.[2] As a result, the plaintiffs sued the manufacturer and distributor of the defective altimeters. The plaintiffs' original complaint consisted of three counts. The first two alleged various traditional theories of recovery including strict liability, breach of warranty and ordinary negligence and the third alleged a cause of action based upon failure to comply with the requisites of the Federal Aviation Act of 1958 (the Act) and the safety regulations promulgated thereunder.[3] The named plaintiffs claimed that they and the other members of the proposed class[4] had each suffered approximately seventy-five dollars in damages as a result of the defendants'

[1] Federal Aviation Act of 1958, 72 Stat. 731, *as amended*, 49 U.S.C. § 1421 (1970), *formerly* Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 973 concerns the powers of the Administrator of the Federal Aviation Administration. Among his duties are to establish minimum standards and promulgate reasonable rules and regulations in the interest of safety.

[2] The gravamen of plaintiffs' complaint was that because of defective conditions existing in the balance arm and gear assembly barometric dial drive of certain altimeters manufactured by Tokyo Aircraft Instrument Company and distributed by United Instruments, Inc., the Federal Aviation Administration issued Airworthiness Directive No. 74-24-13. This Airworthiness Directive requires owners of these altimeters to incur the expense of removing, servicing and repairing them, having the altimeter recertified and then reinstalled in their aircraft. Approximately 74,000 of the defective altimeters were manufactured and distributed.

[3] The regulations cited by plaintiffs were 14 C.F.R. §§ 21.3(b), 21.95, 21.125(b)(5), (7), 37.3, 37.7, 37.9, 37.17, 37.120, 145.63 (1975). These regulations have the force of law. Todd v. United States, 384 F. Supp. 1284, 1294 (M.D. Fla. 1975).

[4] The proposed class was composed of all those who owned either the altimeters in question or aircraft equipped with the altimeters. 405 F. Supp. at 437.

actions, and that they were accordingly entitled to compensatory relief from the defendants. Later plaintiffs discovered that the defendants as early as 1968[5] had been aware of the defects which rendered the altimeters unairworthy and notwithstanding that actual knowledge, as well as a suitable solution for the problem, knowingly produced and distributed tens of thousands of these defective instruments for installation in general aviation aircraft. The plaintiffs filed a Motion for Leave to File an Amended Complaint which set forth in Count Four a claim for fraud and deceit by defendants together with a prayer for punitive as well as compensatory damages. The defendants, arguing that a federal tort remedy in favor of the plaintiffs could not be implied under the Act, opposed plaintiffs' motion on the ground that leave to amend should be denied where it appeared that the proposed amendments could not withstand a motion to dismiss.[6] *Held, granted*: An implied private right of action exists for a violation of the safety regulations promulgated by the FAA pursuant to the authority contained in 49 U.S.C.A. section 1421.[7]

The subject of implied private civil remedy under federal regulatory legislation has provided much grist for the federal judicial mill.[8] In 1916 the Supreme Court announced the doctrine of implying private action in the absence of specific statutory authorization in *Texas and Pacific Railway Co. v. Rigsby*.[9] Rigsby, a railroad employee, sought damages for injuries resulting from his employer's violation of the Federal Safety Appliance Act.[10] The Supreme Court upheld his recovery while recognizing that the Federal Safety Appliance Act did not expressly confer a private right of action.[11]

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[5] This was six years before the Federal Aviation Administration issued the Airworthiness Directive concerning the defect in question. Brief for Appellee at 4-5, Rauch v. United Instruments, Inc., 405 F. Supp. 435 (E.D. Pa. 1975).

[6] *Id.*

[7] *Id.* at 442, 444.

[8] *See, e.g.*, Doak v. City of Claxton, Georgia, 390 F. Supp. 753, 755 (S.D. Ga. 1975). For a more complete history of the doctrine of implication than will be permitted here, *see*, Comment, *Implying Private Causes of Action From Federal Statutes: Amtrak And Cort Apply the Brakes*, 17 B.C. IND. & COM. L. REV. 53 (1975); Comment, *Private Rights of Action Under Amtrak and Ash: Some Implications for Implication*, 123 U. PA. L. REV. 1392 (1975).

[9] 241 U.S. 33 (1916).

[10] Ch. 196, 27 Stat. 531 (1893), *as amended*, 45 U.S.C. §§ 1-16 (1970).

[11] 241 U.S. at 39.

The *Rigsby* decision led to the standard most favored in the early history of implication: Disregard of a statutory command which damages an intended beneficiary of that statute creates a cause of action in the injured party.[12] This early standard was dominant until the 1950's when it fell into disfavor as the attitude of the courts toward implication turned against it. Instead of formulating a completely new rule that would be more in line with the underlying rationale of implication,[13] some courts fashioned rules of construction which limited the situations in which an implied action could be found to be consistent with the underlying statute.[14] The Supreme Court itself sought to limit the doctrine of implication rather than formulate a new rule in *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*[15] and *T.I.M.E. Inc. v. United States.*[16] The rules of construction that resulted did little more than confuse the implication process because they failed to state a generally applicable test which would serve the underlying implication theory.

The attitude of the courts toward implication became more favorable in 1964 when the Supreme Court decided *J. I. Case Co. v. Borak.*[17] In finding an implied action for a violation of the proxy solicitation rules promulgated pursuant to section 14(a) of the

[12] Texas & Pacific Railway v. Rigsby, 241 U.S. 33 (1916); *see also* Fitzgerald v. Pan American World Airways, Inc., 229 F.2d 499 (2d Cir. 1956); Reitmeister v. Reitmeister, 162 F.2d 691 (2d Cir. 1947); Kardon v. National Gypsum Co., 69 F. Supp. 512 (E.D. Pa. 1946).

[13] The most often-stated rationale behind the doctrine of implication is that while Congress must often decide upon penal and remedial schemes without a prior opportunity to evaluate their practical effectiveness, the courts, on the other hand, are able to observe a statute in operation and to determine the actual effectiveness of an enforcement mechanism. *See* Note, *Implying Civil Remedies From Federal Regulatory Statutes*, 77 HARV. L. REV. 285, 291 (1963).

[14] *See* Odell v. Humble Oil and Refining Co., 201 F.2d 123, 127 (10th Cir.), *cert. denied*, 345 U.S. 941 (1953); Acorn Iron & Supply Co. v. Bethlehem Steel Co., 96 F. Supp. 481 (E.D. Pa. 1951).

[15] 341 U.S. 246 (1951). The Court held that when a federal agency is in the first instance entrusted with the enforcement of a statute, but is limited to affording only prospective relief, a court may not imply an action granting retroactive relief, even though primary jurisdiction problems could be largely eliminated by the court's referral to the agency of questions within the agency's expertise.

[16] 359 U.S. 464 (1959). The Court held that when a statute is divided into parts, each of which is intended to govern the same basic conduct but of different groups or persons, and one part of the act provides an express private remedy for a violation, implication is not available for a violation of the part of the statute that contains no express private remedy.

[17] 377 U.S. 426 (1964).

Securities Exchange Act of 1934,[18] the Supreme Court held that a private action may be fairly implied when: (1) the plaintiff is within the zone of interest intended to be protected by the statute; (2) the harm is of the type that the statute was intended to forestall; and (3) the penalty is inadequate to effectuate Congress' purpose in passing the statute.[19]

This formulation was dominant for a number of years as the federal courts liberally construed rights of action into many federal statutes,[20] but again as the attitude of courts toward implication changed, this formula too fell into disfavor. Once more the courts chose not to deal head on with the test's weaknesses, but rather chose to limit implication by way of statutory construction.[21] This created a most confusing state of affairs. In making an implication decision, a court had no single reasonable test to apply, but rather was confronted with two conflicting and equally vital lines of precedent—one line consisting of those cases decided when implication was favored by the courts, and the other line consisting of those cases decided when implication was not so well favored by the courts. This situation was especially undesirable because it invited judges to make decisions based upon their predilections. Judges were able to decide cases in whatever manner they wished and then were able to justify their results by choosing between the lines of precedent. With decisions being made in this manner, all hope of predictability and consistency was lost.

In an attempt to alleviate this situation, the Supreme Court in *Cort v. Ash*[22] set out an elaborate rule governing the use of implied remedies. The plaintiff in *Cort* was a shareholder of Bethlehem

[18] 15 U.S.C. § 78n(a) (1970).

[19] Though not explicitly stated in the *Borak* opinion, this rule has been extracted by later decisions. *See* Wyandotte Transportation Co. v. United States, 389 U.S. 191, 202 (1967); cases cited note 20 *infra.*

[20] *See, e.g.*, Wyandotte Transportation Co. v. United States, 389 U.S. 191 (1967); Stewart v. Travelers Corp., 503 F.2d 108 (9th Cir. 1974); Burke v. Compania Mexicana Aviacion, S.A., 433 F.2d 1031 (9th Cir. 1970); National Ass'n for Community Development v. Hodgson, 356 F. Supp. 1399 (D.D.C. 1973); Fagot v. Flintkote Co., 305 F. Supp. 407 (E.D. La. 1969).

[21] *See, e.g.*, Breitwieser v. KMS Industries, Inc., 467 F.2d 1391 (5th Cir. 1972), *cert. denied*, 410 U.S. 969 (1973); Ferland v. Orange Groves of Fla., Inc., 377 F. Supp. 690 (M.D. Fla. 1974); People for Environmental Progress v. Leisz, 373 F. Supp. 589 (C.D. Cal. 1974); Danna v. Air France, 334 F. Supp. 52 (S.D.N.Y. 1971), *aff'd*, 463 F.2d 407 (2d Cir. 1972).

[22] 422 U.S. 66 (1975).

Steel Corporation who alleged that the defendants, directors of the corporation, had caused Bethlehem to expend money in the 1972 presidential election campaign in violation of federal law.[23] The plaintiff sought damages on the behalf of the corporation, contending that although the election campaign law provided only for penal sanctions, a derivative cause of action for his injuries as a stockholder could be implied.[24]

In reversing the Third Circuit's holding[25] that a private cause of action could be implied, the court relied on a four part test:

> First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted," . . . that is does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . . And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?[26]

The district court in *Rauch* used the *Cort* test as the backbone of its decision,[27] but the *Cort* test itself did little to improve the district court's predictability. As will be seen, the district court had two equally vital lines of precedent from which it could choose in answering each of the four questions contained in the *Cort* test. Since the *Rauch* court relied so heavily on the *Cort* test, the district court's opinion will be analyzed in four separate parts corresponding to the four parts of the *Cort* test.

A. *Creation of a Federal Right*

The district court in *Rauch* relied heavily on *Gabel v. Hughes Air Corp.*[28] in concluding that the Act does create a federal right in favor of those who own or fly aircraft and suffer economic harm

[23] *Id.* at 71. Plaintiff alleged that defendents had violated 18 U.S.C. § 610 (1970), *as amended*, (Supp. II, 1972), which makes it unlawful for any corporation to make a contribution or expenditure in connection with any federal election, and provides criminal penalties of a fine or imprisonment for its violation.

[24] 422 U.S. at 71.

[25] 496 F.2d 416 (3d Cir. 1974).

[26] 422 U.S. at 78.

[27] 405 F. Supp. at 438-40.

[28] 350 F. Supp. 612 (C.D. Cal. 1972).

as a direct result of the violation of the Act.[29] In doing so the district court did not mention either the cases which found no federal right in other federal statutes analogous to the Act,[30] or the cases which have found the Act's safety regulations to be at most, standards of conduct and not essential elements of a federal tort claim.[31]

Several statutes similar to the Act appear to create federal rights, but the Supreme Court has not implied a private remedy from these statutes. Like Part II of the Interstate Commerce Act,[32] which was considered in *T.I.M.E., Inc.*,[33] the language and legislative history of the Act could suggest that Congress drafted the safety provisions merely to serve as administrative criteria, not to create judicial legal rights.[34] Cases construing the Federal Safety Appliance Act,[35] another statute analogous to the Act,[36] provide further support for the conclusion that the Act did not create a federal right. In *Anderson v. Bingham & Garfield Railway*,[37] where the case was removed to federal court on the theory that the action, based on a violation of the Federal Safety Appliance Act, arose under federal law, the United States Court of Appeals for the Tenth Circuit rejected the defendant's theory and held that a violation of the Federal Safety Appliance Act does not establish a cognizable federal cause of action.[38] While certain provisions of the Federal Safety Appliance Act create a duty, the right of action and the incidents of such right derived from the laws of the state.[39] In construing the Act, many courts have reached a similar result and have found the Act's safety

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[29] 405 F. Supp. at 439.

[30] *See* notes 32-39 *infra* and accompanying text.

[31] *See* note 40 *infra* and accompanying text.

[32] Sec. 201-28, 49 U.S.C. §§ 301-27 (1970).

[33] 359 U.S. 464 (1959). *See* note 16 *supra.*

[34] *Compare* Federal Aviation Act of 1958, § 610, 49 U.S.C. § 1430 (1970) *with* Interstate Commerce Act §§ 216(b), (d), 49 U.S.C. §§ 316(b), (d) (1970). The language of each emphasizes the prohibition of certain conduct and not the creation of federal rights.

[35] 45 U.S.C. §§ 1-16 (1970).

[36] Although both statutes impose certain duties, they are primarily concerned with the regulation of carriers to ensure the safety of workers and passengers. *See* Federal Aviation Act of 1958, § 610, 49 U.S.C. § 1430 (1970); Federal Safety Appliance Act §§ 4, 5, 45 U.S.C. §§ 13, 14 (1970).

[37] 169 F.2d 328 (10th Cir. 1948).

[38] *Id.* at 330.

[39] *Id.* at 331.

provisions and the agency regulations to be at most standards of conduct and not rights upon which a federal tort claim may be based.[40]

Departing from other courts' interpretations of the Act,[41] the district court in *Gabel*[42] held that a violation of the duties imposed by the Act does create a federal cause of action.[43] The *Gabel* opinion contained an exhaustive demonstration of the emphasis on safety found in the Act,[44] and concluded:

> If the foregoing repetitive emphasis by Congress on *safety* does not refer to the *safety of individuals* and does not impose a duty, the violation of which is a tortious, actionable wrong, then one is led to wonder just whose *safety* Congress was talking about, or if there is some safety that is in the public interest which does not include the saving of human lives.[45]

The rationale of the district courts in *Gabel* and *Rauch* is not a novel approach to a determination that plaintiffs, such as those here, are entitled to damages for violations of an act designed for their protection. As early as 1703 an English Court concluded that a private cause of action existed for any person injured by the violation of a statute enacted for that person's benefit.[46]

[40] *See, e.g.*, Dickens v. United States, 378 F. Supp. 845, 854 (S.D. Tex. 1974); Rosdail v. Western Aviation, Inc., 297 F. Supp. 681, 684 (D. Colo. 1969); Moody v. McDaniel, 190 F. Supp. 24, 28 (N.D. Miss. 1960); *cf.* Fernandez v. Linea Aeropostal Venezolana, 156 F. Supp. 94, 99 (S.D.N.Y. 1957) (Civil Aeronautics Act of 1938 did not create new and independent wrongful death action). *But see* Gabel v. Hughes Air Corp., 350 F. Supp. 612, 615 (C.D. Cal. 1972) (violation of carriers statutory duty of safety creates federal cause of action).

[41] *See, e.g.*, Sanz v. Renton Aviation, Inc., 511 F.2d 1027, 1029 (9th Cir. 1975) (per curiam) (Congress did not intend to create a cause of action in the Act in favor of those injured through use of rented aircraft); Moungey v. Brandt, 250 F. Supp. 445, 450-53 (W.D. Wis. 1966) (no civil remedy will be implied from safety provisions of the Act); Porter v. Southeastern Aviation, Inc., 191 F. Supp. 42, 43 (M.D. Tenn. 1961) (wrongful death action does not arise under the Act); Moody v. McDaniel, 190 F. Supp. 24, 29 (N.D. Miss. 1960) (wrongful death action does not arise under sections 1421-30 of the Act). The plaintiffs distinguished many of these cases in their brief on the grounds that they were either passive violations of the 1958 Act or wrongful death actions. Brief for Appellee at 23-4, Rauch v. United Intruments, Inc., 405 F. Supp. 435 (E.D. Pa. 1975).

[42] 350 F. Supp. 612 (C.D. Cal. 1972).

[43] *Id.* at 615.

[44] *Id.* at 615-17.

[45] *Id.* at 617.

[46] In Anonymous, 87 Eng. Rep. 791 (Q.B. 1703) an individual sued for damages, alleging a violation of a statute that contained no express remedy. In support of its implication of a remedy, the court reasoned that:

Since Congress did not expressly say whether or not the Act was intended to create a federal right in those it benefited, it is clear that the district court had two equally vital lines of precedent from which to choose.

B. *Legislative Intent*

The district court in *Rauch* concluded that while there is no clear expression of an intent to create a private right of action, there is certainly no explicit evidence of an intent to deny one.[47] Though this is no doubt a true statement, the district court failed to distinguish either the decisions holding that a private right of action for civil damages was neither intended nor envisioned by Congress as a means of enforcement of the Act,[48] or the cases that flatly state that had Congress intended to create private causes of action and private remedies, it was fully capable of directly and clearly so providing.[49] The district court also had to twist and squeeze to make its decision consistent with the Supreme Court's decision in *National Railroad Passenger Corporation v. National Association of Railroad Passengers (Amtrak).*[50]

The plaintiffs in *Rauch* asserted an implied cause of action under a statute which already provided for private remedies.[51] In *Amtrak*

> [w]here-ever a statute enacts anything, or prohibits anything, for the advantage of any person, that person shall have remedy to recover the advantage given him, or to have satisfaction for the injury done him contrary to law by the same statute; for it would be a fine thing to make a law by which one has a right, but no remedy
> . . . .

[47] 405 F. Supp. at 439.

[48] *See, e.g.*, McCord v. Dixie Aviation Corp., 450 F.2d 1129, 1131 (10th Cir. 1971); Rogers v. Ray Gardner Flying Service, Inc., 435 F.2d 1389, 1393 (5th Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971); Snuggs v. Eastern Airlines, Inc., 13 Av. Cas. 17,631, 17,632 (S.D. Fla. 1975); D'Arcy v. Delta Air Lines, Inc., 12 Av. Cas. 18,282 (S.D.N.Y. 1974); Rosdail v. Western Aviation, Inc., 297 F. Supp. 681, 683 (D. Colo. 1969); Yeilnek v. Worley, 284 F. Supp. 679, 681 (E.D. Va. 1968); Moungey v. Brandt, 250 F. Supp. 445, 451 (W.D. Wis. 1966).

[49] *See, e.g.*, Chavez v. Freshpict Foods, Inc., 456 F.2d 890, 894-95 (10th Cir.), *cert. denied*, 409 U.S. 1042 (1972); McCord v. Dixie Aviation Corp., 450 F.2d 1129 (10th Cir. 1971); Rogers v. Ray Gardner Flying Service, Inc., 435 F.2d 1389 (5th Cir. 1970); Rosdail v. Western Aviation, Inc., 297 F. Supp. 681 (D. Colo. 1969).

[50] 414 U.S. 453 (1974).

[51] 49 U.S.C. § 1487(a) (1970), *as amended*, (Supp. 1975), provides:

> If any person violates any provision of this chapter, or any rule, regulation, requirement, or order thereunder, or any term, condition or limitation of any certificate or permit issued under this chapter,

the Supreme Court stated that where a statute already provides private remedies, the principle of statutory construction, *expressio unius est exclusio alterius*,[52] would clearly compel the conclusion that the remedies created by the statute were exclusive.[53] This conclusion, however, would yield to clear evidence of a contrary legislative intent.[54]

If the Supreme Court in *Amtrak* meant that the plaintiff in such a case must prove that Congress intended to create a private cause of action in his favor, the decision in *Rauch* would be inconsistent with the *Amtrak* decision. On the other hand, if a contrary legislative intent can be shown by proof that Congress was at least neutral with respect to additional private remedies, then *Rauch* is compatible with the decision in *Amtrak*.

To reach the conclusion that Congress was neutral regarding additional private remedies in the Act, the district court distinguished *Eisman v. Pan American World Airlines*,[55] by noting that 49 U.S.C.A. section 1487(a)[56] applied only to prospective relief and not violations which had already taken place;[57] noted that 49 U.S.C.A. section 1471(a)[58] which does provide relief for past violations, does

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> the Board or Administrator, as the case may be, their duly authorized agents, or, in the case of a violation of section 1514 of this title, the Attorney General, or, in the case of the violation of section 1371(a) of this title, any party in interest, may apply to the district court of the United States, for any district wherein such person carries on his business or wherein the violation occured, for the enforcement of such provision of this chapter, or of such rule, regulation, requirement, order, term, condition, or limitation; and such court shall have jurisdiction to enforce obedience thereto by a writ of injunction or other process, mandatory or otherwise, restraining such person, his officers, agents, employees and representatives, from further violation of such provision of this chapter, or of such rule, regulation, requirement, order, term, condition, or limitation, and requiring their obedience thereto.

[52] "Expression of one thing is the exclusion of another."

[53] 414 U.S. at 458.

[54] *Id.*

[55] 336 F. Supp. 543 (E.D. Pa. 1971).

[56] *See* note 51 *supra.*

[57] 405 F. Supp. at 440.

[58] 49 U.S.C.A. § 1471(a) (1976) provides that any person who violates any provision of Subchapter VI of the Act, or any rule, regulation, or order issued thereunder, shall be subject to a civil penalty not to exceed $1,000.00 for each violation.

not claim to be the sole remedy for past violations of the Act;[59] and added that 49 U.S.C.A. section 1506,[60] clearly states that the federal remedies provided shall be in addition to those provided at common law.[61] Thus the district court, without distinguishing cases of an opposite opinion, worked its way to the conclusion that since there was no explicit intent to deny or create implied private causes of action in the Act, it could do as it pleased.

C. *Effectuating the Congressional Purpose*

In reaching the conclusion that the underlying purposes of the safety regulations would be effectuated by the implication of a private remedy for the plaintiffs, the *Rauch* court first had to decide what the underlying purposes of the safety regulations were. To a great extent the district court's decision here was predetermined by the answer it gave to the question of whether the plaintiffs were members of the class for whose especial benefit the statute was enacted. If the purposes of a legislative scheme are to promote safety and to save lives, then more likely than not a statute is intended to establish a right in those who are members of the class whose safety is at stake. Conversely, if the purpose of a legislative scheme is only to serve as a set of administrative criteria, then a private right is not likely to be intended. The district court concluded here, as it did in answering the first question of the *Cort* test, that the primary purposes of the safety regulations are to promote safety and to save lives.[62]

If the Act does create a federal prohibition or right, a private remedy still should not be implied unless it would clearly further the policies underlying the Act. In *Cort*, the Supreme Court did not merely examine whether the private cause of action would be consistent with the statute's purpose, but further examined whether the remedy sought would aid Congress' primary purpose in enact-

[59] 405 F. Supp. at 440.

[60] 49 U.S.C.A. § 1506 (1976) entitled "Remedies not exclusive," states: "Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies."

[61] 405 F. Supp. at 440. *But see, e.g.*, McCord v. Dixie Aviation Corp., 450 F.2d 1129, 1131 (10th Cir. 1971); Yelinek v. Worley, 284 F. Supp. 679, 681 (E.D. Va. 1968); Moungey v. Brandt, 250 F. Supp. 445, 451 (W.D. Wis. 1966) (savings clause evidences congressional intent that state tort law apply).

[62] 405 F. Supp. at 441.

ing the statute.[63] Moreover, the Supreme Court was very demanding with respect to whether the remedy sought would aid in the statute's enforcement. It rejected the argument that allowing a private remedy would have a deterrent effect on the persons against whose conduct the statute was directed;[64] rather, the intent of the Supreme Court seemed to be to allow the courts to imply a remedy only where one is *necessary* in order to effectuate a statute's purposes.

Only one case has flatly stated that the network of procedures established by the Act adequately protects the interests created therein,[65] even though other courts have found no persuasive reason to fashion a federal remedy for violation of safety regulations.[66] In those cases, however, the respective courts saw the purposes of the safety provisions of the Act as nothing more than standards for air safety regulation.

In *Rauch*, the district court concluded that when the primary purpose behind a statute is to promote safety and to save lives, then it certainly should not be necessary for the very events to occur which the Act is intended to prevent—namely, death or personal injury—before a private individual may claim a right to enforce the provisions of the statute.[67] The district court added that liability to private enforcement of the safety regulations, along with the possibility of civil damages, is or may be as potent a deterrent as liability to public prosecution.[68]

While the district court talked only in terms of preventing the events the Act intended to prevent and concluded that a private cause of action would tend to accomplish this by acting as a deterrent to those who might possibly violate the provisions of the safety regulations, it is likely that the district court also believed that a private cause of action was *necessary* in order to effectuate the statute's purposes. It is possible that the district court concluded

[63] 422 U.S. at 84.

[64] *Id.*

[65] *See* Moungey v. Brandt, 250 F. Supp. 445, 451 (W.D. Wis. 1966).

[66] *See, e.g.*, McCord v. Dixie Aviation Corp., 450 F.2d 1129, 1131 (10th Cir. 1971); Yelenik v. Worley, 284 F. Supp. 679, 681 (E.D. Va. 1968) (per curiam); *cf.* Sanz v. Renton Aviation, Inc., 511 F.2d 1027, 1029 (9th Cir. 1975) (per curiam) (safety not advanced by holding owner-lessor of aircraft liable for negligence of pilot).

[67] 405 F. Supp. at 441.

[68] *Id.*

that the FAA was unable to police the conduct of manufacturers of aviation equipment to the extent required to keep dangerous and defective products from being installed in aircraft sold to the public. Though the district court does not say so, the fact that it took the FAA six years to discover a defect and issue an Airworthiness Directive[69] may have persuaded the court to conclude that the FAA, by itself, was not an effective policing agent. If this was the case, the ineffectiveness of the Federal Aviation Administration then created the *need* for the threat of additional civil liability to serve as a deterrent. Only if this is so can the district court's conclusion as to the third part of the *Cort* test be consistent with the intentions of the Supreme Court, as expressed in *Cort*.

D. *State Versus Federal Law*

Once again, as in all previous parts of the *Cort* test, the district court in *Rauch* had the choice of two conflicting, and equally valid points of view. The question whether state or federal law should govern in cases that involve a national government activity such as aviation regulation raises issues of federalism.[70] While certain situations present no problem in determining whether state or federal law is to apply, the limits the federal courts may not go beyond in ignoring state law and choosing another appropriate governing rule are not clearly established.[71] At one extreme are those situations where the federal courts have the competence to apply a federal rule where state authority is either nonexistent or inappropriate.[72] At the opposite extreme are those situations where the federal courts lack competence due to a well developed network of state statutes and common law, and where there is no compelling federal interest or controlling federal statute.[73] The violation of a safety regulation lies somewhere between these two extreme cate-

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[69] *See* note 5 *supra* and accompanying text.

[70] *See generally* Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489 (1954); Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules of Decision*, 105 U. PA. L. REV. 797 (1957).

[71] *See*, Note, *The Competence of Federal Courts to Formulate Rules of Decision*, 77 HARV. L. REV. 1084 (1964).

[72] *Id.* at 1088-89.

[73] *See* Mishkin, *supra* note 70, at 799; Note, *The Applicability of Federal Common Law To Aviation Tort Litigation*, 63 GEO. L.J. 1083, 1086-87 (1975).

gories; federal involvement in safety regulation is pervasive, but an established state body of tort law exists. If a court centers its analysis on the question of whether the cause of action is one in an area basically the concern of the States, a private cause of action is likely to be implied, but if a court centers its analysis on whether the cause of action is one traditionally relegated to state law, a private right of action is less likely to be implied.

The district court in *Rauch* concentrated on whether the regulation of aviation was an area basically the concern of the States. It inescapably concluded that it was not,[74] and then iced its own cake by declaring that when the federal government assumes primary responsibility over the standards of conduct in an industry to the extent that it has through the Act, a court should be hesitant to leave open the congressional intent to the possibility of compromise in state-created causes of actions.[75]

The district court in reaching its decision on September 11, 1975, was not aware of the decision by the United States Court of Appeals for the Third Circuit in *Polansky v. Trans World Airlines, Inc.*,[76] which had been handed down only two days before. The Third Circuit in *Polansky* refused to imply a private remedy for an alleged violation of the economic regulations under the Act.[77]

In light of the *Polansky* decision and at the district court's request, a Motion for Reconsideration was filed by the defendants together with a Motion for Certification for an Interlocutory Appeal pursuant to 28 U.S.C. section 1292(b).[78] Upon reconsideration of the September 11, 1975 Order, the district court reaffirmed its earlier decision as consistent with the reasoning of the Third

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[74] 405 F. Supp. at 441.

[75] *Id.*

[76] 523 F.2d 332 (3rd Cir. 1975).

[77] The Third Circuit emphasized that the remedy requested would serve no statutory purpose and citing *Moungey v. Brandt*, 250 F. Supp. 445, 451 (W.D. Wis. 1966), held that there was no greater interest for the development of a federal contract law than earlier courts had seen for the development of a federal tort law for regulated air carriers. 523 F.2d at 337.

[78] 28 U.S.C. § 1292(b) (1970) provides that a district judge may grant leave to file an interlocutory appeal when, in making in a civil action an order not otherwise appealable under this section, he is of the opinion that such an order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.

Circuit in *Polansky*. The Interlocutory Appeal was certified, however, since the issue disposed of by the September 11, 1975, Order involved a controlling question of law which would materially advance the ultimate termination of the litigation.[79] This interlocutory appeal is presently in process.

The *Rauch* court concluded that a private remedy exists for a violation of the safety regulations promulgated by the Administrator of the FAA. In reaching this conclusion the district court answered all four parts of the *Cort* test and cited precedent to support each answer it gave. The district court did not make an attempt to distinguish any cases that had reached opposite conclusions to the same or similar questions. The absence of such an attempt leads one to believe that the instant case was not distinguishable from earlier decisions reaching an opposite conclusion, or that if any distinguishing facts did exist, they were of no consequence. If this is so, then the only essential difference between this decision and an opposite decision on the same facts would be the attitude of the court toward implication. Where the district court in *Rauch* leaned toward the utility of judicial access, another court could have relied on legislatively created administrative procedures. While one court may have been willing to accept an approach to legislative interpretation that would restrain judicial implication, the *Rauch* court was not.

Whether or not this decision is viewed as correct depends solely upon which line of precedent is personally favored. The district court obviously thought it was implying a cause of action where it was needed, and into a statute that did not explicitly forbid the implication of private actions. While the district court did not shed any new light on whether Congress really did intend to create a private remedy for a violation of the safety regulations of the Act, it did once again focus attention on the unpredictability and inconsistency of the courts in this area of the law.

James H. Moody III

[79] Rauch v. United Instruments, Inc., 405 F. Supp. 442, 447. The *Rauch* court thought that the remedy requested by the plaintiffs *would* serve a statutory purpose and that the *Polansky* court's referral to *Moungey v. Brandt*, 250 F. Supp. 445, 451 (W.D. Wis. 1966), was only a reflection of the *Polansky* court's approval of the analytical framework employed, rather than the result itself. For these reasons the district court in reconsidering its Order of September 11, 1975, refused to hold the *Polansky* decision as controlling. 405 F. Supp. at 444.

AIR CARRIERS—RECOVERY OF RATES—Any Right to Relief From Air Passenger Rates Collected by Airlines Under Rates Found to Have Been Unlawfully Determined Does Not Include Right of Recovery of Amounts in Excess of the Last Lawfully Established Rates When Airlines Have Not Received Any Unjust Enrichment. *Moss v. C.A.B.*, 521 F.2d 298 (D.C. Cir. 1975), *cert. denied*, 44 U.S.L.W. 3526 (U.S. March 23, 1976).

In February 1969 several airlines filed tariffs with the Civil Aeronautics Board (CAB) proposing passenger fare increases pursuant to provisions of the Federal Aviation Act (the Act).[1] In August 1969 Congressman John E. Moss and some 24 colleagues requested the CAB to suspend those proposed tariff revisions,[2] and the CAB in September 1969 issued an order which suspended the proposed rates and suggested a rate formula by which the airlines could compute rates which the Board intimated would not be suspended.[3] On October 1, 1969, the airlines filed rate increases utilizing the CAB's formula.[4]

In 1970, in *Moss v. C.A.B.*[5] (*Moss I*), the Court of Appeals for the District of Columbia held that the CAB had "determined" rates within the meaning of section 1002(d) of the Act,[6] that it had done so without observance of the notice and hearing requirements of those sections, and that all tariffs filed pursuant to the

[1] The Federal Aviation Act of 1958, 72 Stat. 731, *as amended*, 49 U.S.C. §§ 1301 *et seq.* (1970), *formerly* Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 973. Under the Act, rates and fares are initially established by the airlines through the filing of tariffs with the CAB. Rates may thereafter be changed by filing new tariffs and, unless suspended by the CAB, such changes will take effect in accordance with the tariffs. 49 U.S.C. § 1373(a) (1970).

[2] The filing of complaints against tariffs is authorized by § 1002 of the Act, 49 U.S.C. § 1482 (1970).

[3] CAB Order No. 69-9-68 (Sept. 12, 1969).

[4] The original tariffs filed by the airlines called for increases of nearly ten percent for first-class coach fares. The CAB's suggested fare formula was more closely related to costs of service and while lower than the fares proposed by the airlines, was expected to result in approximately 6.35% additional revenue for the airlines. CAB Order No. 69-9-68 (Sept. 12, 1969).

[5] 430 F.2d 891 (D.C. Cir. 1970).

[6] 49 U.S.C. § 1482(d) (1970): "Whenever, after notice and hearing, . . . the Board is of the opinion that any individual or joint rate . . . is or will be unjust or unreasonable, . . . the Board shall determine and prescribe the lawful rate, fare, or charge . . . thereafter to be demanded, charged, collected, or received . . . ."

procedurally defective ratemaking determination and in effect between October 1, 1969, and October 15, 1970, were unlawful. As a result, the CAB adopted a new order, calling for the filing of new tariffs, free of any compulsion the airlines may have been under due to the CAB's specified rate formula.[7] The carriers filed new tariffs pursuant to the CAB order, and in September 1970 the CAB suspended all new fares filed except those that re-established the previously invalidated rates.[8]

Shortly thereafter, at the request of Congressman Moss and his colleagues, the CAB instituted an investigation[9] to determine whether the fares charged during that period[10] were unjust and unreasonable and, if so, to determine whether relief should be granted to those passengers who had paid those fares.[11] In July 1973 the CAB found that the domestic passenger fares in effect during the period were not unjust and unreasonable, that the air carriers were not unjustly enriched, and that the fares resulted in no overcharges to the public.[12] Petitioners sought review of the order in the District of Columbia Circuit Court of Appeals. *Held, affirmed*: Any right to relief from air passenger rates collected by airlines under rates found to have been unlawfully determined does not include right of recovery of amounts in excess of the last lawfully established rates when the airlines have not received any unjust enrichment. *Moss v. C.A.B.*, 521 F.2d 298 (D.C. Cir. 1975), *cert denied*, 44 U.S.L.W. 3526 (U.S. March 23, 1976).

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[7] CAB Order No. 70-7-128 (July 29, 1970). The CAB claimed that until new fares were established, the invalid fares were the only ones which could be lawfully charged. To avoid any conflict on this point, the CAB requested and was granted a stay of the Court's mandate insofar as it declared the fares unlawful, until new tariffs could be filed.

[8] CAB Order No. 70-9-123 (Sept. 24, 1970). More accurately, those rates had been "rounded up" to the nearest dollar in July 1970, and it was those rounded-up rates which were re-established.

[9] CAB Order No. 71-2-109 (Feb. 25, 1971).

[10] Petitioners insisted that since lawful rates were not re-established until April 9, 1971, the recovery period should extend to that date instead of October 15, 1970.

[11] 49 U.S.C. §§ 1382(a), 1482(a) (1970). Petitioners also claimed that the CAB was without the power to inquire into the justness and reasonableness of past rates, but as the court noted, § 1324(a) grants the CAB the power to "conduct such investigations . . . as it shall deem necessary to carry out the provisions of . . . this chapter."

[12] CAB Order No. 73-7-39 (July 11, 1973).

The leading case on the question of restitution for charges collected pursuant to subsequently invalidated administrative orders[13] is *Atlantic Coast Line R.R. v. Florida.*[14] In that case the Interstate Commerce Commission (ICC) had established rate increases for lumber carriers to prevent a discrimination against interstate commerce. After the Supreme Court invalidated that rate schedule because it was unsupported by adequate factual findings the ICC issued new and more complete findings and approved the same rates as before. These new rates were then upheld by the Supreme Court. A group of shippers subsequently sought restitution for the freight charges they had paid under the invalidated ICC order.

Speaking for the Court, Justice Cardozo explained that in an action for restitution, the question was no longer whether the possessor of the money would have been entitled to it initially, but rather whether he can equitably be required to return the money once he had been allowed to collect it.[15]

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[13] The only case dealing with the recovery of unlawful air passenger fares is *Danna v. Air France*, 334 F. Supp. 52 (S.D.N.Y. 1971), *aff'd*, 463 F.2d 407 (2d Cir. 1972). *Danna* concerned a charge of discriminatory fares, under § 404(b) of the Act (49 U.S.C. § 1374(b)), as opposed to unjust and unreasonable fares.

[14] 295 U.S. 301 (1935).

[15] *Id.* at 309, 310, 314, 315.

> A cause of action for restitution is a type of the broader cause of action for money had and received, a remedy which is equitable in origin and function . . . . The claimant to prevail must show that the money was received in such circumstances that the possessor will give offense to equity and good conscience if permitted to retain it . . . . The question no longer is whether the law would put him in possession of the money if the transaction were a new one. The question is whether the law will take it out of his possession after he has been able to collect it. . . .
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> [T]o prevail, the claimants must make out that in the circumstances here developed a fixed and certain duty has been laid upon a court of equity to make the carrier pay the price of the blunders of the commerce board in drawing up its findings. The blunders being now corrected, the verities of the transaction are revealed as they were from the beginning. We think the better view is that in the light of its present knowledge the court will stay its hand and leave the parties where it finds them.
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> . . . All that the federal court does is to announce that it will stay aloof. It inquires whether anything has happened whereby a court of equity would be moved to impose equitable conditions upon equitable relief. In the course of that inquiry it perceives that the charges were collected under color of legal right, in circumstances relieving the carrier of any stigma of extortion. It discovers through the evidence submitted to the Commission and renewed in the present record that what was charged would have been lawful as

United States v. Morgan[16] applied the principles enunciated in *Atlantic Coast Line*. The *Morgan* proceedings involved an order of the Secretary of Agriculture establishing stockyard rates pursuant to the Packers and Stockyards Act.[17] The order was reversed because the Secretary failed to hold an evidentiary hearing,[18] and the difference between the invalidated rates and the previous rates was paid into court. The Supreme Court decided that there was no equitable basis for the recovery of the fund unless the invalidated rates were unjust and unreasonable, and therefore ordered that a disposition of the funds await the Secretary's evaluation of the reasonableness of the rates.[19]

The Secretary determined in his investigation that the rates were not unjust and unreasonable, and, in a suit to recover the funds, the Supreme Court held that his determination furnished the appropriate basis for action in the district court in making distribution of the fund in custody.[20] Pursuant to that decision the funds were returned to the stockyard owners and the claims for restitution were denied.

These two cases illustrate the basic guidelines to be followed in an action for restitution of unlawful rates. In both cases the Court based its decision upon "equitable principles." In *Morgan*, the primary consideration was that the Secretary had determined that the invalidated rates were not unjust and unreasonable,[21] and in *Atlantic Coast Line*, the equities involved included the fact that the original rates were so unreasonably low as to be confiscatory, as well as the fact that the ICC found the invalid rate schedule to be reasonable.[22] The test Justice Cardozo applied in *Atlantic Coast Line* was that to prevail, the claimants must show that a court of

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well as fair if there had been no blunder of procedure, no administrative delays. Learning those things, it says no more than this, that irrespective of legal rights and remedies it will not intervene affirmatively, in the exercise of its equitable and discretionary powers, to change the *status quo*.

[16] 307 U.S. 183 (1939).

[17] 7 U.S.C. §§ 181-231 (1970).

[18] 304 U.S. 1 (1937).

[19] 307 U.S. 183, 199 (1939).

[20] 313 U.S. 409, 421 (1941).

[21] *Id.*

[22] 295 U.S. 301, 318 (1935).

equity had a duty to make the carrier pay the price of the blunders of the ICC.[23]

The question of refunds has also been considered in the area of natural gas rates. Under the Natural Gas Act,[24] the Federal Power Commission (FPC) can order the refund of money collected under unjustified rate increases.[25] The rates and charges made by natural gas companies must be just and reasonable,[26] and the courts have held that the right to such refunds turns upon equitable considerations.[27] In *Public Service Commission of New York v. F.P.C.*,[28] for example, the petitioners argued that since the gas certificates under which they operated contained no refund provision, it would be inequitable to require them to refund rates in excess of those found to be in line with that region. The court rejected that contention, stating that public interest factors existed which must be weighed along with the effect of a mere absence of a refund condition, and it remanded the case for fuller consideration of those equitable factors.[29]

A final area in which the question of recovery of unlawful rates has arisen is in connection with ground transportation. In *Williams v. Washington Metropolitan Area Transit Commission*[30] the District of Columbia Circuit Court of Appeals reversed an order by the Commission increasing rates because the order lacked sufficient findings. Restitution was sought for the difference between the invalidated rates and the last lawfully established rates. The transit company was required to "restore the amount realized by the fare increase only to the extent that its actual return is not reduced to an amount which . . . would be unreasonably low."[31]

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[23] *Id.* at 314.

[24] Natural Gas Act §§ 1 *et seq.*, 15 U.S.C. §§ 717 *et seq.* (1920).

[25] *Id.* § 717c(e) (1970): "[T]he Commission may . . . order such natural gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified."

[26] *Id.* § 717c(a) (1970).

[27] Public Serv. Comm'n v. F.P.C., 329 F.2d 242, 249-50 (D.C. Cir.), *cert. denied*, 377 U.S. 963 (1964).

[28] *Id.*

[29] *Id.* at 250. Among those factors was the fact that the prices were known to be in excess of the "in-line" price of gas for the region.

[30] 415 F.2d 922 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1081 (1969).

[31] *Id.* at 946.

An examination of the District of Columbia Code under which the transit commission operated reveals that unlike the Interstate Commerce Act and the Natural Gas Act, both of which contain specific refund sections,[32] the D.C. Code has no such provision. Accordingly, it was held in *Bebchick v. Public Utilities Commission*[33] that no direct refund could be granted for improperly authorized fare increases.[34] Instead, the District of Columbia Court of Appeals directed that the money be somehow utilized for the benefit of the class which had paid it.

Like the statute under which the transit commission operated, the Federal Aviation Act contains no refund provision. In the only prior case concerning recovery of unlawful air fares, *Danna v. Air France*,[35] the District Court for the Southern District of New York ruled that no right of recovery existed because of the absence of a statutory provision.[36] The Second Circuit Court of Appeals affrmed the decision on the narrower ground that recovery must in any event await a determination that the contested fares were discriminatory,[37] so the effect of the absence of any statutory provision remains judicially undetermined.

In following its mandate to regulate air transportation under the Act, the CAB is directed to consider several goals in determining the public interest. Among these are the regulation of air transportation in such a manner as to foster sound economic conditions in such transportation and the promotion of adequate, economical, and efficient service by air carriers at reasonable charges.[38] Specifically, in determining rates to be charged by air carriers, the CAB must take into consideration the public's need for adequate and efficient transportation at the lowest cost consistent with such service, and the need of each air carrier for revenue sufficient to enable it to provide adequate and efficient service.[39]

The District of Columbia Circuit Court of Appeals in *Moss v.*

[32] 49 U.S.C. §§ 1(5), 3(1), 8, 9 (1970) and 15 U.S.C. § 717c(e) (1970).

[33] 318 F.2d 187 (D.C. Cir.), *cert. denied*, 373 U.S. 913 (1963).

[34] *Id.* at 203-04.

[35] 334 F. Supp. 52 (S.D.N.Y. 1971).

[36] *Id.* at 61.

[37] 463 F.2d 407, 410 (2d Cir. 1972).

[38] 49 U.S.C. § 1302(b)-(c) (1970).

[39] 49 U.S.C. § 1482(e)(2)-(5) (1970).

C.A.B. (*Moss II*) examined all of the above cases[40] and the regulatory contexts in which they arose and found that the primary consideration was whether it would be equitable to require a refund in each case. It rejected petitioners' theory of recovery, holding that "One right which clearly does not exist is the one petitioners claim for recovery of all amounts in excess of the last lawfully established rates."[41] In particular the court relied on the Supreme Court's decision in *Atlantic Coast Line* denying the same type of recovery.

The court held that, pursuant to the directions of the Act, the CAB, in denying recovery to petitioners, had correctly focused on the equities of restitution and not simply the reasonableness of the rates, noting that "[t]here are distinct equitable considerations which may prevent a recovery even where fares have been found to exceed what was just and reasonable,"[42] and that in determining rates the CAB must consider the requirements of the air carriers as well as the passengers in its consideration of the public interest. The court concluded that "the equitable aspects of refunding past rates are . . . inextricably entwined with the CAB's normal regulatory responsibility"[43] and that "the statutory scheme thus seems to require that the Board pass in the first instance not only on the reasonableness of past rates, but on the equity of any recovery where such rates are found to be unreasonable."[44]

Using the instant situation as an example, the court suggested several factors that could be considered. Among these was the idea that reasonable rates might have paid for a more modest service than was actually provided, but that since a lavish service was in fact provided, there would be no equity in making the airlines disgorge profits which never existed.[45] Also, the airlines might have

[40] The court also examined *T.I.M.E., Inc. v. United States*, 359 U.S. 464 (1959), and *Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc.*, 371 U.S. 84 (1962), when it considered whether there was statutory authority for any recovery.

[41] 521 F.2d at 307. The court's study of the cases in other areas led it to theorize that if a remedy exists at all for properly filed airline rates which are later found to be unlawful, the proper remedy would be either a common law action for unreasonable charges, a right to seek the exercise by the CAB of its power to condition certificates of convenience and necessity on the refunding of fares which are unreasonable, or a right to have the CAB or the courts order the restitution of amounts collected by virtue of errors of judgment. *Id.* at 306-07.

[42] *Id.* at 308.

[43] *Id.* at 308-09.

[44] *Id.* at 309.

[45] *Id.* at 308.

faced circumstances which had already denied them the fruits of their profits, such as a decline in the volume of air traffic caused by excessive rates and an unexpected economic downturn.[46] Another consideration was that it might be inequitable to grant recovery of excessive profits, especially where large classes of people are involved, since it would be difficult to reimburse those who had actually paid the unreasonable rates.[47] Also, if refunds were made, future shareholders of the airlines would be adversely affected instead of past shareholders who benefited from the unreasonable fares.[48] Finally, any recovery would have to come from future earnings, which might possibly impair the economic health of the airlines to the disadvantage of the flying public.[49]

Applying these considerations to the facts of *Moss II*, the court found in particular that "the excessive profits sought to be recovered were not in fact earned but must be hypothesized by a recomputation of costs and revenues,"[50] that no fund of net enrichment existed from which restitution could be made, and that the CAB was correct in deciding that the airlines did not receive an unreasonable rate of return. It concluded that the airlines should not suffer for the procedural mistakes of the CAB, especially when the airlines were not unjustly enriched by those mistakes.[51]

Each of the cases to which *Moss II* was analogized concerned procedural errors on the part of the respective administrative agencies. Petitioners claimed that the instant situation involved conduct on the part of the carriers which rendered the CAB's action more

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[46] *Id.*

[47] *Id.* The court, however, did recognize the possibility of creating a fund on the airlines' books to be applied for the benefit of future fare-payers.

[48] *Id.*

[49] *Id.*

[50] *Id.* One of petitioners' contentions was that the rate of return for the airlines, which the CAB decided was an appropriate measure of the reasonableness of rates [CAB Order No. 73-7-39 (July 11, 1973)], should be recomputed, and that this computation should take into account the findings of the CAB's Domestic Passenger Fare Investigation (DPFI). The DPFI was intended to produce uniform standards against which airline operating performance could be measured.

The CAB, in finding that the rate of return was unreasonably low, contended, first, that the DPFI standards were expressly intended for future application, and, second, that even if DPFI standards were used instead of the actual operating results, the rate of return would still be unreasonably low. CAB Order No. 73-7-39 (July 11, 1973).

[51] 521 F.2d at 315.

than a mere procedural defect. In *Moss I* the court found that CAB representatives had conferred with airline officials before the original rates had been submitted.[52] In a related case, however, the proceedings were analyzed thusly:

> The *Moss* court found the fares to be unlawful not because they were unjust or unreasonable, or that they violated the substantive rate making factors contained within § 1482(e) as plaintiffs claim, but rather for the reason that the CAB failed to give notice and conduct a hearing in prescribing rates under § 1482(d).[53]

The question of whether the airlines participated in the rate formulations has significance aside from determining whether the cases cited in *Moss II* are relevant authority. In the balancing of equities, the culpability of the airlines would seem to be an important factor to consider. If the Board's irregular procedure was encouraged by the carriers, then the error is less innocent. The question was brought to the court's attention by petitioners,[54] but the court apparently agreed with respondents that the mistake was solely the Board's since it used the "procedural error" cases as authority.

In any event, the question remains whether the cases were strictly analogous. The Federal Aviation Act contains no provision for liability in the case of unlawful rates, in contrast to the Interstate Commerce Act, on which the court principally relied, which provides for refunds from rail carriers which violate the Interstate Commerce Act's commands.[55] The court in *Moss I* believed that the lack of a remedy for airline passengers placed an added responsibility on the CAB,[56] and that the cases interpreting the ratemaking provisions of the Interstate Commerce Act were not necessarily relevant in determining whether the CAB complied with the Act in making rates.[57]

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[52] 430 F.2d at 894.

[53] Weidberg v. American Airlines, Inc., 336 F. Supp. 407 (N.D. Ill. 1972).

[54] Petitioners' brief at 28-29.

[55] 49 U.S.C. §§ 1(5), 3(1), 8, 9 (1970).

[56] "In the absence of a retrospective remedy for reparations for airline passengers, the procedural safeguards provided in the Federal Aviation Act become the public's sole defense against unreasonable rates permitted by the Board." 430 F.2d at 898.

[57] *Id.*

In *Morgan*, the difference between the previous rates and the unlawful rates had been ordered paid into court and was available if a refund had been deemed necessary. In situations such as that of *Public Service Commission*,[58] involving the Natural Gas Act, the FPC can both order refunds directly and condition the certification of natural gas rates upon the refunding of previously charged excessive rates. Only in the transit commission cases was it considered important that the statute lacked any provision for recovery of excessive rates, and in *Bebchick*[59] this lack meant only that no direct refund could be ordered. In any event the *Moss II* court did not compare specific sections of the various acts; rather, it relied on a general impression it obtained from the cases, that regardless of the recovery provisions, equitable considerations determined whether recovery was to be had at all.[60] The court believed that each of the situations, including the one before it, was in the category of suits for restitution and that in such cases, recovery must be based on equitable principles.[61]

Because there is no statutory liability under the Act, it is still not certain whether any recovery would be available to petitioners regardless of the unreasonableness of the rates. As noted previously,[62] the question arose in *Danna v. Air France*, but was avoided on appeal. The court in *Moss II* mentioned the matter in connection with its examination of the motor carriers portion of the Interstate Commerce Act.[63] The court noted that the particular section contained no statutory liability for unreasonable rates until 1965 and that in *T.I.M.E., Inc. v. United States*,[64] the absence was held to preclude recovery of unreasonable rates. In *Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc.*,[65] however, the Supreme Court held that common law remedies against common carriers were not extinguished by the enactment of the statute so long as the remedies were consistent with the statutory scheme. Again, because the *Moss II*

[58] *See* note 27 *supra*.
[59] *See* note 33 *supra*.
[60] 521 F.2d at 308.
[61] *Id.* at 314.
[62] *See* note 13 *supra*.
[63] 521 F.2d at 305.
[64] 359 U.S. 464 (1959).
[65] 371 U.S. 84 (1962).

court agreed with the CAB that the rates charged were reasonable, it did not have to reach the question of a remedy under the Federal Aviation Act.

The *Moss II* court found that the equities of the case precluded restitution of the excess amounts, especially in view of the CAB's determination that the invalidated rates were not unjust and unreasonable. The court accepted the premise that an evaluation of the reasonableness of the rates was a matter within the CAB's primary jurisdiction, and it rejected petitioners' claim that the CAB's lack of statutory authority to grant restitution precluded it from ruling on the reasonableness of those rates.[66] In part, the court found the authority for such an inquiry in the CAB's power under the Act to "conduct such investigations . . . as it shall deem necessary to carry out the provisions of . . . this chapter."[67]

The court properly affirmed the CAB's use of the rate of return as the proper measure of the reasonableness of the rates. In its determinations the Board must consider both the public interest need for low-cost yet adequate and efficient transportation and the need of airlines for revenue sufficient to produce such transportation services. If the rate of return is either unreasonably high or unreasonably low, then one or the other of the CAB's standards would not be met. All the parties involved agreed that the annual rate of return was inadequate,[68] and even petitioners' recalculations, which were based on rate standards to be applied to the airlines prospectively, resulted in unreasonably low rates of return.[69] An analysis of the CAB's calculations led the court to the conclusion that the rates charged were not unreasonable.

One point which the court failed to discuss but which would have reinforced its decision was the fact that during the time the unlawful rates were charged, the airlines had no choice but to follow the tariffs that were filed with the CAB. Section 403(b) of

[66] "The Board's primary jurisdiction over that question strongly argues for its power to furnish a retroactive answer to it, even if it is doing so only as a prelude to action by the courts." 521 F.2d at 307-08.

[67] 49 U.S.C. § 1324(a) (1970).

[68] 521 F.2d at 302-03. The court noted that the trial examiner had found that the average rate of return for the year ending 1970 was 3.29% for trunkline carriers and —.40% for local carriers, while the CAB in 1960 had determined that 10% was a reasonable rate of return.

[69] *See* note 50 *supra.*

the Act states that no air carrier shall charge or collect a different compensation for air transportation than the fares in its currently effective tariffs.[70] Whether those tariffs were still the only ones which could be followed after the *Moss I* decision, as the CAB claimed, was a question made moot by that court's stay of its decision. Until the rates were declared invalid, however, they were the only ones the airlines could lawfully use.[71]

The court also held that there could be no recovery of invalidated rates if they merely exceeded the last lawfully established rates. That decision was based in part on an examination of the refund provisions in the other statutes the court considered. Each of those statutes, however, conditions recovery on the presence of unreasonable rates.[72] The possibility still exists, therefore, that a recovery such as petitioners were denied might be available if the relevant statute expressly authorized a recovery of amounts in excess of lawful rates.

The decision in *Moss II* is not a landmark holding, especially in light of *Atlantic Coast Line*; however, it is only the second time the question of unlawful rates has been raised in an aviation setting, and the first time that a standard for such a recovery has been described. The decision is in line with similar ones in other areas, all of which have held that equitable principles determine whether restitution may be had in each particular case. The District of Columbia Circuit Court of Appeals focused in particular on the absence of unjust enrichment on the part of the airlines and the CAB's determination that the invalidated rates were not unjust or unreasonable, and on that basis denied recovery.

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[70] 49 U.S.C. § 1373(b) (1970).

[71] The matter was taken up in *Weidberg v. American Airlines, Inc.*, 336 F. Supp. 407, 411 (N.D. Ill. 1972):

> The tariffs filed with the Board but subsequently found to be unlawful were voidable due to the CAB's error; until a court of proper jurisdiction declared them to be unlawful, however, they were the only tariffs which were on file with the CAB and were the only 'currently effective' tariffs. Any other result would create chaos and destroy the purpose of the Act: uniformity of treatment. A contrary holding would allow or compel a carrier to charge a fare at variance with its filed tariffs on the pretext that it may be procedurally defective. Under such a situation, plaintiff's [who also sought to recover excess amounts] construction of § 1373(b) would in fact undermine and destroy the very purpose of that section.

[72] *See, e.g.*, 49 U.S.C. §§ 1(5), 3(1), 8, 9 (1970).

Assuming that the court's assessment of the airlines' troubled economic situation was accurate, then the decision was not only judicially correct, but economically sound.

The question still remains, however, whether a right of recovery exists at all under the Act. As noted, the district court in *Danna* rejected any remedy out of hand, but both the *Moss II* court and the Second Circuit Court of Appeals in *Danna* refused to decide the question because other aspects of the cases made it unnecessary to address the issue. The fact that the *Moss II* court so carefully examined the CAB's analysis of the rates may indicate that a recovery could be awarded if a future petitioner could show unjust enrichment by the airlines—at least it seems unnecessary for the court to have gone to such lengths if no recovery could ever be granted. The reference to *Hewitt-Robins*[73] in the opinion might be another clue that the court suspects that at least a common law remedy exists. And finally, the court was careful to say that relief for the petitioners was precluded, "at least at this stage of the proceedings."[74] The court did not explain at what stage relief might not be precluded, but unless it thought one existed, the phrase is meaningless. These are all indications that a plaintiff who meets the standard for recovery—unjust enrichment by the airlines—may also find that some form of recovery is available.

Randy S. Brooks

AIRPORT DEVELOPMENT—MUNICIPAL ZONING ORDINANCE—The Authority of a Municipality to Enact an Ordinance Banning the Take-off and Landing of Aircraft within the Municipality Has Not Been Preempted by Federal or State Control of Airspace. *Garden State Farms, Inc. v. Boublis*, 136 N. J. Super. 1, 343 A.2d 832 (1975).

In 1971, plaintiff Garden State Farms, Inc., sought to construct a helicopter landing pad on a tract of land in Hawthorne, New

[73] 521 F.2d at 305.

[74] *Id.* at 304.

Jersey, in order to facilitate fast and efficient transportation between the company's production facilities.[1] Plaintiff received approval for the construction from the Board of Commissioners of the Borough of Hawthorne,[2] and in 1973 hearings began on plaintiff's application for a license with the Division of Aeronautics of the New Jersey Department of Transportation.[3] The Borough Commissioners' approval of plaintiff's proposal, however, met with widespread objection from area residents who unsuccessfully sought to enjoin the construction on the grounds that the proposed land use violated the borough's zoning ordinance[4] and thus required a variance from the ordinance.[5] Subsequently the Borough Commissioners adopted Ordinance No. 1223[6] which prohibited the use of any property for

[1] Garden State maintains over 85 retail stores selling milk and related food products. These outlets are supplied by nine processing and packaging plants owned by Garden State and located in New Jersey, New York and Pennsylvania.

[2] The Board's action was taken in the belief that local approval was a necessary prerequisite for issuance of a license by the Division of Aeronautics of the New Jersey Department of Transportation.

[3] This license is required by law for operation of a private helipad. N.J. STAT. ANN. 6: 1-43 (1973).

[4] Borough of Hawthorne, New Jersey, Ordinance 1175, Revision of 1970.

[5] Boublis v. Garden State Farms, Inc., 122 N.J. Super. 208, 299 A.2d 763 (Law Div. 1972).

[6] On or about March 7, 1963, following both the *Boublis* decision and commencement of the Division of Aeronautics hearings on Garden State's license application, the Borough clerk received a petition in opposition to the use of the helistop which called for a popular referendum to amend the zoning ordinance to prohibit helipads within the municipality. Although this petition was rejected by the Clerk, Ordinance No. 1223 was introduced at the April 18, 1973, meeting of the Board of Commissioners and finally adopted on May 2, 1973. Ordinance No. 1223, which is the subject of the instant litigation, reads as follows:

> AN ORDINANCE TO FURTHER AMEND THE ZONING ORDINANCE OF THE BOROUGH OF HAWTHORNE, REVISION OF 1970, HERETOFORE ADOPTED AS ORDINANCE 1175 OF THE BOROUGH OF HAWTHORNE.
>
> The Board of Commissioners of the Borough of Hawthorne, in the County of Passaic and the State of New Jersey, do hereby ORDAIN as follows:
>
> Section 1. That the Zoning Ordinance of the Borough of Hawthorne, Revision of 1970, heretofore adopted as Ordinance No. 1175 of the Borough of Hawthorne shall be and hereby is amended by the addition to Section 5 thereof of Paragraph 11, as follows:
>
> 11. In all districts the use of any land or property or any buildings or roof tops or structures, or the construction, development or alteration of any structure, roof or buildings, for the purpose of accommodating the taking off or the landing of airplanes, helicopters or any and all other types of airborne vehicles is specifically prohibited whether a principal use or accessory use.

the purpose of airport facilities. Thereafter plaintiff[7] brought an action against defendants, the Mayor and Borough Commissioners, seeking to have the amendment to the zoning ordinance declared invalid and void. Plaintiff alleged that federal[8] and state legislation[9] have occupied the field of regulating aviation to the exclusion of local enactments.[10] *Held, Judgment for defendants*: The authority of a municipality to enact an ordinance banning the take-off and landing of aircraft within the municipality has not been preempted by federal or state control of airspace.[11]

The Supremacy Clause[12] of the U. S. Constitution is the basis for the judicially developed doctrines of preemption[13] and conflict.[14]

Section 2. Any and all parts or provisions of Ordinance 1175, and any amendments or supplements thereto which are inconsistent or in conflict with this Ordinance are hereby repealed to the extent of said conflict, and all remaining provisions of Ordinance 1175 as amended and supplemented are hereby confirmed and shall remain in full force and effect.

Section 3. This Ordinance shall take effect upon final passage and publication by law.

[7] On August 16, 1973, the court executed an order permitting the State of New Jersey, Department of Transportation, Division of Aeronautics, to intervene as a party plaintiff, and various residents of the borough and the borough itself, to intervene as party defendants.

[8] U.S. CONST. art. I, § 8, cl. 3.

[9] N.J. STAT. ANN. 6: 1-29, 6: 1-44, 6: 1-20, 40: 8-2 (1973).

[10] Garden State further alleged that aside from the question of federal and state preemption, the ordinance violates the enabling statutes from which the municipality derives its local zoning authority. In both allegations Garden State argued that the borough had gone beyond the scope of its powers in banning land use for aircraft take-offs and landings.

[11] The court further held that the borough's zoning ordinance was not unreasonable in light of the fact that the borough was a highly developed municipality with a dense population living in residential areas interspersed among industrial and commercial zones.

[12] U.S. CONST. art. VI, cl. 2.

[13] For a discussion of the development of the concept of federal preemption, see Comment, *Pre-emption as a Preferential Ground: A New Canon of Construction*, 12 STAN. L. REV. 208 (1959); Note, *Congressional Pre-emption by Silence of the Commerce Power*, 42 VA. L. REV. 43 (1956). For a discussion of the concept of federal preemption and its development within the field of aviation, see Comment, *State Versus Federal Regulation of Commercial Regulation of Commercial Aeronautics*, 39 J. AIR L. & COM. 521 (1973).

[14] The principles governing a determination of conflict under the supremacy clause were set forth by the United States Supreme Court most recently in *Perez v. Campbell*, 402 U.S. 637 (1971), by way of a discussion of earlier cases, in these words: "As early as *Gibbons v. Ogden*, Chief Justice Marshall stated the governing principle—that "acts of the State legislatures . . . [which] interfere with, or are contrary to the laws of Congress, made in pursuance of the con-

The doctrine of preemption is that if it is apparent that the legislature intended to take over the entire field of regulating an activity, or if the activity is one which is in need of uniform regulation, then the field is deemed preempted.[15] The doctrine of conflict provides that even if the field is not preempted, legislation of a lesser government that conflicts with the legislative policy of a higher government must give way to that of the higher government.[16] Under the Supremacy Clause of Article VI, the "supreme" congressional law supersedes state law. But preemption occurs not only when there is an outright conflict between the federal scheme and the state requirement. State authority is barred as well when state regulation would interfere unduly with the accomplishment of congressional objectives. The fact that Congress has spoken in the area of state regulation does not necessarily preclude state regulation.[17] Furthermore, even when there is no explicit federal-state conflict or no explicit congressional statement of intent to bar state authority, preemption may nevertheless be found. A determination of federal preemption is not difficult when there is an expressed congressional intent that the field be regulated exclusively by the federal government. This is seldom the case, however, and the courts must make a determination of the implied intent of Congress.[18] The Supreme

stitution, are invalid under the Supremacy Clause.' Three decades ago Mr. Justice Black, after reviewing the precedents, wrote in a similar vein that, while '[t]his Court, in considering the validity of state laws in the light of treaties or federal laws touching the same subject, had made use of the following expressions; conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference' [,] . . . [i]n the final analysis, our function is to determine whether a challenged state statute stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* at 649.

[15] *See, e.g.*, Florida Avocado Growers v. Paul, 373 U.S. 132, 142 (1963), where the Court said that "federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakenly so ordained. *See, e.g.*, Huron Portland Cement Co. v. Detroit, 362 U.S. 440, 447-48 (1960). *See also* note 13 *supra.*

[16] *See* note 14 *supra.*

[17] *See, e.g.*, Florida Avocado Growers v. Paul, 373 U.S. at 142, where the Court said, "This Court has . . . sustained state statutes having objectives virtually identical to those of federal regulations . . . The test of whether both federal and state regulations may operate, or the state regulation must give way, is whether both regulations can be enforced without impairing the federal superintendence of the field . . . "

[18] Where a federal statute does not expressly describe the scope of the power

Court in *Rice v. Santa Fe Elevator Corp.*[19] recognized that the intent of Congress to preempt a field may not be apparent on the face of the statute and accordingly developed a three-pronged test[20] to determine the intention of Congress if none were directly evident.

In the field of aviation, if Congress has preempted the field through enactment of the Federal Aviation Act of 1958,[21] then any exercise of power by a state or municipality which is inconsistent with this congressional action is violative of the Supremacy Clause. The question, therefore, is whether this congressional act is a part of such a scheme of supremacy. No specific language of preemption is directly used in the Act or in the regulations promulgated pursuant to the statute. Where explicitness is lacking, the implied intent of Congress must be ascertained through the use of the *Rice* three-pronged test.

The principle of federal preemption in aviation was first adopted in *Alleghany Airlines, Inc. v. Village of Cedarhurst*,[22] when the validity of a minimum altitude ordinance was in question. The federal district court found a clear intent to preempt the regulation and control of aircraft, regardless of altitude. The court held that the Civil Aeronautics Act of 1938,[23] the predecessor of the Federal Aviation Act of 1958, by regulating air traffic in the navigable air

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accorded to the states within the federal scheme, the Court generally will examine its legislative history for an expression of congressional intent. *See* Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 146-50 (1963); Colorado v. Continental Airlines, Inc., 372 U.S. 714 (1963); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 232 (1947). *See also* Comment, *Preemption as a Preferential Ground: A New Canon of Construction*, 12 STAN. L. REV. 208, 215-16 (1959).

[19] 331 U.S. 218 (1947).

[20] The Court recognized three independent ways that congressional intent to preempt could be ascertained:

> (i) if the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the state to supplement it, or,
>
> (ii) 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, or,
>
> (iii) if the state law may produce a result inconsistent with the federal statute, the federal measure will prevail. *Id.* at 230.

These three tests had been formulated in other cases in part. *Rice*, however, marked the first presentation of these factors as a consolidated test.

[21] Federal Aviation Act of 1958, 72 Stat. 731, *as amended*, 49 U.S.C. § 1301 *et seq.* (1970), *formerly* Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 973.

[22] 132 F. Supp. 871 (E.D.N.Y. 1955), *aff'd*, 238 F.2d 812 (2d Cir. 1956).

[23] Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 973.

space in the interest of safety, has preempted the field; thus, states and municipalities are precluded from enacting contrary or conflicting legislation. The court said that although various states have legislated in the field of air traffic regulation, this is no indication that Congress did not intend to preempt the field.[24] The court noted that the existence of the various state laws plus the adoption of the Uniform Aeronautics Act by several of these states prior to the enactment of the Civil Aeronautics Act of 1938, indicated that Congress intended preemption in the interest of uniformity as a prerequisite of safety.[25]

Thirteen years later in *American Airlines, Inc. v. City of Audubon Pk., Ky.*[26] the federal district court invalidated the municipality's maximum altitude ordinance. The court held the ordinance unconstitutional because it was in conflict with statutes adopted by Congress pursuant to its power under the Commerce Clause and with Federal Aviation Administration (FAA) and Department of Transportation regulations promulgated pursuant to such statutes.[27] The court said that the statutes enacted by Congress "clearly expressed an intent fully to preempt the field of law and regulation of interstate and foreign air traffic."[28]

In the field of noise abatement the federal district court in *American Airlines, Inc. v. Town of Hempstead*[29] invalidated the municipality's noise ordinance on the conflict and preemption issues. The court said that the ordinance did not forbid noise except by forbidding flights and was therefore the legal equivalent of the invalid *Cedarhurst* ordinance. The court noted that like the *Cedarhurst* ordinance, the ordinance in question denied the lower airspace to aircraft. Aircraft were thus foreclosed from using landing approaches and take-off paths to an established airport. The court said that this was in contravention of the federally granted public right of freedom of transit through the navigable airspace[30] including

[24] 132 F. Supp. at 881.

[25] *Id.*

[26] 297 F. Supp. 207 (W.D. Ky. 1968), *aff'd*, 407 F.2d 1306 (6th Cir. 1969), *cert. denied*, 396 U.S. 845 (1969).

[27] *Id.* at 211, 212.

[28] *Id.* at 212.

[29] 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).

[30] 49 U.S.C. § 1304 (1970).

the airspace needed to insure safety in take-off and landing of air craft.[31] The Second Circuit, however, declined to rule on the pre-emption issue and instead held the ordinance invalid on the ground of conflict with FAA regulations.[32]

The Supreme Court in *City of Burbank v. Lockheed Air Terminal, Inc.*,[33] invalidated a municipality's noise ordinance by holding that "[i]t is the pervasive nature of the scheme of federal regulation of aircraft noise that leads us to conclude that there is preemption."[34] The Court said that the pervasive nature of the scheme of federal regulation of aircraft noise coupled with the Noise Control Act of 1972[35] gives the FAA and the Environmental Protection Agency full control over aircraft noise, preempting state and local control. The Court also referred to the cumulative effect theory[36] to invalidate the Burbank ordinance. The Court said that the imposition of curfew ordinances on a national basis would result in a launching of flights in those hours immediately preceding the curfew.[37] This bunching of flights would increase an already serious congestion problem; such result being totally inconsistent with the objectives of the federal statutory and regulatory scheme.[38] The court also noted that the imposition of curfew ordinances on a nationwide basis would cause a serious loss of efficiency in the use of navigable air space.[39] Thus, if the Burbank ordinance were upheld and

[31] The district court went on to say that "if the Commerce Clause were not thought without more to preclude local action in the area in question, the actual exercise by Congress of the power to regulate in this field is so pervasive as to preclude valid enactment of the Hempstead Ordinance. It would be difficult to visualize a more comprehensive scheme of combined regulation, subsidization and operational participation than that which the Congress has provided in the field of aviation." 272 F. Supp. at 232.

[32] 398 F.2d at 372.

[33] 411 U.S. 624 (1973). For a more detailed discussion of the case, see Note, *Federal Pre-emption—Aviation Noise Control*, 40 J. AIR L. & COM. 341 (1974).

[34] *Id.* at 633.

[35] Noise Control Act of 1972, 86 Stat. 1234.

[36] *See* Wickard v. Filburn, 317 U.S. 111 (1942), where the Court established the cumulative effect theory by holding that a home consumed crop could be regulated by Congress. The Court said that "(e)ven if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce . . . " *Id.* at 125.

[37] 411 U.S. at 627.

[38] *Id.*

[39] *Id.*

other municipalities enacted similar ordinances, a fractionalized control of the timing of take-offs and landings would result, severely limiting the flexibility of the FAA in controlling air traffic flow.[40]

More recently, a New Jersey court[41] relied upon the *Burbank* decision to invalidate a court order that jet aircraft be prohibited from take-offs or landings between certain hours because of excessive noise and other hazards detrimental to the health, safety and welfare of the residents of the plaintiff municipalities. The court held that the control and regulation of aircraft noise have been preempted by the federal government and that the Chancery Division infringed on the federal power when it imposed the restrictions on the use of the airport.[42]

The scope of congressional action has also forstalled state court action to enforce a contempt order for use of an airport runway extension. A federal district court[43] has held that the regulation of the navigable airspace has been preempted by federal regulation; thus, a state court has no power to enjoin use of an airport runway and expand "clear zones". The court said that "the federal government's ability to proceed with airport development is not contingent upon the peculiarities of local property laws."[44] And in another federal district court case[45] the plaintiffs, owners of property near an airport, brought suit against the county and five federally certified airlines alleging violation of a state law dealing with liability for low altitude flights. The court dismissed this count, following the *Burbank* decision, on the ground that the airlines cannot be charged with violating state law so long as their operation complies with federal law and regulations.[46] The court said that local attempts, public or private, to control and regulate aviation are preempted by the federal government.[47]

Despite this broad language of federal preemption in the field of

[40] *Id.* at 639.

[41] Township of Hanover v. The Town of Morristown, 13 Avi. 17983 (N.J. Super-App. Div. 1975).

[42] *Id.* at 17985.

[43] United States v. City of New Haven, 367 F. Supp. 1338 (D. Conn. 1973), *aff'd*, 469 F.2d 452 (2d Cir. 1974).

[44] *Id.* at 1341.

[45] Luedtke v. County of Milwaukee, 371 F. Supp. 1040 (E.D. Wis. 1974).

[46] *Id.* at 1043.

[47] *Id.*

aviation, particularly in response to municipal legislation attempting to alleviate noise and other problems associated with airport location and development, the entire field of air commerce has not, however, been preempted. It is well settled that state and local authority is preempted in the area of *operation* and *navigation* of aircraft.[48] The extent of congressional preemption, however, in the area of ground operations is not clear. Each case involving a preemption question "turns on the peculiarities and special features of the federal regulatory scheme in question."[49] The scheme set out in the Federal Aviation Act of 1958 indicates that Congress did not intend to exclude state action in all areas relating to aeronautics.[50] The Act[51] calls for the Civil Aeronautics Board (CAB) and the FAA to cooperate with state and local aeronautical agencies in connection with any matter arising under the FAA's jurisdiction. The FAA is further required to avail itself of the cooperation, services, records and facilities of such state agencies in its administration of the Act. This is an express recognition of the role of nonfederal authorities in the aviation field. In addition, the Administrator has various powers to develop plans, expend funds and formulate policy to provide air facilities.[52] Furthermore, according to a federal district court opinion,[53] "the Administrator has not so pervasively regulated the movement of aircraft that he has excluded the existence of areas of proper airport regulation."[54]

In addition to the 1958 Act, the Airport and Airway Development Act of 1970[55] provides a basis for federal action in the area of air facility location and development. Although the Airway Development Act requires federal approval as a condition for federal funding and thereby expands the concern of the federal government

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[48] *See* notes 22, 26, 29, 33, 41, 43 *supra.*

[49] City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. at 638.

[50] *See* notes 51-54 *infra.* Note also that the entire field of air commerce has not been preempted. *See, e.g.*, Braniff Airways, Inc. v. Nebraska, 347 U.S. 590 (1954); Colorado Anti-Discrimination Comm. v. Continental Airlines, Inc., 372 U.S. 714 (1963).

[51] 49 U.S.C. §§ 1324(b) and 1343(i) (1970).

[52] *Id.* §§ 1348, 1349, 1350, 1353.

[53] Aircraft Owners & Pilots Ass'n v. Port Auth. of N.Y., 305 F. Supp. 93 (E.D.N.Y. 1969).

[54] *Id.* at 104.

[55] 49 U.S.C. §§ 1701 *et seq.* (1970), *as amended,* (Supp. III 1973).

and the role of the Secretary of Transportation in the area of airport construction, it does not preempt state authority to develop, construct and enlarge airports.[56] It appears that Congress did not intend to preempt the entire field of aviation as evidenced by the overall scheme reflected in the Federal Aviation Act of 1958 and the Airport and Airway Development Act of 1970 and that some regulation of ground operations is left to state and local authority.

Aside from the issue of federal preemption the state statutory scheme must be examined to determine whether the state has intended to take over the entire field of legislation dealing with aeronautics to the extent that the federal government has not preempted the area. The role of the State of New Jersey and its municipalities in providing for the aviation needs of the state is well recognized.[57] The question to be determined is whether the state legislature has given the municipality the power to enact the particular ordinance or whether the legislature retained unto itself the right and power to regulate the field of aeronautics.[58]

The issue of New Jersey state preemption[59] was succinctly stated in *Summer v. Teaneck*[60] where the court said that it is not enough

[56] Town of New Windsor v. Ronan, 329 F. Supp. 1286, 1290-91 (S.D.N.Y. 1971), *aff'd*, 481 F.2d 450 (2d Cir. 1973); City of Boston v. Volpe, 464 F.2d 254, 259 (1st Cir. 1973). For a more detailed discussion, see Note, *Federalism—Airport Expansion*, 41 J. AIR L. & COM. 550 (1975).

[57] *See*, Transportation Act of 1966, N.J. STAT. ANN. 27: 1A-1, *et seq.*; N.J. STAT. ANN. 6:1-29, 6:1-20, 40:8-1, 40:8-2 (1973).

[58] It is well recognized that a municipality is a government of enumerated powers acting by a delegation of authority from the legislature; it has no inherent jurisdiction to make laws or adopt regulations of government except as authorized by a specific enabling statute. *See, e.g.*, N.J. STAT. ANN. 40: 48-2 (1973). The exercise of a delegated power by a municipality in a manner not within the purview of a governing statute is capricious and *ultra vires* of the delegated power. *See, e.g.*, Olivia v. City of Garfield, 1 N.J. 184, 190; 62 A.2d 673, 676 (Sup. Ct. 1948).

[59] *See also* Chester Township v. Panicucci, 62 N.J. 94, 99-100; 299 A.2d 385, 388 (Sup. Ct. 1973), where the court said, " . . . [M]unicipalities have been granted broad police power over matters of local concern and interest, both in numerous specified instances, as here, by N.J. STAT. ANN. 40: 48-1 and generally by N.J. STAT. ANN. 40: 48-2. Our Constitution, art. IV, § VII, par. 11, ordains liberal construction of those powers. Their scope, however, does not extend to subjects inherently in need of uniform treatment or to matters of general public interest and applicability which necessarily require an exclusive state policy. In addition, a municipality may be foreclosed from exercising power it would otherwise have if the state has sufficiently acted in a particular field . . . Our cases establish that a municipality is precluded from exercising its powers in an area which the state has preempted."

[60] 53 N.J. 548, 251 A.2d 761 (Sup. Ct. 1969).

that the legislature has acted upon the subject, for the question is whether the legislature intended to immobilize the municipalities from dealing with local aspects otherwise within their power to act. Although the grant of police power by the New Jersey statutory scheme[61] is a broad one,[62] the power is restricted to those matters which are of purely local concern, and even where the state legislature has not spoken, some matters, inherently requiring uniform treatment, are not a proper subject for municipal legislation.[63]

Two prior decisions have upheld ordinances prohibiting private airports.[64] The court's inquiry was limited, however, to the issue of the reasonable exercise of police power. The question of preemption and conflict was not raised nor discussed. Therefore these decisions should not be applicable in regard to the case in question. The Appellate Court of Illinois,[65] however, considered the question of whether the state's aeronautics act was intended to supersede the zoning powers relating to air landing strips conferred upon counties by the County Zoning Act.[66] The court held that the state's aeronautics act was not intended to and does not cover the whole subject matter of the act conferring zoning powers upon the counties.[67] The court said that the County Zoning Act and the state's aeronautics act are not so repugnant to each other that they could not exist or be applicable concurrently. The court further held that control over restricted landing areas conferred upon the Department of Aeronautics by the Aeronautics Act presupposes compliance with local zoning ordinances.[68]

The question of whether the state has preempted the field of licensing and regulating private helistops was also considered in

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[61] N.J. STAT. ANN. 40:48-2 (1973).

[62] Fred v. Mayor and Council, Old Tappan Borough, 10 N.J. 515, 92 A.2d 473 (Sup. Ct. 1952).

[63] In re Public Service and Gas, 35 N.J. 358, 371; 173 A.2d 233, 239 (Sup. Ct. 1961).

[64] *See* Yoemans v. Hillsborough Tp., 135 N.J.L. 599, 54 A.2d 202 (Sup. Ct. 1947); Ridgewood Air Club v. Ridgewood Bd. of Adj., 136 N.J.L. 222, 55 A.2d 100 (Sup. Ct. 1947).

[65] County of Du Page v. Harris, 89 Ill. App. 2d 101, 231 N.E.2d 195 (1967).

[66] ILL. REV. STAT., ch. 34, pars. 3151-62 (1965).

[67] 231 N.E.2d at 199-200.

[68] *Id.*

the predecessor case to the suit in question.[69] The New Jersey Superior Court—Law Division noted in dictum that the State of New Jersey has not preempted the field of regulating helistops and heliports to the exclusion of municipal zoning ordinances.[70]

Against this background the New Jersey court rather summarily rejected plaintiff's first contention that congressional action had preempted the field.[71] The court noted that through the Federal Aviation Act of 1958 Congress has provided a comprehensive federal scheme to deal with air commerce under the administrative auspices of the FAA and CAB. The court then reviewed the insufficient altitude, excessive noise, and runway extention preemption cases and conceded that "states and municipalities are without authority to regulate any operation or navigation of aircraft within the limits of any federal airway or any operation or navigation of aircraft which directly affects interstate, overseas or foreign commerce."[72] Based upon this conclusion the court held that state and local authority is preempted in the area of "operation and navigation of aircraft," but that the extent of congressional preemption in related matters of aviation involving ground operations was not clear. Following the rule in *Burbank* that "each case involving a preemption question turns on the peculiarities and special features of the federal regulatory scheme in question,"[73] the court proceeded to review the Act. Relying upon sections of the Act calling for cooperation by the CAB and FAA Administrator with state and local aeronautical agencies,[74] the court held that Congress did not intend to exclude state action in all areas relating to aeronautics. The court then noted that other sections[75] give the Administrator powers to develop plans, expend funds and formulate policy to provide air facilities. The court, however, relied upon the precedent decisions that "these powers do not preclude local action in areas of proper airport regulation,"[76] to conclude that "despite the comprehensive

[69] Boublis v. Garden State Farms, Inc., 122 N.J. Super. 208, 299 A.2d 763 (1972).

[70] *Id.* at 766, 767.

[71] 343 A.2d 837-39 (N.J. Super.—Law Div. 1975).

[72] *Id.* at 838.

[73] 411 U.S. at 638.

[74] 49 U.S.C. §§ 1324(b) and 1343(i) (1970).

[75] *Id.* §§ 1348, 1349, 1350 and 1353.

[76] 305 F. Supp. 104-05 (E.D.N.Y. 1969).

effect of federal regulation on air commerce, the states and localities retain power to regulate ground activities not directly involving actual aircraft operation."[77]

Plaintiff's second assertion was that the state has exclusive control over aeronautics to the extent that the federal government has not preempted the field. Plaintiff relied principally upon New Jersey Stat. Ann. 6: 1-29.[78] The court found it clear that control in the areas of public safety and aeronautical development remain within the Department of Transportation of the State of New Jersey. The court said, however, that the legislative scheme does not clarify whether or the extent to which state control in the supervision and development of aeronautics precludes land-use power of location of facilities.[79] Thus the court was required to examine the question of local preemption. Analyzing New Jersey Stat. Ann. 6: 1-29[80] in light of rules of legislative interpretation,[81] the court was of the opinion that local zoning power "is not preempted by granting the Commissioner 'supervision over aeronautics within this State.' The

[77] 343 A.2d at 838.

[78] N.J. STAT. ANN. 6:1-29 (1973) provides in pertinent part: "Except as otherwise specifically provided by law, the Commissioner . . . shall promote progress and education in and shall have supervision over aeronautics within this State, including, but not by way of limitation, the avigation, flight and operation of aircraft, the establishment, location . . . of airports, landing fields, landing strips, heliports and helistops. . . . The Commissioner may adopt and promulgate reasonable rules, regulations and orders regulating air traffic and establishing minimum standards for aircraft, pilots, fixed base operators, airports . . . heliports and helistops. . . . The Commissioner shall have power to promulgate and adopt any reasonable rules and regulations that may be necessary to effectuate the purposes of this act in the interest of public safety and the development of aeronautics in this State."

The court reviewed this statute along with N.J. STAT. ANN. 6:1-44 and used the rule of interpretation that in construing any statute, the court must give effect to the legislative intention and purpose. In so doing the court analyzed the intention against the purpose set out in N.J. STAT. ANN. 6:1-20.

[79] 343 A.2d at 840.

[80] N.J. STAT. ANN. 6:1-29 (1973).

[81] The court followed the principle set out in *Summer v. Teaneck* (*See* note 55 *supra*) that in determining if a statutory scheme precludes local action the court must ascertain whether the legislature intended to immobilize the municipalities from dealing with local aspects otherwise within their power to act. 251 A.2d at 761, 764. The court also relied upon the rules of construction that a liberal construction is given to legislation favoring local action (N.J. CONST. 1947, art. IV, § VII, par. 11) and that espoused in *Kennedy v. Newark* that the area not covered by legislation shall be left to local determination upon the principle of home rule and that had the legislature intended to restrain local action, the more likely course would have been to express that purpose. 148 A.2d at 478.

expressed statutory purpose to promote progress and development in aeronautics does not necessarily mean that a municipality be precluded from determining whether or not airport facilities should be constructed within its boundaries."[82] Aside from this, the court found an even more compelling reason for finding no state preemption in the fact that New Jersey statutes[83] explicitly grant localities the authority to initiate and pursue development of air facilities. After reviewing the statutory scheme[84] the court thought it apparent that the legislature does not intend to preempt local land use control for airports.

Plaintiff's third contention[85] was that the entire thrust of aeronautical development in the state could be thwarted if localities are able to zone individually for airport use. The court acknowledged that perhaps a unified system of laws preempting all land-use power for aeronautics would best serve the interests of the people of the State of New Jersey. The court held, however, that such a decision should be made by the legislature and not by the court.

By so holding the court further clarified the roles of the federal and state governments by delineating the areas within the field of aviation where the federal government remains supreme and those areas in which states retain their police power to legislate within the field. Although it clarified this area, it is significant to note that the court failed to view the Hawthorne ordinance as an extension of the preemption principle developed in the earlier minimum altitude and noise ordinance cases and also failed to consider the problems of cumulative effect and conflict with the Federal Aviation Act of 1958.

Garden State is distinguishable from the earlier aviation preemption cases in that the present case involves no existing airport and in the earlier cases there was already an airport subject to regulation. The federal government has preempted the regulation

[82] 343 A.2d at 841.

[83] N.J. STAT. ANN. 40:8-1 and 40:8-2 (1973).

[84] The court analyzed N.J. STAT. ANN. 40:8-1 and 40:8-2 together with N.J. STAT. ANN. 6:1-20 and 6:1-29 as statutes in *pari materia.*

[85] Garden State also advanced an argument that the ordinance was unreasonable. The court held that in light of the fact that the borough was a highly developed municipality with a dense population living in residential areas interspersed among industrial and commercial zones, such ordinance was not unreasonable.

of the navigable airspace in the U.S. The navigable airspace can be entered, however, only by an airborne vehicle alighting from either a domestic or foreign landing area. If domestic, entry is possible only upon ascending from a landing facility located within the jurisdiciton of the Act. To declare that the navigable airspace of the United States can only be regulated on a federal level is meaningless unless the terminals of operation are also included in the federal scheme.[86] Furthermore, federal jurisdiction over airspace extends to the time during which aircraft is on the ground.[87] Thus there is support for the contention that federal supremacy extends to some ground operations. It can be argued, however, that such supremacy exists only with respect to existing ground facilities. Based upon this reasoning it would seem that the early aviation preemption cases are not controlling with respect to the Hawthorne ordinance.

Despite this distinguishing factor, there are similarities between the minimum altitude—excessive noise ordinances and the Hawthorne ordinance. All prohibit the taking off and landing of aircraft. The Hawthorne ordinance is more restrictive since there is a total prohibition respecting aircraft use, whereas in the minimum altitude ordinance cases flights were prohibited only below certain altitudes. In the excessive noise ordinance cases flights were prohibited only during certain hours or at levels that exceeded certain ground decibel levels. Furthermore, the motivating purpose behind enacting these ordinances, including the Hawthorne ordinance, seems to be identical, attempting to alleviate the noise and other problems associated with an airport. Instead of regulating these problems once the airport was in existence as was done in the earlier cases, however, the borough simply carried its legislation one step further by completely prohibiting airports. The borough maintained[88] that such a facility would generally cause or require low flying aircraft, with noise and air pollution, which would con-

[86] *See* American Airlines v. Hempstead, 272 F. Supp. 226 (S.D.N.Y. 1967), where the court said that to recognize the supremacy of the navigable air space and to deny the supremacy of the facility from which and to which the aircraft must necessarily embark, is to deny the supremacy of the navigable air space.

[87] 49 U.S.C. § 1301(32) (1970).

[88] The borough maintained these reasons in answer to interrogatories covering the borough's reasons for enacting the Hawthorne ordinance.

tribute to greater interference with and diminution of the quiet, serenity, and natural appearance and environment of the residential areas. Thus it appears that the entire alleged factual background upon which the Hawthorne ordinance was passed is expressly or impliedly governed by *Burbank*. Additionally, the Burbank ordinance was specifically designed to prohibit a single intrastate flight. The Hawthorne ordinance prohibits all aircraft from landing, even though a significant portion of plaintiff's flights would be of an interstate nature,[89] thereby affecting interstate commerce more so than in *Burbank* or the earlier cases. Thus, although the Hawthorne ordinance is more restrictive in that it prohibits all flights and appears to be analogous to and a logical extension of the earlier ordinances held to be invalid, the court failed to treat it as such.

The *Garden State* court also failed to consider the cumulative effect theory of such ordinances which Justice Douglas approvingly referred to in *Burbank*,[90] as establishing the federal preemption in the field. It could be conceded that the Hawthorne ordinance, standing by itself, may not have a material adverse effect on the use of the navigable airspace, and might not therefore be violative of the Interstate Commerce Clause.[91] The situation involved in *Garden State*, however, is similar to the *Burbank* dilemma: a multiplicity of similar ordinances could defeat, frustrate and negate the active federal regulatory scheme. It could be argued that the federal regulatory scheme is not thwarted because there is no existing airport. It seems clear, however, that if many municipalities enacted similar ordinances, this denial of landing facilities would begin seriously to infringe upon the FAA's supremacy over the navigable airspace. Furthermore, by prohibiting the take-off and landing of

[89] Plaintiff's processing and packaging plants are located in New Jersey, New York and Pennsylvania. *See* note 1, *supra*.

[90] *See* 411 U.S. 625, 627, where Justice Douglas said, "The imposition of curfew ordinances on a national basis would result in a launching of flights in those hours immediately preceding the curfew. This bunching of flights during these hours would have the twofold effect of increasing an already serious congestion problem and actually increasing, rather than relieving, the worse problem by increasing flights in the period of greatest annoyance to surrounding communities. Such a result is totally inconsistent with the objectives of the federal statutory and regulatory scheme. (T)he imposition of curfew ordinances on a nationwide basis would cause a serious loss of efficiency in the use of the navigable air space."

[91] U.S. CONST., art. I, § 8, cl. 3.

aircraft, the Borough of Hawthorne has engaged in the planning of the use of the navigable airspace of the United States. Whether its planning takes the form of a limited use restriction,[92] or a complete prohibition,[93] the local legislative enactment would seem to contravene the federal regulatory scheme.

The *Garden State* court also avoided the doctrine of conflict. Although most of the opinions of the early cases were grounded on the doctrine of preemption, the Court of Appeals in *Burbank* considered both doctrines and rested its decision on both. In respect to the doctrine of conflict, the court observed that a local ordinance could not be sustained if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[94] The principles of the doctrine of conflict might apply to the Hawthorne case, since the ordinance in question "stands as an obstacle to the federal guarantee," in the Act of "a public right of freedom of transit through the navigable airspace of the United States."[95] In *Hempstead*, the district court also rested its holding invalidating the local ordinance upon the conflict doctrine.[96] In *Garden State* the ordinance seems to regulate both the cause and consequences of presence of a heliport by directly forbidding any heliport construction at all. Although the ordinance does permit flight through the airspace and only denies landing, and even though there is no conflict with the federal law and regulations governing the operation of the heliport, there seems to be a direct conflict with the right of access guaranteed by the Act.

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[92] *See* Burbank v. Lockheed Air Terminal, 411 U.S. 624 (1973).

[93] *See* Fouke Company v. Mandel, 386 F. Supp. 1341 (D. Md. 1974), where Maryland argued that its statute would have a *de minimis* effect on interstate commerce, that its statute would not seriously interfere with interstate commerce because Maryland is not a significant market for the subject matter in question, and that similar legislation existed only in Maryland and California. The court answered this argument by saying that it rejected the contention that the first two, four or fifteen states could validly enact statutes such as the Maryland statute on the grounds of minimal impact, but that the preemption doctrine would bar any more states from passing such a statute. *Id.* at 1359, note 21.

[94] 457 F.2d at 675, 676.

[95] 49 U.S.C. § 1304 (1970).

[96] The court went on to say that "[L]ocal initiative in noise control of aviation is inherently an effort to regulate a consequence while disclaiming regulation of the cause . . . It cannot coexist with a comprehensive system of federal regulation of aircraft manufacture (through certificates of airworthiness) and federal regulation of air navigation and air traffic." 272 F. Supp. at 235.

The court failed to consider many questions by limiting its analysis of the preemption issue to the delineation of authority between operational and ground based activity. The court's approach may be rational, however, if viewed as a zoning problem and not as a problem of preemption or conflict. Viewed from the perspective that municipalities have traditionally held the zoning power, the maxim that where legislation exists in a field that local governments have traditionally occupied, an assumption of nonsupremacy exists, would seem to support the court's conclusion that this area of legislation may be reserved to the municipality.[97]

In regard to plaintiff's contention of state preemption, there seems to be room for questioning the court's interpretation of the applicable statutes and the legislative intent behind them.[98] Furthermore, the New Jersey Legislature's scheme required no municipal sanction for the establishment of a heliport or helistop.[99] Finally a New Jersey Assembly Bill[100] would have amended the legislative scheme[101] to require that the applicant for any license submit a certificate from the appropriate local authority that the proposed

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[97] *See generally*, Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230, for the proposition that where legislation exists in a field that local governments have traditionally occupied an assumption of non-supremacy exists. *See* Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), for the proposition that a zoning ordinance is a valid police regulation. For a discussion of cases dealing with local authority in zoning, see Symposium, 20 LAW & CONTEMP. PROB. (1955).

[98] N.J. STAT. ANN. 6:1-29 gives authority over heliport locations to the Commissioner in broad and sweeping terms. Furthermore, the legislature has prohibited anyone other than the Commissioner from regulating aeronautics within the state including determination of heliport location by providing: "Except as otherwise specifically provided by law, the Commissioner shall . . . " N.J. STAT. ANN. 6:1-29. If these opening words of direction and limitation are to have any meaning at all, they must show a legislative desire to provide that the powers stated in N.J. STAT. ANN. 6:1-20 through 60 are granted to whomever is mentioned therein, as well as to other persons or governmental bodies specifically provided for in the legislation or regulations. For this specific provision, the Garden State court relied upon N.J. STAT. ANN. 40:8-1 and 2 giving municipalities the power to acquire and use lands for municipally owned airports. Yet this statute is not necessarily evidence of an intent by the state legislature to allow concurrent exercise of jurisdiction over airports. Rather it might be considered a clear example of the legislature giving power to municipalities to acquire and use lands for municipally owned airports which power the municipality would not otherwise have.

[99] *Cf.* McKinney's Laws of New York, Section 249 of the General Business Law, which does so provide.

[100] New Jersey Assembly Bill No. 456.

[101] N.J. STAT. ANN. 6:1-44 (1973).

facility is not contrary to provision of existing zoning ordinances. On November 26, 1973, the governor vetoed the bill upon the ground that construction of air facilities could be effectively precluded in any part of the state regardless of the needs of the people of the state. The governor noted that although communities were entitled to be protected against environmental hardships, the people of the entire state must not have their best interests frustrated by local ordinances which could produce wider effects than local protection or community safety and welfare.

The *Garden State* court thus failed to consider many significant questions in the areas of federal and state preemption. Although the motivating factors behind enactment of the Hawthorne ordinance seems to be identical to those which influenced enactment of the earlier invalid ordinances, the court failed to view the Hawthorne ordinance as equivalent to them. Despite the interstate nature of plaintiff's proposed flights and the total prohibition of flights under the ordinance, the court failed to view the *Burbank* decision as controlling. Furthermore, the court failed to consider either the doctrines of conflict or cumulative effect. Yet, if other localities attempt to follow suit with such prohibitory zoning there can be no question that federal and state regulatory schemes will be thwarted. This area of legislation is clearly in need of uniform treatment, either on a federal or state level. The very purpose for the existence of the FAA and the various state aeronautical agencies is for the orderly and systematic development of civil aeronautics. If municipalities are given the authority to prohibit the construction of airports, there can hardly be an orderly development of transportation facilities. Furthermore prohibiting airport construction in one locality may not be in the best interests of the people of the entire state and state transportation plans could be rendered meaningless. Orderly development of air facility locations thus requires that the legislature or a higher court settle the question before there is a proliferation of similar ordinances.

David J. Lowery

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