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Comments

AIRCRAFT NOISE: FEDERAL PRE-EMPTION OF LOCAL CONTROL, CONCORDE AND OTHER RECENT CASES

JOSHUA A. MUSS

The efforts of British Airways Board ("British Airways") and Compagnie Nationale Air France ("Air France") to secure American landing rights for Concorde, their supersonic airliner, have produced a controversy of unexpected proportion. The disputes engendered have threatened to affect the international relationships of the United States and have put in issue principles of federalism as related to the locus of authority to regulate aircraft noise emissions. The focus of this controversy has been the attempt to secure landing rights for Concorde at John F. Kennedy International Airport ("JFK") as access port to the lucrative New York-Paris/London market. These efforts resulted in 18 months of extensive litigation which is likely to be resolved only by the United States Supreme Court.

The central legal issue raised by the Concorde question concerns whether the federal government has pre-empted the authority of airport proprietors to regulate noise emission levels for aircraft using their facilities. Since 1975, this issue has been litigated in four cases with the courts arriving at differing conclusions.¹ An examination of the facts and legal precedents relating to the pre-emption question raised by Concorde is the best means of clarifying the issues and giving insight into their ultimate resolution. In order to separate the issues from the emotional volatility that has attached to Concorde it is necessary to examine the historical background of Concorde, the federal legislative history of the regulation of

¹ British Airways Bd. v. Port Auth. of N.Y., 558 F.2d 75 (2d Cir. 1977); National Av. v. City of Haywood, 418 F. Supp. 417 (N.D. Cal. 1976); Air Transp. Ass'n of Amer. v. Crotti, 389 F. Supp. 58 (N.D. Cal. 1975); and San Diego Unified Port Dist. v. Superior Court, 67 Cal. App. 3d 361, 136 Cal. Rptr. 557 (Ct. App.), *cert. denied*, 98 S.Ct. 184 (1977).

aircraft noise and the judicial interpretation of the law and its application to the Concorde question.

In 1962 Britain and France, in a bold attempt to regain a share of the world market for commercial airplanes for their aviation industries and to enhance their sagging prestige as industrial powers, entered a treaty to jointly construct a commercial airliner capable of carrying 150 passengers across the North Atlantic at supersonic speeds.² The project was ambitiously named "Concorde." The engineering and economic difficulties which have plagued Concorde first appeared shortly after its birth. In 1963 it was discovered that the initial design of the airplane developed a cruising range which was 500 miles less than the distance from London to New York. The consequent redesign was the first of many, and the cost revision attributable thereto presaged many upward revisions in the cost estimates of the project. The initial cost estimate of £95 million was revised to £275 million.³ As if predestined by this inauspicious beginning, it has been all downhill for Concorde ever since.

Concorde has been a commercial, engineering and economic failure. The cost of the project has risen 15-fold from the initial estimate of £95 million (\$266 million) to an early 1977 estimate of £1460 million (\$2540 million).⁴

The reported costs of Concorde do not represent the true costs of the project to the partners; they only represent the aggregate annual expenditures over the life of the project without any adjustment for current price levels or exchange rates and without any allocation of interest for fund utilization. With such additions, it has been estimated that Concorde's total cost is £4,260 million (\$7,400 million).⁵ In the course of design, not only did the cost of the airplane increase, but concurrently its range and passenger

² Mach 2, approximately 1400 miles per hour.

³ Gillman, *Supersonic Bust—The Story of the Concorde*, ATLANTIC MONTHLY, Jan. 1977, at 78 [hereinafter cited as *Supersonic Bust*].

⁴ Conversion to dollars has been made at current exchange rates—\$1.74 per pound. In 1959 the rate was \$2.80 per pound. The official British government figures of the development costs of Concorde are £1154 million. To this cost must be added the production costs of Concorde and the operating losses which British Airways and Air France have sustained, estimated at £306 million. These additions raise the total to £1460 million. *Id.* at 73-74.

⁵ Estimate by David Henderson, Professor of Political Economy at University College, London, as reported in *Supersonic Bust*, *supra* note 3, at 73.

capacity decreased and its fuel consumption increased. Ultimately, the transatlantic payload of Concorde in actual operations was reduced to 100 passengers from the initial plan of 150 passengers. In 1967 the sales manager for British Aircraft Corporation, the prime contractor for Britain's Concorde participation, predicted "on the most pessimistic assumptions, sales of 225 Concorde by 1975."⁶ In 1967, Concorde achieved its highwater mark in sales by registering options of 74 aircraft to 16 airlines.

Ultimately, only British Airways and Air France exercised their options. So far only nine of the sixteen planes which have been constructed have been sold, and no purchasers are in sight for the remaining seven.⁷ Thus, from the first, Concorde has been a venture conceived more out of desperation than realistic expectations, deformed and maladapted for survival since birth, and incapable of self sustenance without massive external aid.

The inherent economic disabilities of Concorde have been aggravated by its emergence as an important symbol for American environmental interests. It is almost certain that a great deal of the antagonism to Concorde is engendered by its potential for reactivating the drive for an American supersonic transport ("SST"). In 1970 the Senate narrowly rejected a multibillion dollar appropriation for the development of an American SST.⁸ This rejection was to a great extent attributable to intense large scale lobbying by various environmental groups. The case for SST was seriously damaged by the difficulties encountered by Concorde. When Concorde failed to secure any significant number of orders, its latent threat as a challenge to American domination in the production of commercial aircraft faded. Thus, even a limited demonstration of success by Concorde, however defined, jeopardizes the finality of the environmental lobby's victory over SST. Congress, if freed from the constant reminder of Concorde's failure, might

⁶ *Id.* at 79.

⁷ Five planes were sold to British Airways and four to Air France. *NEWSWEEK*, May 23, 1977, at 20.

⁸ On December 3, 1970, the Senate by a vote of 52-41 passed an amendment to the House-passed appropriation for the Department of Transportation, H.R. 17755, which deleted from the bill a \$290 million appropriation for a prototype SST. This amendment effectively ended the efforts to secure public financing for development of an American SST. A year earlier, a similar amendment had failed to pass. 116 Cong. Rec. S39,798 (1970).

be less inclined to resist the aeronautical lobby's plea for SST as a replacement for the now apparently abandoned B-1 bomber. Additionally, any modicum of success might rekindle the British and French interest in further Concorde development and precipitate the expansion, modification, or refinement of the project. Such action by the Concorde partners would certainly provide new impetus for supporters of the American SST.⁹

A decision early in program development has provided Concorde's adversaries with a technical basis for attack. In the early 1960's, two British jet engine building firms, Rolls-Royce and Bristol-Siddeley, competed for the contract to supply Concorde's power plant. In its proposal, Rolls-Royce demonstrated substantial concern for the noise emission characteristics of the engines.¹⁰ After noting that the Port Authority of New York and New Jersey ("Port Authority") had established a limitation of 112 Perceived Noise Decibels ("PNdb") for takeoffs from JFK, Rolls' report concluded that "the next generation of subsonics is being designed to be appreciably quieter—of the order of 100 PNdb—and this is the order to which the supersonic should be designed throughout."¹¹ The engine contract, however, was awarded to a consortium of Bristol and SNECMA, the French engine manufacturer, for a power plant based on the Olympus engine. Despite substantial research and expenditures of over \$100 million, the efforts to reduce the engine noise emission characteristics of the Olympus engine below 112 PNdb were unsuccessful.¹² The failure to reduce noise emissions was in part attributable to the increased thrust requirements of the engine as a consequence of Concorde's

⁹ The proposed fiscal year 1979 authorization of appropriation for the National Aeronautic and Space Administration (NASA) includes funds for the further work on Supersonic Cruise Aircraft Research (SCAR). H.R. 11401, 95th Cong., 2d Sess. 124 CONG. REC. H3164 (1978). On April 25, 1978, the House passed this bill, including \$27.9 million for SCAR. 124 CONG. REC. H3190 (1978). The Senate passed a modified version of the bill on May 18, 1978, approving \$23.9 million for SCAR. 124 CONG. REC. S7680 (1978).

¹⁰ *Supersonic Bust*, *supra* note 3, at 77.

¹¹ *Id.* at 77.

¹² *British Airways Bd. v. Port Auth. of N.Y.*, 558 F.2d 75, 79 (2d Cir. 1977). By adopting severely restrictive operating procedures such as limitations on selections of runways, steep banks after takeoffs and rapid climbs, Concorde has been able to stay within the 112 PNdb restriction. U.S. DEP'T OF TRANSPORTATION, THE SECRETARY'S DECISION ON CONCORDE SUPERSONIC TRANSPORT 20 n.32 (Feb. 4, 1976) [hereinafter cited as *Coleman Report*].

increase in weight¹³ and the early 1950 origins of the basic Olympus engine. Additionally, the sound generated by Concorde has substantially more low frequency content than that of subsonic jet engines, and consequently the noise causes more vibrations in homes and buildings in Concorde's sound footprint.¹⁴ Concorde's foes have focused their attack on these unfavorable noise characteristics and have used the noise issue to recruit the Port Authority as a primary participant in their controversy.

The Port Authority was one of the first airport operators to recognize that the Authority's three terminals, Newark, LaGuardia, and JFK, adjoin heavily populated built up areas.¹⁵ Since 1952, the municipalities which adjoin JFK have had a long history of unsuccessful attempts to restrict noise disturbances in their communities by the use of their police powers to control aircraft operations.¹⁶ In 1951, in response to the noise emission history of military jets, the Port Authority adopted a regulation which prohibited jet or prop jet operations from any facilities of the Port Authority without its permission.¹⁷ This rule is still in effect.¹⁸ In the mid-1950's the Port Authority invoked this regulation to refuse landing rights to an early model of the British pure-jet Comet and to Boeing's proto-

¹³ The initial specification of 30,000 lbs. thrust was increased to 38,000 lbs. thrust for the production engines. *Supersonic Bust*, *supra* note 3, at 78-79.

¹⁴ See *Coleman Report*, *supra* note 12, at 42-44.

¹⁵ The Port Authority of New York and New Jersey is a body corporate and politic created in 1921 by an interstate compact between the states of New York and New Jersey. In addition to New York's three airports, the Authority owns and operates various terminals, tunnels, and bridges in the New York City area, the World Trade Center, the New York and New Jersey harbor facilities, and other facilities of commerce in the New York and New Jersey metropolitan area.

¹⁶ The municipalities passed various ordinances establishing minimum aircraft altitudes and maximum noise emission levels for overflying aircraft. These ordinances were invalidated in *American Airlines v. Town of Hempstead*, 272 F. Supp. 226 (E.D.N.Y. 1967), *aff'd*, 398 F.2d 369 (2d Cir. 1968), *cert. denied*, 393 U.S. 1017 (1969) and *Allegheny Airlines v. Village of Cedarhurst*, 132 F. Supp. 871 (E.D.N.Y. 1955), *aff'd*, 238 F.2d 812 (2d Cir. 1956). The villages of Cedarhurst and Hempstead as well as the villages of Lawrence and Atlantic Beach filed *amicus curiae* briefs in the *Concorde* litigation.

¹⁷ Defendants' Memorandum of Law at 7-10, *British Airways Bd. v. Port Auth. of N.Y.*, 431 F. Supp. 1216 (S.D.N.Y. 1977).

¹⁸ *Port Authority Board of Commissioners' Minutes and Resolution*, Mar. 11, 1976, as cited in Defendant's Memorandum of Law at 5, *British Airways Bd. v. Port Auth. of N.Y.*, 431 F. Supp. 1216 (S.D.N.Y. 1977) [hereinafter cited as *Port Authority Resolution*].

type jet transport.¹⁹ Both refusals were based on the excessive noise levels that the aircraft would impose on the adjoining communities. In 1955 the Port Authority commissioned a study to determine maximum acceptable noise for aircraft using its facilities.²⁰ The standard adopted pursuant to this study was a single event noise level of 112 PNdb, approximately the sound produced by a DC-6B, the dominant airliner of that era. This standard is still in force today.²¹ To a large extent, as a consequence of the Port Authority's leadership, aircraft manufacturers developed noise suppressing devices for their engines and operating procedures for their aircraft which would satisfy the Port Authority's standards.²²

In late summer of 1975, British Airways and Air France applied to the Federal Aviation Administration ("FAA") for amendment to their operating specifications²³ to permit use of the Concorde at Dulles and JFK. On February 4, 1976, Secretary of Transportation William T. Coleman, Jr., issued a report which constituted a provisional consent by the federal government for the airlines to conduct limited Concorde operations into the United States.²⁴

On March 11, 1976, in response to this notification the Port Authority adopted a resolution denying Concorde permission to operate at JFK.²⁵ This ban was to continue until the completion of a Port Authority-commissioned independent evaluation of noise data and community reaction to Concorde based on a six-months study at Dulles, Charles DeGaulle and Heathrow airports.²⁶ The Port Authority, while acknowledging the Concorde's sponsors claim that it can meet the 112 PNdb standard,²⁷ expressed concern that

¹⁹ Defendants' Memorandum of Law at 6, *British Airways Bd. v. Port Auth. of N.Y.*, 431 F. Supp. 1216 (S.D.N.Y. 1977).

²⁰ *Id.* at 7.

²¹ *Id.* at 5-9.

²² *Id.* at 7.

²³ "Operations Specifications" which are issued pursuant to 14 C.F.R. § 129 (1975), include a list of the carriers' routes, airports served, flight procedures and type of aircraft to be utilized.

²⁴ *Coleman Report*, *supra* note 12, at 2. For a full discussion of the *Coleman Report*, the background and content of the subsequent controversy, and the resultant litigation see Donin, *British Airways v. Port Authority: Its Impact on Aircraft Noise Regulation*, 43 J. AIR L. & COM. 691 (1978).

²⁵ *Port Authority Resolution*, *supra* note 18.

²⁶ *Id.*

²⁷ Minutes of Mar. 11, 1976, Port Authority Board of Commissioners Meeting

the aircraft's unique noise characteristics²⁸ would aggravate the present serious aircraft noise problem at JFK.²⁹ Sixteen months later in July, 1977, the ban was still in effect, and the evaluation upon which its conclusion was dependent was not yet completed.³⁰

On March 17, 1976, in response to the ban, British Airways and Air France commenced an action in federal court seeking a declaratory judgment and an injunction banning the Port Authority from enforcing its Concorde ban. In part the complaint contended that the Port Authority ban was unlawful in that the regulation of aircraft flight operations was a field which had generally been pre-empted by the federal government and that the regulation of landing rights for Concorde had been specifically pre-empted by Secretary Coleman's decision.³¹

as quoted in Defendants' Memorandum of Law at 13, *British Airways Bd. v. Port Auth. of N.Y.*, 431 F. Supp. 1216 (S.D.N.Y. 1977). Further, in April, 1977, the airlines submitted to the FAA and to the Port Authority a technical noise study which specified operating procedures which predicted noise levels within the JFK limits. The FAA has acknowledged that the "analysis is technically sound." FAA letter to British Aircraft Corp. (U.S.A.) appended to the Brief for United States as *amicus curiae*, *British Airways Bd. v. Port Auth. of N.Y.*, 558 F.2d 75 (2d Cir. 1977).

²⁸ See *Coleman Report*, *supra* note 12, at 44-50.

²⁹ In justification of the ban, the resolution in part stated:

[T]he Secretary's decision raises a number of significant questions concerning the effect of low frequency noise and vibrations generated by the Concorde and the airplane's overall impact on the noise environment in the area surrounding Kennedy. . . . The unique noise characteristics of the Concorde and the expected aggravated community response to this noise add new and serious dimensions to the present aircraft noise problem, one not necessarily reflected in the Port Authority's current noise standard. . . . It does not appear to be in the public interest to test the subjective characteristics of noise response to the Concorde in the densely populated areas around Kennedy International Airport.

Port Authority Resolution, *supra* note 18, at 13-14.

³⁰ On July 7, 1977, the Port Authority Board met and voted to continue the Concorde ban for an indefinite period of time. The Minutes of that meeting state:

Our reports indicate that the Concorde operations proposed in the [airlines'] report of March, 1977, can be expected to result in significant annoyance and complaint activity regarding the noisiness and house vibration effects of Concorde's noise in particular, and an increase in such activity about aircraft noise in general in some communities near JFK. A vibration rattle index is being further studied to quantify this noise factor. However, more research and analysis is needed before such an index can be established.

As quoted in *British Airways Bd. v. Port Auth. of N.Y.*, 437 F. Supp. 804, 816 (S.D.N.Y. 1977).

³¹ *British Airways Bd. v. Port Auth. of N.Y.*, 431 F. Supp. 1216 (S.D.N.Y. 1977) [hereinafter cited as *Concorde I*].

On May 11, 1977, U. S. District Court Justice for the Southern District of New York Milton Pollack granted summary judgment to the plaintiff airline companies and enjoined the Port Authority from further banning Concorde operations at JFK.³² Judge Pollack based his decision on a finding that Secretary Coleman's authorization of Concorde landings at JFK and his establishment of a detailed regulation for noise control specifically precluded a conflicting exercise of power by the Port Authority.³³ Accordingly, Judge Pollack found it "unnecessary to treat the other grounds on which the plaintiffs seek relief, viz., the claimed conflict of the Port Authority resolution with the international agreements and foreign policy."³⁴

The Port Authority appealed Judge Pollack's order to the United States Court of Appeals for the Second Circuit. At the request of the Second Circuit, the Justice Department filed an *amicus curiae* brief on the question of federal pre-emption of local authority to regulate aircraft noise. That brief reviewed the relevant statutes, their legislative history, and the practice of federal regulation of aviation noise. The government concluded that it was Congress' intent to permit airport proprietors to impose nondiscriminatory, reasonable noise emission standards. The government's position, which was adopted by the circuit court, maintained that "under the existing statutory framework, Congress did not intend to provide, and the Executive did not intend to exercise, the power to pre-empt an airport proprietor from excluding any aircraft on the basis of noise considerations."³⁵ On June 14, 1977, the appellate court reversed Judge Pollock's decision and remanded the case for further hearing. Chief Judge Kaufman, speaking for a unanimous court, found "the ground for Judge Pollack's grant of summary judgment . . . simply untenable."³⁶

³² *Id.* at 1226.

³³ *Id.* at 1223.

³⁴ *Id.* at 1226.

³⁵ Brief for the United States, as *amicus curiae*, *British Airways Bd. v. Port Auth. of N.Y.*, 558 F.2d 75 (2d Cir. 1977).

³⁶ *British Airways Bd. v. Port Auth. of N.Y.*, 558 F.2d 75, 81-82 (2d Cir. 1977) [hereinafter cited as *Concorde II*]. The case was remanded to the district court for determination of whether or not the Port Authority's 13-months delay in promulgating a noise emission standard for Concorde was unreasonable, and whether such delay was so excessive as to constitute unfair discrimination and an undue burden on commerce. On August 17, 1977, the district court concluded

The far reaching impact of an otherwise trivial event³⁷ explains the intensity of the interest in this issue and the willingness of the protagonists to invest substantial time and money in the prosecution of their position. The political and economic forces in tension in this controversy precluded either side from compromising its position or from accepting the decision of a lower court. Further, the outside agencies which could independently terminate the matter failed to intervene.

Concorde's sponsors, Great Britain and France, cannot concede the exclusion of the aircraft from the lucrative and prestigious New York transatlantic run. Failure to gain access to this market will require that they continue to subsidize the Concorde related operating losses of their flag carrying airlines.³⁸ Air France estimates its total Concorde losses to be \$44 million.³⁹ The importance of the New York run to the viability of Concorde is demonstrated from Air France's estimates that its four Concordes would each have to fly 2750 hours per year with a 65 percent load factor to break even on an operational basis. In 1976 Air France averaged 1190 hours per aircraft. It estimates that access to New York would add 1550 hours per year per aircraft to its operating time. In 1976 British Airways averaged an 85 percent load factor on the Washington/London run on an average of just under 85 saleable seats

that the delay in developing a standard for Concorde had been "excessive and unjustified and that the ban is discriminatory, arbitrary and unreasonable." *British Airways Bd. v. Port Auth. of N.Y.*, 437 F. Supp. 804, 806 (S.D.N.Y. 1977) [hereinafter cited as *Concorde III*]. The court enjoined the Port Authority from continuing its Concorde ban. On September 29, 1977, the Court of Appeals for the Second Circuit affirmed the district court order. *British Airways Bd. v. Port Auth. of N.Y.*, 564 F.2d 1002 (2d Cir. 1977) [hereinafter cited as *Concorde IV*]. On October 17, 1977, Justice Marshall of the Supreme Court rejected a Port Authority request for authority to maintain its Concorde ban until the Court had an opportunity to review the lower courts' decisions. Subsequently, the Port Authority did not appeal the circuit court's ruling. On November 27, 1977, commercial Concorde service was initiated into JFK.

³⁷ Six additional takeoffs and landings at two airports whose combined daily traffic exceeds 1500 such movements per day. *Coleman Report*, *supra* note 12, at 49.

³⁸ "Exact loss figures for Concorde operations between U.S. and Europe are, according to airline officials, difficult to assess." Air France estimates its overall Concorde operations produced operating losses for 1976 of \$26 million, and British Airways estimates its operating losses attributable to Concorde operations at \$14 million. Operating costs do not include capital and other indirect costs of operation. *International Herald Tribune*, July 29, 1977, at 1, col. 3.

³⁹ *AV. WEEK & SPACE TECH.*, May 9, 1977, at 22.

per flight. In the same period, Air France operated an overall 66.3 percent load factor based on an average of 90 saleable seats. The distance from Washington to London/Paris approaches the range limits of Concorde and, consequently, the normal 100-passenger capacity of the aircraft must periodically be diminished when the wind and/or atmospheric temperatures and other aeronautic factors are adverse.⁴⁰ Further, lack of a New York landing right would terminate the faint remaining prospect for an economic salvation for the Concorde program. This lingering hope, however tenuous, is based on the assumption that once granted access to JFK, the aircraft will become so popular that for self protection Pan American Airlines and Trans World Airlines will acquire and operate Concorde. Thereafter, Britain, France, and the United States will cooperate in the development and production of the next generation of supersonic aircraft.⁴¹

The parties in power in Britain and France have tenuous control of government, and neither seems willing to risk the political repercussions which would emanate from an admission of the failure of Concorde. Understandably, both French President Valéry Giscard D'Estaing and British Prime Minister James Callahan implored President Carter to assist the Concorde. Additionally, both warned of the damage to American foreign relations with their countries which would result from a continuing Concorde ban at JFK.⁴²

The forces at work on the Port Authority to maintain or reinstitute the Concorde ban at JFK are also great. While the twelve commissioners who constitute the governing body of the authority are appointed, not elected, they are certainly not immune from political influence. The governors of New York and New Jersey each appoint six residents of their states to be members of the commission, and either governor may veto a Port Authority resolution. New Jersey's Governor Brendon Byrne, whose constituents are not directly affected by the Port Authority's Concorde decision, has announced that he will support whatever decision the New York commissioners reach.⁴³ New York's Governor Hugh Carey

⁴⁰ *Id.*

⁴¹ *Supersonic Bust*, *supra* note 3, at 80.

⁴² The New York Times, Sept. 16, 1977, at A8, col. 1.

⁴³ The governor's decision was no doubt influenced by the knowledge that the

has been in the vanguard in his opposition to Concorde. In 1976, the legislature of the state of New York passed, and the governor signed, legislation which would mandate the Port Authority to deny the use of JFK to Concorde.⁴⁴ The governor was undoubtedly influenced by the activism of the groups representing environmental interests and the predominately middle class, independent voters who live in the vicinity of JFK.⁴⁵

Secretary Coleman's report estimated that approximately 485,000 residents in New York City's borough of Queens and the nearby suburban areas of Nassau County are affected by aircraft noise emissions from operations at JFK.⁴⁶ The demagogic solution to Concorde's equation makes Governor Carey's and the Port Authority's tenacious opposition to Concorde easy to understand.

The court of appeals decision may not have terminated the Concorde controversy nor have finally resolved the issues of federal pre-emption. The current injunction as modified by the court of appeals does not preclude the Port Authority from developing a nondiscriminatory standard which would in effect prohibit Concorde landings at JFK in the future. Accordingly, the extent of the federal government's pre-emption of the Port Authority's power to regulate aircraft noise emission may yet again be at issue in a Concorde-centered controversy. Alternatively, the pre-emption issue is likely to be resurrected in the context of a confrontation between domestic or foreign airlines, airport proprietors, and a public with a substantially increased environmental awareness.

The phoenix-like quality of the pre-emption issue makes it unlikely that the matter will be finally put to rest without either congressional action or a decision of the United States Supreme Court. The Congress of the United States could resolve the pre-emption conflict by passing appropriate legislation,⁴⁷ but it is not likely to intervene.

runways of the Port Authority's New Jersey air terminal, Newark Airport, are too short to accommodate Concorde (9800 feet long versus a required 13,250 feet). *NEW YORKER*, Apr. 4, 1977, at 91.

⁴⁴ New Jersey did not pass concurrent legislation. A federal court ruled that the New York statute was inoperative in the absence of such action by New Jersey. *Brown v. Carey*, No. 76-CV-103 (N.D.N.Y. May 13, 1976).

⁴⁵ *New York Times*, July 8, 1977, § A, at 1, col. 1; *NEW YORKER*, Apr. 4, 1977, at 91.

⁴⁶ *Coleman Report*, *supra* note 12, at 47.

⁴⁷ See discussion *infra* notes 52-85 and accompanying text.

The vocal and activist opposition which developed to Concorde from local domestic environmental groups and Kennedy area residents demonstrates why it is easy for Congress to duck this issue. As the Washington Post observed, the legislative bodies have purposely avoided the question and, consequently their responsibility, preferring to pass to the courts "not only the responsibility for a fair decision but the criticism that will inevitably flow from it."⁴⁸

A Supreme Court resolution of the issues in the context of a case similar to the Concorde litigation would provide a final determination of the extent of the pre-emption by the federal government of an airport proprietor's authority to regulate the noise emissions of aircraft using its facilities. The general issue of federal pre-emption of the regulation of aircraft noise emissions has received much legislative and judicial attention. The subject has been addressed by two federal statutes⁴⁹ and by the Supreme Court in *City of Burbank v. Lockheed Air Terminal, Inc.*⁵⁰ Since *Burbank*, in addition to the decision of the court of appeals in the subject Concorde case, three courts explored the extent of federal pre-emption of an airport proprietor's authority to regulate aircraft noise emissions and have arrived at differing opinions.⁵¹ In order to evaluate the philosophical rationale underlying these decisions and to synthesize from them a doctrine applicable to the issue, it is first necessary to examine the general concept of pre-emption; to understand the existing legislative scheme, its history and administrative enforcement; and to apply the judicial interpretation of the relevant statutes and regulations.

⁴⁸ The Washington Post, *quoted in* the International Herald Tribune, July 11, 1977, at 6, col. 1.

⁴⁹ The 1968 Aircraft Noise Abatement Amendments to the 1958 Federal Aviation Act codified at § 611 of the 1958 Act, 49 U.S.C. § 1431, which was adopted by Congress July 21, 1968, Pub. L. No. 90-411, 82 Stat. 395 (1968), and the Noise Control Act of 1972, 86 Stat. 1234, also codified at 49 U.S.C. § 1431 (1973).

⁵⁰ 411 U.S. 624 (1973). The Court held that the federal government had pre-empted state and local governments from exercising their police powers to control aircraft noise emissions. For further discussion, *see* notes 129-139 *infra* and accompanying text.

⁵¹ *National Av. v. City of Hayward, Cal.*, 418 F. Supp. 417 (N.D. Cal. 1976); *Air Transp. Ass'n of Amer. v. Crotti*, 389 F. Supp. 58 (N.D. Cal. 1975); *San Diego Unified Port Dist. v. Superior Court*, 67 Cal. App. 3d 361, 136 Cal. Rptr. 557 (Ct. App. 1977), *cert. denied*, 98 S.Ct. 184 (1977).

Pre-Emption Doctrine

The concept of pre-emption by the federal government of a state's authority to regulate in a field is a corollary to the Supremacy Clause of the Constitution, Article VI, Clause 2. The Supremacy Clause invalidates state enactments which conflict directly with federal statutes in a field which the Constitution has reserved to the federal government. The concept of pre-emption, which is derived from the Supremacy Clause, does not require direct conflict for its invocation.⁵² The impact of pre-emption is also wider than that of the exercise of federal power under the Supremacy Clause. A state's entire power to regulate in a field is negated under the concept of pre-emption while under the Supremacy Clause only those statutes which are in conflict with federal legislation or the Constitution are invalid. State regulation is pre-empted where it stands as "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."⁵³ The Court has identified two general categories as constituting such obstacles: (1) those situations where there is "such actual conflict between the two schemes of regulation that both cannot stand in the same area;" or (2) those areas where there exists "a congressional design to pre-empt the field."⁵⁴

The Supreme Court has held that federal pre-emption of states from regulating in a field of commerce should be avoided in the absence of a "persuasive reason"⁵⁵ and a finding that the supersession of historic state police powers was "the clear and manifest purpose of Congress."⁵⁶ Additionally, the Court has developed two guidelines for the determination of the existence of a congressional design to occupy the field: those instances where "the nature of the regulated subject matter permits no other conclusion or that Congress has unmistakably so ordained."⁵⁷ The approach to pre-

⁵² For a full discussion of the concept and application of the pre-emption doctrine, see: *The Pre-Emption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 COLUM. L. REV. 623 (1975) [hereinafter cited as *Pre-Emption Doctrine*]; and Note, *Pre-emption as a Preferential Ground: A New Canon of Construction*, STAN. L. REV. (1959). [hereinafter cited as *Preferential Ground*].

⁵³ *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

⁵⁴ *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 141 (1963).

⁵⁵ *Id.* at 142.

⁵⁶ *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

⁵⁷ *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963).

emption which is dependent on the nature of the subject matter regulated stems from *Cooley v. Board of Wardens*.⁵⁸ Such subjects do not require explicit congressional action to support a finding of pre-emption.⁵⁹ The ordination of Congress for pre-emption can be invoked directly by express statutory language or indirectly by implicit expression of congressional intent. In *Rice v. Santa Fe Elevators Corp.*,⁶⁰ Justice Douglas, writing for the Court, summarized the varying grounds from which earlier decisions had inferred congressional intent for pre-emption. These grounds were:

- (1) "The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it."⁶¹
- (2) "(T)he 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."⁶²
- (3) "(T)he object sought to be obtained by the federal law and the character of obligations imposed by it may reveal (the intent to preclude local regulation)."⁶³
- (4) "(T)he state policy may produce a result inconsistent with the objective of the federal statute."⁶⁴

The criteria established in *Rice* were most recently reaffirmed by the Supreme Court in *Burbank* and *Perez v. Campbell*.⁶⁵

Since a determination of congressional intent is a prerequisite to a decision as to whether a field of regulation has been pre-empted by the federal government, it is not surprising that an examination of the relevant Supreme Court decisions emphasizes the importance of the subject matter in determining the outcome of the decision. "Pre-emption's diversity and breadth of application makes

⁵⁸ 53 U.S. (12 How.) 299 (1852). "Whatever subjects of this power [to regulate commerce] are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress." *Id.* at 319.

⁵⁹ See *Pre-Emption Doctrine*, *supra* note 52, at 624-26.

⁶⁰ 331 U.S. 218, 230 (1947).

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ 402 U.S. 637 (1971).

abstract principles only the roughest of guides. A certain subject matter can bring Justice to an unexpected side of a controversy. . . . What matters, along with the subject matter at hand, are dominant and long-sustained attitudes toward federalism."⁶⁶ Justice Douglas observed in tracing the history of the Supreme Court decisions on pre-emption that "our prior cases on pre-emption are not precise guidelines in the present controversy, for each case turns on the peculiarities and special features of the federal regulatory scheme in question."⁶⁷

A large part of the difficulty in determining the direction which the Court is taking in cases involving the pre-emption doctrine is inherent in the dependence in a majority of the cases on discovering an inferred expression of congressional intent. The question of pre-emption is rarely directly addressed by Congress, and attempts to recreate congressional intent are most analagous to attempting to find a lost horse by postulating where you would go if you were a horse and lost.⁶⁸

Until 1973, the Court's decision emphasized the principle of absolute supremacy of the federal government and the consequent presumption for pre-emption.⁶⁹ The pervasiveness of federal regulation in a field was sufficient to infer congressional intent to preempt state authority.⁷⁰ In 1973, however, the Burger Court in a decision, *Goldstein v. California*,⁷¹ signaled a change of direction. Since then the trend of the Court has been away from inferring

⁶⁶ See *Pre-Emption Doctrine*, *supra* note 52, at 652.

⁶⁷ 411 U.S. at 638.

⁶⁸ By framing the pre-emption question in terms of specific congressional intent the Supreme Court has manufactured difficulties for itself. Apart from the difficult problem of defining what Congress' and which congressman's intent is relevant, this manner of stating the issue suggests that the pre-emption question was consciously resolved and that only diligent effort is needed to reveal the intended solution. But Congress, embroiled in controversy over policy issues, rarely anticipates the possible ramifications of its acts upon state law. Like the conflict of laws questions which are inherent in state statutes but seldom articulated, pre-emption questions are implicit in many federal statutes but remain for the courts to answer.

Preferential Ground, *supra* note 52, at 209.

⁶⁹ See *Pre-Emption Doctrine*, *supra* note 52, at 630-32.

⁷⁰ *Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947).

⁷¹ 412 U.S. 546 (1973).

congressional intent in the absence of an express legislative history and a clear congressional mandate supporting such a position. In a recent decision, the Supreme Court highlighted this change in emphasis:

Often Congress does not clearly state in its legislation whether it intends to pre-empt state laws; and in such instances, the courts normally sustain local regulation on the same subject matter unless it conflicts with federal law or would frustrate the federal scheme, or unless the courts discern from the totality of the circumstances that Congress sought to occupy the field and to the exclusion of the states.⁷²

In *Goldstein* the Court confronted the problem of federal pre-emption in the context of the question of a state's authority to regulate intrastate copyrights. The Court sustained such a California act and at the same time established a new standard which in effect created a presumption *against* pre-emption of states' rights to concurrent regulation with the federal government. Thus, states are not to be pre-empted unless the subject matters are "*necessarily* national in impact" and "such conflicts *will necessarily* arise."⁷³

In subsequent decisions the Court has more fully developed and articulated its current philosophy.⁷⁴ The Court has recently emphasized this trend in a decision validating a California labor code provision which prohibited an employer from knowingly employing an alien who is not entitled to lawful residence in the United States.⁷⁵ Writing for a unanimous court, Justice Brennan observed that it is inappropriate to presume a congressional intent to preclude local regulation.

⁷² *Malone v. White Motor Corp.*, — U.S. —, — S. Ct. —, 55 L.Ed.2d 433, 450 (1978). See also *Pre-Emption Doctrine*, *supra* note 52, at 639-54.

⁷³ The Court quoted with approval from the Federalist Papers:

We must also be careful to distinguish those situations in which the concurrent exercise of a power by the Federal Government and the States or by the States alone *may possibly* lead to conflicts and those situations where conflicts *will necessarily* arise. "It is not . . . a mere possibility of inconvenience in the exercise of powers, but an immediate constitutional repugnancy than can by implication alienate and extinguish a pre-existing right of [state] sovereignty." The Federalist No. 32, p. 243 (B. Wright ed. 1961).

412 U.S. at 554-55 (emphasis in the original).

⁷⁴ See *Rizzo v. Goode*, 423 U.S. 362 (1976); *Merrill Lynch Pierce Fenner & Smith, Inc. v. Ware*, 414 U.S. 117 (1973); and *New York State Dep't of Social Services v. Dublino*, 413 U.S. 405 (1973).

⁷⁵ *DeCanas v. Bica*, 424 U.S. 351 (1976).

Only a demonstration that complete ouster of state power—including state power to promulgate laws not in conflict with federal laws—was “the clear and manifest purpose of Congress” would justify that conclusion (citations omitted). . . . (A)n independent review does not reveal, any specific intention in the wording or the legislative history of the (federal legislation) that Congress intended to preclude even harmonious state regulation touching on aliens in general, or in the employment of aliens in particular.⁷⁶

Another Burger Court decision has raised questions as to the continuing validity of the pervasiveness of federal regulation as a basis for pre-emption. In *New York State Department of Social Service v. Dublino*⁷⁷ the Court rejected a claim that a New York regulation, which conditioned receipt of federal benefits (under the Aid to Families with Dependent Children section of the Social Security Act) on acceptance of proffered employment, was pre-empted by a provision in the Social Security Act with similar intent. The Court refused to infer pre-emption based on the pervasiveness of the federal scheme of regulation. “The Court’s rejection of the preemptive significance of the comprehensive character of the federal program cast further doubt upon the continuing validity of *Rice*.”⁷⁸

While the decisions of the Burger Court in regard to pre-emption are not doctrinally uniform, they do demonstrate an attitude towards federalism which dictates a presumption against pre-emption of states’ regulatory power. Certainly this Court will not infer such pre-emption lightly.⁷⁹

The instances when Congress has expressly stated the intent to

⁷⁶ 424 U.S. at 357-58.

⁷⁷ 413 U.S. 405 (1973).

⁷⁸ *Pre-Emption Doctrine*, *supra* note 52, at 646.

⁷⁹ Two long-standing preemptive conditions—pervasiveness and potential conflict—have been reexamined. As to the former, the Court indicated its protective attitude toward state power by depriving complex federal regulatory schemes of any *prima facie* preemptive implications. If the questioning of the latter leads to its permanent rejection, the conflict ground will be thrust back to being merely the correlative of specific intent to occupy the field embodied in the “actual” conflict standard. . . .

. . . The Burger Court’s most recent decisions suggest that where Congress has not made clear its intention to preempt, or where a conflict is unripe or peripheral to the purpose of the federal statute, state legislation will be allowed to stand.

Pre-Emption Doctrine, *supra* note 52, at 653.

pre-empt state regulation in a field are rare.⁸⁰ A majority of the cases concerning pre-emption have therefore been dependent on a judicial determination of the intent of Congress, and have accordingly led to extensive reliance on the legislative history of the subject regulation. Unfortunately, forays into the legislative history never produce clearcut or convincing results.⁸¹ Most frequently, these exercises by the courts are only makeweights for decisions reached by a determination of the compatibility of the state regulation with the general purpose of the federal statute.⁸² The legislative and administrative histories of the relevant federal enactments affecting the regulation of aircraft noise emissions are far from conclusive to establish the intent of Congress in this regard. Nonetheless, the courts which have addressed this question have examined the extensive legislative history of the relevant legislation and utilized their interpretation thereof to support their conclusions.⁸³ The problems inherent in attempting to decide the question of pre-emption by reliance on and interpretation of the intent of Congress is demonstrated by the *Burbank* case.⁸⁴ There, the majority relied on its interpretation of the congressional purpose and intent as determined from the legislative history of the controlling statute as a basis for inferring the finding of pre-emption. One commentator has noted "for each cite offered, Judge Rehnquist, dissenting, countered with authority that the congressional intent was *not* to disturb the existing federal, state, and local governments balance of power."⁸⁵ Despite the obvious weakness of this approach, the inquiries into legislative and administrative histories are nonetheless the best available evidence in the absence of a clear statement of congressional purpose or intent.

⁸⁰ For example, the Warehouse Act, 7 U.S.C. §§ 241-273 (1970), explicitly precludes state regulation of certain aspects of warehouse receipts.

⁸¹ See *Preferential Ground*, *supra* note 52, at 209.

⁸² *Id.* at 210. See also *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977), where the Court invalidated the California regulation of the labeling requirement for flour as pre-empted by the congressional purpose of the Fair Packaging and Labeling Act.

⁸³ See discussion *infra* notes 140-96 and accompanying text.

⁸⁴ See discussion *infra* notes 125-39 and accompanying text.

⁸⁵ Warren, *Airport Noise Regulation: Burbank, Aaron and Air Transport*, 5 ENV'TL AFF. 97, 104 (1976).

Legislative History

The Federal Aviation Act of 1958 (the "Act")⁸⁶ as amended governs the federal government's role in regulating air commerce. The Act reaffirms the doctrine which was first established in the Civil Aeronautics Act of 1938⁸⁷ that "the United States of America is hereby declared to possess and exercise complete and exclusive national sovereignty in the air space of the United States."⁸⁸ The Act assigned to the Federal Aviation Administrator primary responsibility to develop and administer federal programs for air safety and for the promotion of air commerce.⁸⁹ The 1966 legislation which created the Department of Transportation transferred primary responsibility in both these areas to the Secretary of that Department. It then reassigned to the Director of the Federal Aviation Administration the responsibility for air safety.⁹⁰ In recognition of the need for a standardized uniform system to control the use of navigable air space, navigation facilities and air traffic control systems, and the certification of pilots and aircraft, Congress vested pre-emptive federal authority in the FAA. The Administrator has been granted extensive and broad authority in

⁸⁶ 72 Stat. 731, 49 U.S.C. §§ 1301 *et seq.* The first federal legislation in this field was the Air Commerce Act of 1926, 44 Stat. 568. It was superceded by the Civil Aeronautics Act of 1938, 52 Stat. 973, 49 U.S.C. §§ 1301 *et seq.*, which was the immediate predecessor of the 1958 Act.

⁸⁷ The Civil Aeronautics Act of 1938 provided that "there is recognized and declared to exist in behalf of any citizen of the United States a public right of freedom of transit in air commerce through the navigable air space of the United States (June 23, 1938, Ch. 601, § 3, 52 Stat. 973)." 49 U.S.C. § 403 (1952).

⁸⁸ 49 U.S.C. § 1508(a) (1970).

⁸⁹ 49 U.S.C. § 1346 (1970).

⁹⁰ The basic national policies established in the Federal Aviation Act are set forth in § 103, 49 U.S.C. § 1303 of that Act which provides public interest standards including:

(a) The regulation of air commerce in such manner as to best promote its development and safety and fulfill the requirement of national defense;

(b) The promotion, encouragement, and development of civil aeronautics;

(c) The control of the use of the navigable air space of the United States and the regulation of both civil and military operations in such airspace in the interest of the safety and efficiency of both;

...

(e) The development and operation of a common system of air traffic control and navigation for both military and civil aircraft.

order to attain the national policies recognized by the Act.⁹¹ The courts which have considered the question have consistently acknowledged the congressional intent to pre-empt state and local governments from enforcing any regulation which affects airspace use and management, aviation safety, and control of air traffic.⁹²

None of the federal enactments affecting aviation noise have contained express statements concerning the question of federal pre-emption of the field of regulation. In fact, the Act and its predecessors were silent on the question of control of aircraft noise. In 1968, Congress enacted an aircraft noise abatement amendment to the Act which directed the FAA, after consultation with the Secretary of Transportation, to prescribe rules for the control of aircraft noise.⁹³ On November 18, 1969, the FAA implemented

⁹¹ Section 1348 of the Act provides in part:

(a) Use of airspace. The Administrator is authorized and directed to develop plans for and formulate policy with respect to the use of navigable airspace; and assign by rule, regulation, or order the use of the navigable airspace under such terms, conditions, and limitations as he may deem necessary in order to insure the safety of aircraft and the efficient utilization of such airspace. . . .

(c) Air traffic rules. The Administrator is further authorized and directed to prescribe air traffic rules and regulations governing the flight of aircraft, for the navigation, protection, and identification of aircraft, for the protection of persons and property on the ground, and for the efficient utilization of the navigable airspace, including rules as to safe altitudes of flight and rules for the prevention of collision between aircraft, between aircraft and land or water vehicles, and between aircraft and airborne objects.

⁹² *Allegheny Airlines v. Village of Cedarhurst*, 238 F.2d 812 (2d Cir. 1956); *Rosenham v. United States*, 131 F.2d 932 (10th Cir. 1942); *American Airlines v. Town of Hempstead*, 272 F. Supp. 226 (E.D.N.Y. 1967).

⁹³ Codified at § 611 of the 1958 Act, 49 U.S.C. § 1431 (1970), which was adopted by Congress July 21, 1968, Pub. L. No. 90-411, 82 Stat. 395.

(a) Consultations; standards; rules and regulations.

In order to afford present and future relief and protection to the public from unnecessary aircraft noise and sonic boom, the Administrator of the Federal Aviation Administration, after consultation with the Secretary of Transportation, shall prescribe and amend standards for the measurement of aircraft noise and sonic boom and shall prescribe and amend such rules and regulations as he may find necessary to provide for the control and abatement of aircraft noise and sonic boom, including the application of such standards, rules, and regulations in the issuance, amendment, modification, suspension, or revocation of any certificate authorized by this subchapter.

(b) Considerations determinative of standards, rules, and regulations.

In prescribing and amending standards, rules, and regulations under

the provisions of Section 611 by promulgating regulations which adopted a uniform technique for measuring aircraft sound emissions and established the first aircraft noise limitations.⁹⁴ These regulations set limits on the noise emission of aircraft of new design⁹⁵ and dictated that the standards adopted would be extended to newly manufactured aircraft of existing design as soon as the requisite technology was developed.⁹⁶

In response to what it perceived as foot dragging by the FAA in implementing rules to reduce noise emissions for aircraft, Congress passed the Noise Control Act of 1972.⁹⁷ This enactment amended Section 611 of the Act to require consideration of the effect on the "public health and welfare from aircraft noise and sonic boom;" deleted the term "unnecessary" from the description of the noise which the section intended to regulate; added the EPA to the rule-making process;⁹⁸ and prohibited certification of any new aircraft which does not meet FAR-36 standards.⁹⁹ The 1972 amendments

this section, the Administrator shall—

- (1) consider relevant available data relating to aircraft noise and sonic boom, including the results of research, development, testing, and evaluation activities conducted pursuant to this chapter and chapter 23 of this title;
- (2) consult with such Federal, State and interstate agencies as he deems appropriate;
- (3) consider whether any proposed standard, rule or regulation is consistent with the highest degree of safety in air commerce or air transportation in the public interest;
- (4) consider whether any proposed standard, rule or regulation is economically reasonable, technologically practicable, and appropriate for the particular type of aircraft, aircraft engine, appliance, or certificate to which it will apply; and
- (5) consider the extent to which such standard, rule or regulation will contribute to carrying out the purposes of this section.

⁹⁴ Federal Aviation Regulation, Part 36, 14 C.F.R. § 36 (1977) (*FAR 36*) establishes measuring points at standardized locations from which aircraft noise is measured for certification purposes. Such measurements are specified at three points, one under the approach path (one nautical mile from the runway), and one to the side of the runway at the point from maximum noise during takeoff (0.35 nautical miles for four-engine aircraft, 0.25 nautical miles for two and three-engine aircraft). At these points the intensity of sound emission is measured, and a "single event" noise measurement, usually expressed in Effective Perceived Noise Level in decibels (*EPNdb*), is made.

⁹⁵ 14 C.F.R. § 36.201 (1970).

⁹⁶ 14 C.F.R. § 36.1 (1970).

⁹⁷ 86 Stat. 1234, 49 U.S.C. § 1431 (Supp. V 1975).

⁹⁸ 49 U.S.C. § 1431(b)(1) (Supp. V 1975).

⁹⁹ 49 U.S.C. § 1431(b)(2) (Supp. V 1975).

directed the Environmental Protection Agency to propose noise control rules to the FAA which must publish the proposed rules in 30 days and commence hearings within 60 days.¹⁰⁰ Within a reasonable time the FAA is required to either promulgate the proposed rule, with or without modifications, or publish a notice declining to promulgate the rule and explaining the reasons for its action.¹⁰¹ The Department of Transportation and the FAA announced that they will require the modification by retrofit or retirement of all aircraft in the commercial fleet which do not yet meet the FAR-36 noise level.¹⁰²

The Senate Commerce Committee report on the 1968 noise abatement amendment to the Federal Aviation Act is informative of the congressional intent in regard to pre-emption of airport proprietors from regulating the noise emissions of aircraft using their facilities. The report emphasized the intent to continue the prohibitions on the exercise by state and local governments of their police powers to control the flight of aircraft.¹⁰³ The report further quoted with approval from a letter from Secretary of Transportation Boyd which emphasized this intention.¹⁰⁴

In regard to the bill's effect on the rights of airport proprietors, the Committee endorsed Secretary Boyd's position.

¹⁰⁰ 49 U.S.C. § 1431(c)(1) (Supp. V 1975).

¹⁰¹ 49 U.S.C. § 1431(c) (Supp. V 1975).

¹⁰² U.S. DEPT OF TRANSPORTATION, AVIATION NOISE ABATEMENT POLICY 35-42 (1976) [hereinafter cited as ANAP]. The "retrofit or retire" time tables are: 8 years for B-720, B-707, DC-8, CV-990; and 6 years for B-727, B-737, DC-9, BAC 1-11, and B-747. (About 45 early models do not meet the standards.) Approximately 77 percent of the present fleet (1654 aircraft) do not meet FAR 36 standards. *Id.* at 40-41.

¹⁰³ The report stated:

The bill is an amendment to a statute describing the powers and duties of the Federal Government with respect to air commerce. . . . It is not the intent of the committee in recommending this legislation to effect any change in the existing apportionment of powers between the Federal and State and local governments. . . . Of course, the authority of units of local government to control the effects of aircraft noise through the exercise of land use planning and zoning powers is not diminished by the bill. Finally, since the flight of aircraft has been preempted by the Federal Government, State and local governments can presently exercise no control over sonic booms. The bill makes no change in this regard.

S. REP. NO. 1353, 90th Cong., 2d Sess. 6-7 (1968).

¹⁰⁴ The courts have held that the Federal Government presently preempts the field of noise regulation insofar as it involves controlling

In this regard, we concur in the following views set forth by the Secretary in his letter to the committee on June 22, 1968: . . . "the proposed legislation will not affect the rights of a State or local public agency, as the proprietor of an airport, from issuing regulations or establishing requirements as to the permissible level of noise which can be created by aircraft using the airport. Airport owners acting as proprietors can presently deny the use of their airports to aircraft on the basis of noise considerations so long as such exclusion is nondiscriminatory."¹⁰⁵

Thus, the legislative history of the Noise Control Act of 1972 reaffirms the congressional intent to pre-empt state and local police powers in the field of regulation of aircraft operations, but to leave unchanged the power of airport proprietors to establish regulation of aircraft noise emissions.¹⁰⁶

The Senate report of the Committee of Public Works on Senate Bill 3342 stated:

the flight of aircraft. Local noise control legislation limiting the permissible noise level of all overflying aircraft has recently been struck down because it conflicted with Federal regulation of air traffic. *American Airlines v. Town of Hempstead*, 272 F. Supp. 226 (E.D.N.Y. 1966). . . . H.R. 3400 would merely expand the Federal Government's role in a field already preempted. It would not change this preemption. State and local governments will remain unable to use their police powers to control aircraft noise by regulating the flight of aircraft.

Id. at 6.

¹⁰⁵ *Id.* The Secretary's letter went on to say:

Just as an airport owner is responsible for deciding how long the runways will be, so is the owner responsible for obtaining noise easements necessary to permit the landing and takeoff of the aircraft. The federal government is in no position to require an airport to accept service by a larger aircraft and, for that purpose, to obtain additional noise easements. The issue is the service desired by the airport owner and the steps it is willing to take to obtain the service. In dealing with this issue, the federal government should not substitute its judgment for that of the states or elements of local government who, for the most part, own and operate our nation's airports. The proposed legislation is not designed to do this and will not prevent airport proprietors from excluding any aircraft on the basis of noise considerations.

Id. at 7.

¹⁰⁶ The House Report which accompanied H.R. 11021 provides:

[N]o provision of the bill is intended to alter in any way the relationship between the authority of the Federal Government and that of the State and local governments that existed with respect to matters covered by section 611 of the Federal Aviation Act of 1958 prior to the enactment of the bill.

H.R. REP. NO. 92-842, 92d Cong., 2d Sess. 10 (1972).

States and local governments are preempted from establishing or enforcing noise emission standards for aircraft unless such standards are identical to standards prescribed under this bill. This does not address responsibilities or powers of airport operators, and no provision of the bill is intended to alter in any way the relationship between the authority of the Federal government and that of the State and local governments that existed with respect to matters covered by section 611 of the Federal Aviation Act of 1958 prior to the enactment of the bill.¹⁰⁷

Senate Bill 3342 was subsequently amended by Senator John Tunney to include an express pre-emption provision. At the time he sponsored the amendment, Senator Tunney stated:

[T]here was no intention in the committee bill to alter the relative power of the federal government, state and local governments, and airport operators over the control of aircraft noise. This amendment would also retain the same powers for all parties.¹⁰⁸

The Senate version of the bill, however, was never adopted by the House. Instead, the Senate passed, with amendment, a House version of the bill which was silent on the question of pre-emption.¹⁰⁹

Administrative Interpretation

The FAA has consistently recognized that the federal government has not pre-empted airport proprietors' authority to regulate the noise emissions for aircraft using their facilities. The preamble to FAR-36 provided:

Responsibility for determining the permissible noise levels for aircraft using an airport remains with the proprietor of that airport. The noise limits specified in Part 36 . . . are not intended to substitute federally determined noise levels for those more restrictive limits determined to be necessary by individual airport proprietors in response to the locally determined desire for quiet and the locally determined need for the benefits of air commerce.¹¹⁰

Further, the Aviation Noise Abatement Policy ("ANAP") which was jointly issued by the Department of Transportation and the Federal Aviation Administration on November 18, 1976, specifically acknowledged the existence of this proprietorial right on nu-

¹⁰⁷ S. Rep. No. 92-1160, 92d Cong., 2d Sess. 10-11 (1972).

¹⁰⁸ 118 CONG. REC. 35,868 (Oct. 13, 1972).

¹⁰⁹ *Id.* at 35,886.

¹¹⁰ 34 Fed. Reg. 18,355 (1969).

merous occasions.¹¹¹ ANAP posed a solution to the aircraft noise problem after considering what is technologically and financially attainable and dividing the responsibilities among "airport proprietors, federal and local government agencies, air carriers, and manufacturers."¹¹² The ANAP statement also promulgated a noise compliance rule for existing aircraft not already subject to FAR-36 restrictions.¹¹³ A section of the report commenting on the legal responsibilities of the various parties noted that the powers of an airport proprietor "to control what types of aircraft use its airports, to impose curfews or other use restrictions, and, subject to FAA approval, to regulate runway use and flight paths" were not pre-empted.¹¹⁴

Thus, while Congress has not clearly or unequivocally expressed its intent, the legislative history and administrative interpretation of the relevant federal legislation offer support for the contention that Congress did not intend to pre-empt airport proprietors from regulating aircraft noise emission at their facilities.

Judicial Background

Griggs v. Allegheny County,¹¹⁵ a 1962 Supreme Court decision which did not directly involve the question of pre-emption, supplies incisive background into much of the controversy surrounding the locus of control of aircraft noise emissions. In *Griggs*, a Pennsylvania court determined that plaintiff's property had been taken by virtue of the aircraft operations at Allegheny County Airport. The controversy was whether the taking was a consequence of federal or local governmental action. A seven justice majority of the court allocated the financial liability for the taking of an air easement over plaintiff's property to the county airport proprietor, not to the federal government. The Court observed that it had been established in *U. S. v. Causby*¹¹⁶ that the glide path for landing or the flight path for takeoff was not part of the navigable air space which Congress had declared as being in the public

¹¹¹ ANAP, *supra* note 102, at 2, 5, 9, 32-34, 50-55, 58, 59.

¹¹² *Id.* at 2.

¹¹³ *See* note 94 *supra*.

¹¹⁴ ANAP, *supra* note 102, at 34.

¹¹⁵ 369 U.S. 84 (1962).

¹¹⁶ 328 U.S. 256 (1946)

domain. The Court held that the county as "promoter, owner, and lessor of the airport, was in these circumstances the one who took the air easement in the constitutional sense."¹¹⁷ In support of this decision, Justice Douglas writing for the majority, noted that the county determined (subject to the approval of the Civil Aeronautics Administration) the location of the airport and all of the significant design criteria. "The Federal Government takes nothing; it is the local authority which decides to build an airport vel non, and where it is to be located."¹¹⁸

Several of the courts which have considered *Griggs*¹¹⁹ have interpreted that decision as standing for the proposition that the federal government is immune from liability for all consequences of airport operations.¹²⁰ Such a broad extrapolation of *Griggs* goes too far and is responsible for generating irrelevant issues which unnecessarily complicate the question of pre-emption of an airport proprietor's right to regulate aircraft noise emissions. A much narrower reading is appropriate. *Griggs* mandates immunity from liability for the federal government where its actions are indirect and constitute a relatively minor involvement in the major decisions relating to the airport. Dictating operating procedures for aircraft safety or requiring federal grants for airport construction would be such activities.¹²¹ The philosophical underpinnings of *Griggs* are valid under such circumstances. More extensive federal intervention such as directing an airport to accept aircraft whose noise emissions exceed reasonably established limits or an order to lengthen runways certainly exceeds the scope of the *Griggs* ruling and would most likely subject the federal government to liability for any consequence of such action.¹²² The federal government's

¹¹⁷ 369 U.S. at 89 (footnote omitted).

¹¹⁸ 369 U.S. at 89.

¹¹⁹ *British Airways Bd. v. Port Auth. of N.Y.*, 558 F.2d 75 (2d Cir. 1977); *National Av. v. City of Hayward*, 418 F. Supp. 417 (N.D. Cal. 1976); *Air Transp. Ass'n v. Crotti*, 389 F. Supp. 58 (N.D. Cal. 1975).

¹²⁰ 558 F.2d at 83; 418 F. Supp. at 424; 389 F. Supp. at 63-64.

¹²¹ 49 U.S.C. § 1348(c) (1970) authorizes the Administrator to dictate operating procedures. The Federal Airport and Airway Development Act of 1970, 42 U.S.C. § 1718 (Supp. V 1975), prohibits discrimination in the use of federally assisted facilities.

¹²² Despite the suggestion to the contrary in Secretary Boyd's letter, *see supra* note 105, there is adequate authority to legitimize such an order by virtue of the power conveyed to the federal government under the commerce clause.

care to avoid any action which might disturb the *Griggs* decision or to cross its boundaries is dictated by the vast extent of the aircraft noise problem¹²³ and the current allocation of the cost of correcting that problem to local proprietors. This caution explains the otherwise incongruous efforts of the government in opposing court findings of federal pre-emption of aircraft noise regulation.¹²⁴

*City of Burbank v. Lockheed Air Terminal, Inc.*¹²⁵ is the leading case concerning the extent of federal pre-emption of local governments' authority to regulate aircraft noise. The City of Burbank had adopted an ordinance establishing a curfew which made it unlawful to operate jet aircraft at the privately owned Hollywood/Burbank Airport between the hours of 11:00 p.m. and 7:00 a.m. Justice Douglas writing for a five-member majority of the Court analyzed the regulatory and legislative histories of the various federal statutes concerning aviation and concluded that, "There is to be sure, no express provision of pre-emption in the 1972 Act. That, however, is not decisive It is the pervasive nature of the scheme of federal regulation of aircraft noise that leads us to conclude that there is pre-emption."¹²⁶ The majority's judgment was that the Noise Control Act of 1972 "reaffirms and reenforces the conclusion that FAA, now in conjunction with EPA, has full control over aircraft noise, pre-empting state and local control."¹²⁷

In addition to a finding of pre-emption based on the pervasive nature of federal regulation, the Court also found the need for a

¹²³ The DOT-FAA ANAP estimated that six million Americans currently reside in areas exposed to significant airport noise and 600,000 people live within the NEF-40 contour, an area severely impacted by aircraft noise. The report also noted that in the past five years airport proprietors have paid in excess of \$25 million in legal judgments or settlements in noise related suits, and have spent over \$3 million in legal fees for the defense thereof. Further, it observed that Los Angeles had, in connection with a settlement of various lawsuits, acquired substantial residential land adjacent to the Los Angeles International Airport and had spent over \$130 million in said acquisitions, and plans to spend an additional \$21 million on soundproofing of schools and other public buildings near the airport. The report also noted that 26 airports had been classified by the Air Transport Association as "noise sensitive," and 100 airports had been identified as having noise problems of some degree. ANAP, *supra* note 102, at 17-18.

¹²⁴ In *Burbank* the Solicitor General of the United States filed a brief arguing against pre-emption. Similarly, the Justice Department's *amicus* brief filed with the court of appeals in the *Concorde II* denied federal pre-emption.

¹²⁵ 411 U.S. 624 (1973).

¹²⁶ *Id.* at 633.

¹²⁷ *Id.*

uniform and exclusive system of federal regulation in order to prevent obstruction of the purposes and objectives of Congress underlying the Federal Aviation Act.¹²⁸ The Court endorsed the district court's finding that the imposition of curfew ordinances on a nationwide basis would result in the "bunching" of flights in the hours immediately preceding or following the curfew and would, thus, cause a loss of efficiency in the use of the airways, serve to aggravate the noise problem, and decrease aviation safety.¹²⁹ The Court adopted the district court's finding that "such a result is totally inconsistent with the objectives of the federal statutory and regulatory scheme."¹³⁰

Justice Douglas, however, specifically limited the extent of the Court's finding of federal pre-emption to those instances where state and local governments attempt to control aircraft noise by using their police powers to regulate the flight of aircraft.¹³¹ In its review of the background of the Federal Aviation Act, as amended, the Court cited various portions of the legislative history of the 1968 and 1972 amendments of Section 611 of the Act which tended to confirm a congressional intent to permit airport proprietors to impose nondiscriminatory restrictions in the use of their airports based on noise considerations.¹³² The Court went on to quote from the letter of Secretary of Transportation Boyd which expressed the view that the 1968 amendment to the Act would leave undisturbed the rights of a proprietor of an airport to issue nondiscriminatory regulations establishing permissible levels of noise which can be created by aircraft using their facilities. In the much quoted footnote 14, Justice Douglas noted:

[W]e are concerned here not with an ordinance imposed by the City of Burbank as "proprietor" of the airport, but with the exercise of police power. . . . *Thus, authority that a municipality may have as a landlord is not necessarily congruent with its police power. We do not consider here what limits, if any, apply to a municipality as a proprietor.*¹³³

¹²⁸ *Id.* at 639.

¹²⁹ *Id.* at 627, 639.

¹³⁰ *Id.* at 627.

¹³¹ *Id.* at 635 n.14.

¹³² *Id.*

¹³³ *Id.* at 635 n.14 (emphasis added).

Justice Rehnquist writing for the dissenters¹³⁴ interpreted the same legislative history which had been considered by the majority and came to a conclusion that there was insufficient expression of congressional intent to infer pre-emption. The dissenters' interpretation of the legislative history was to a large extent dictated by their perception of the basic structure of federalism, their preference for decentralism, and their expansive view of states' powers.¹³⁵ Justice Rehnquist emphasized that states should not be pre-empted from exercising their historic police powers "unless the requisite pre-emptive intent is abundantly clear."¹³⁶ Rather, he found that "the history of congressional action in this field demonstrates . . . an affirmative congressional intent to allow local regulation"¹³⁷ The finding by the dissenters of a congressional intent to allow local regulation of aircraft noise disposed of the majority's assertion of pre-emption of state powers based on a theory of pervasiveness of federal regulatory schemes. Justice Rehnquist's search of the legislative history led him to the conclusion that the congressional purpose in enacting Section 611 was to control aircraft noise emissions through "study and regulation of the 'source' of the problem—the mechanical and structural aspects of jet and turbine aircraft design."¹³⁸ Accordingly, he concluded that permitting municipalities to regulate aircraft noise through the use of their police power was not an obstacle to the accomplishment of the purposes of Congress and, hence, not pre-empted.¹³⁹

Post-Burbank Decisions

The *Burbank* decision left unanswered two questions which are central to determination of the pre-emption issues which were raised in the *Concorde* case. One question concerns the extent of federal pre-emption of state regulations which attempt to control the

¹³⁴ Justices Stewart, Marshall and White joined Justice Rehnquist's opinion.

¹³⁵ The dissenters cited with approval from *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959). "[D]ue regard for the presuppositions of our embracing federal system, including the principle of diffusion of power not as a matter of doctrinaire localism but as a promoter of democracy. . . ." *Id.* at 243, quoted in 411 U.S. at 643 (emphasis added by the Court).

¹³⁶ 411 U.S. at 643.

¹³⁷ *Id.* at 653.

¹³⁸ *Id.* at 650.

¹³⁹ *Id.* at 652.

effects of aircraft noise. This is clearly an area of residual state authority to control aircraft noise emissions. As Justice Rehnquist observed, *Burbank* does not preclude a local government from regulating aircraft noise indirectly by use of its zoning powers or by permanently closing down an airport it owns.¹⁴⁰ The boundary between prohibited and permitted state action, between curfew and zoning, has yet to be established. The second question is whether airport proprietors are exempt from the pre-emption, whatever its ultimate extent, which the court determined applicable to police powers. Since the *Burbank* decision, these questions have been addressed by four courts,¹⁴¹ including the court of appeals' decision in the *Concorde* case. The extent of federal pre-emption of an airport proprietor's authority to enact aircraft noise regulation for aircraft using its facilities was expressly undecided in *Burbank* although the Court noted that the "FAA, now in conjunction with EPA, has full control over aircraft noise, pre-empting state and local control."¹⁴²

In *Air Transport Association of America v. Crotti*¹⁴³ a three-judge federal court considered the constitutionality of a California statute¹⁴⁴ which required the California Department of Aeronautics to adopt noise regulations governing the operation of aircraft at all airports in California other than those operated by the United States. The standards adopted pursuant to the statute fell into two categories, (1) Community Noise Equivalent Level ("CNEL") which established as of January 1, 1986, maximum levels of airport noise to which residential communities could be exposed, required airports with noise problems to establish a Noise Impact Boundary by monitoring and measuring noise levels, and suggested various techniques for attaining the mandated noise levels; and (2) Single Event Noise Exposure Levels ("SENEL") which established

¹⁴⁰ *Id.* at 653.

¹⁴¹ *National Av. v. City of Haywood*, 418 F. Supp. 417 (N.D. Cal. 1976); *Air Transp. Ass'n v. Crotti*, 389 F. Supp. 58 (N.D. Cal. 1975); and *San Diego Unified Port Dist. v. Superior Court*, 67 Cal. App. 3d 361, 136 Cal. Rptr. 557 (Ct. App.), *cert. denied*, ___ U.S. ___, 98 S. Ct. 184 (1977).

¹⁴² 411 U.S. at 633.

¹⁴³ 389 F. Supp. 58 (N.D. Cal. 1975).

¹⁴⁴ CAL. PUB. UTIL. CODE §§ 21669-69.4 inclusive, and the implementing regulations thereof, 4 CAL. ADM. CODE, §§ 5000-80.5 (referred to as California Noise Standards adopted Nov. 25, 1970), *cited in* 389 F. Supp. at 60.

maximum noise emission levels for aircraft in flight.¹⁴⁵ The *Crotti* court thus faced the question of determining the extent of federal pre-emption of the state's authority to regulate aircraft noise emissions both as a sovereign, through use of its police powers, and as an airport owner, through use of its proprietary powers.¹⁴⁶ The plaintiffs contended that any local regulation of aircraft noise emission was pre-empted by the federal government and per se void under the holdings of *Burbank*.¹⁴⁷ The district court found this interpretation of *Burbank* overbroad. The court concluded from the legislative history of Section 611, the FAA regulations issued thereunder, and from footnote 14 of *Burbank* that:

(T)he (a)irlines' total reliance upon *Burbank* is misplaced. The factual picture supporting *Burbank* is of a narrow focus, a single

¹⁴⁵ 389 F. Supp. at 62.

¹⁴⁶ The Court noted that the regulations issued by an airport proprietor did not lose that character merely because the action was directed by the state through invocation of its police power.

The power of the State to generally regulate its political subordinates, including local airport authorities, is well established as a matter of law. *City of Trenton v. N.J.*, 262 U.S. 182, 185-87 (1923); *Transworld Airlines v. City & County of San Francisco*, 228 F.2d 473 (9th Cir. 1955).

Id. at 64 n.2.

¹⁴⁷ One commentator has stated the issue in *Crotti* as "the question to be decided was, what are legitimate local regulations and what are not?" Warren, *Airport Noise Regulation: Burbank, Aaron and Air Transport*, 5 ENV'T'L AFF. 97, 117 (1976). This statement of the issues in *Crotti* appears appropriate. The alternate assertion that *Crotti* stands for the proposition that some regulation of aircraft in direct flight is permissible, is erroneous. At one point in the opinion, the court stated, "The Airlines' position narrows to the simple contention that any control and regulation of the levels of noise generated by aircraft in direct flight is pre-empted by the federal government; . . ." 389 F. Supp. at 362 (emphasis added). If this were the question addressed in the opinion and the subject of the later observation concerning the airlines' misplaced "reliance on *Burbank*," the opinion would contain an internal contradiction. Such an interpretation would have the court inferring in one portion of the opinion that airport proprietors were not pre-empted from regulating aircraft in "direct flight" while in another portion of the opinion it invalidated SENEL for attempting "regulation of noise levels which occur when aircraft is in direct flight." *Id.* at 65. Additionally, the court suggested that that portion of the CNEL regulations, § 5011(d), which suggested "reduction of the flight frequency, particularly in the most noise sensitive time periods and by the noisier aircraft," appeared "suspect" and "threatening." *Id.* at 61. Further, the court noted in its conclusion that "we conclude that the CNEL provisions and regulations are not per se invalid as delving into and regulating the field of aircraft operation engaged in direct flight, which is pre-empted unto the federal government. . . ." *Id.* at 65 (emphasis added). Thus, in order to make the decision logically consistent, the court's finding must be addressed to the question as stated above.

police power ordinance of a municipality—not an airport proprietor—intending to abate aircraft noise by *forbidding* aircraft flight at certain night hours. The holding in *Burbank* is limited to that proscription as constituting an unlawful exercise of the police power in a field pre-empted by the federal government¹⁴⁸

Accordingly, the Court concluded that an airport proprietor was not pre-empted from exercising *all* controls over airport noise.¹⁴⁹

The district court noted that the monitoring provisions were passive and innocuous to air traffic, and in no way intruded on the federal regulation of flight operations and air space management. The court concluded:

(S)tate-dictated employment of shielding and ground level facility configurations, as well as development of compatible land uses under the provisions of CNEL, is so patently within local police power control and beyond the intent of Congress in the federal legislation that further discussions would be wasteful.¹⁵⁰

The court further concluded that the CNEL provisions intruded on the federal control of aircraft flights and operations. The regulations were per se an unlawful attempt to exercise a control which had been declared pre-empted in *Burbank*.¹⁵¹

Accordingly, the *Crotti* court envisioned a limited airport proprietor exception to the *Burbank* decision.¹⁵² The source of the power exercised, be it proprietary or police power, was immaterial to a determination of permissibility. Rather, the limitation was established by drawing the boundary line so that passive ground regulation was permitted (land use regulation and airport shielding), but direct control by regulation of noise emanating from aircraft was prohibited.¹⁵³

In *National Aviation v. City of Hayward*,¹⁵⁴ a federal district

¹⁴⁸ *Id.* at 63.

¹⁴⁹ *Id.* at 63-64.

¹⁵⁰ *Id.* at 65.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ The court noted that a portion of the methodology recommended under CNEL, § 5011(d), was suspect in that it recommended "reduction of the flight frequency, particularly in the most noise sensitive time periods and by the noisier aircraft." The court, however, declined to consider the enforceability of such regulation until the question was at issue. 389 F. Supp. at 65.

¹⁵⁴ 418 F. Supp. 417 (N.D. Cal. 1976).

court considered a curfew ordinance which the City of Hayward, California, adopted in its capacity as proprietor of the Hayward Air Terminal.¹⁵⁵ The ordinance prohibited aircraft operations at the airport between 10:00 p.m. and 7:00 a.m. by aircraft which exceeded a noise level of 75 dBa. The ordinance provided criminal penalties for operations in excess of the noise limits which it established. The city contended that in adopting the ordinance in controversy it was acting not as a municipality but rather in its role as proprietor of the Hayward Airport and that, as such, its control of aircraft noise emissions was exempt from the pre-emptive finding of *Burbank*.¹⁵⁶ The plaintiffs countered that the Hayward regulations were invalid by virtue of federal pre-emption of regulation of aircraft noise emissions. They further argued that a decision permitting a municipal airport proprietor to regulate the noise levels of aircraft using its facilities would produce an anomalous result, "namely that a municipality that owns an airport would be free to exercise police powers in the field of airport noise regulation, which powers if identically exercised by a different municipality or state would unlawfully intrude into an area said to have been pre-empted by Congress."¹⁵⁷

In order to evaluate the plaintiff's contention, the court examined the legislative history of the relevant federal enactment, the administrative regulatory practice pursuant to that legislation, and the judicial precedents established by *Griggs*, *Burbank*, and *Crotti*.

Judge Peckham observed that both parties' positions contained inherent contradictions. A finding that there is a proprietor's exception to *Burbank*, which would "comport with the court's holding in *Griggs*, . . . [would] severely undercut the rationale of *Burbank's* finding of pre-emption."¹⁵⁸ A finding that an airport proprietor is precluded from regulating aircraft for the purpose of reducing noise emissions would "impose upon airport proprietors the responsibility under *Griggs* for obtaining the requisite noise easements, yet deny them the authority to control the level of

¹⁵⁵ Hayward, Cal. Ordinance 75-023 C.S. (Oct. 14, 1975).

¹⁵⁶ 418 F. Supp. at 421.

¹⁵⁷ *Id.* at 423.

¹⁵⁸ *Id.* at 424.

noise produced at their airports.”¹⁵⁹ The court determined, influenced largely by the 1968 letter of Secretary of Transportation Boyd to the Senate Commerce Commission,¹⁶⁰ that it was the clear intent of Congress *not* to “prevent airport proprietors from excluding any aircraft on the basis of noise consideration.”¹⁶¹ Therefore, the ordinance was sustained.

The court’s decision in *Hayward* is deprived of some of its precedential efficacy by virtue of several flaws in the court’s logic. While the result appears correct, the rationale used to support that result is deficient in several regards. Judge Peckham resolved the dilemma which he perceived as existing as a result of the conflict between the dictates of *Griggs* and *Burbank* in favor of *Griggs*. Yet, this conflict did not in fact exist and, if it did exist, was a consequence of the *Griggs* decision irrespective of the court’s finding in *Burbank*. Additionally, if an accommodation had to be made between the *Griggs* decision and *Burbank*, it was *Burbank* that should have been favored.

Griggs and *Burbank* conflict only if *Griggs* is read broadly and *Burbank* narrowly. An action mandated by a regulation issued under federal pre-emption can impose liability on an airport proprietor *only* if *Griggs* exculpates the federal government from liability for *any* such exercise of its authority. Such a reading of *Griggs* is inappropriate.¹⁶² Further, the court concluded that adoption of “the proprietor exception”¹⁶³ which was recognized in “the dicta in footnote 14 of the *Burbank* opinion”¹⁶⁴ would “severely undercut the rationale of *Burbank’s* finding of pre-emption.”¹⁶⁵ The concept that at the very least the *Burbank* majority acknowledged in footnote 14 the possibility of an airport proprietor exemp-

¹⁵⁹ *Id.*

¹⁶⁰ See notes 103-06 *supra* and accompanying text.

¹⁶¹ 418 F. Supp. 424, quoting S. REP. NO. 1353, 90th Cong., 2d Sess. 6-7 (1968).

¹⁶² See notes 115-24 *supra* and accompanying text.

¹⁶³ 418 F. Supp. at 424.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* Earlier in the opinion, Judge Peckham recognized that the *Burbank* Court “was not considering ‘what limits, if any, apply to a municipality as a proprietor,’ 411 U.S. at 635-36 n.14.” 418 F. Supp. at 423. He nonetheless concluded that the legislative history of the Act, the noise regulations implemented by the FAA, and the import of *Burbank* dictated the existence of a proprietor exemption to federal pre-emption.

tion from federal pre-emption of control over aircraft noise emissions stems from a misreading of the subject footnote and occasions the *Burbank* side of the controversy. Recall that footnote in part stated:

[W]e are concerned here not with an ordinance imposed by the City of Burbank as "proprietor" of the airport, but with the exercise of police power. . . . *Thus, authority that a municipality may have as a landlord is not necessarily congruent with its police power.* We do not consider here what limits, if any, apply to a municipality as a proprietor.¹⁶⁶

It is clear that the court was distinguishing between the police powers of a municipality and the proprietary powers of an airport owner. These powers are very different and are in fact derivative from distinctive origins. Police powers are appurtenant to the sovereignty of the state while proprietary powers are an outgrowth of property rights.¹⁶⁷ The *Burbank* court's footnote should be interpreted as holding that all exercises of police power to regulate aircraft noise emissions are within the scope of the decision and therefore are pre-empted, and that exercises of proprietary or similar powers to the same end were not considered. The court of appeals, in its consideration of *Burbank*, adopted this approach and distinction as a method of rationalizing Secretary Boyd's letter and the court's finding of pre-emption.¹⁶⁸ Justice Rehnquist, in his dissent to the Supreme Court majority's finding of pre-emption, noted in regard to the finding of the court of appeals rationalization, "if the statute actually enacted drew this distinction, I would of course respect it. But since we are dealing with 'legislative history,' rather than the words actually written by Congress into law, I do not believe it is of the controlling significance attributed to it by the court below."¹⁶⁹ Thus, the conflict which Judge Peckham addressed in *Hayward* between *Griggs* and *Burbank* is nonexistent.

Even if *Griggs* is read as conferring absolute immunity from liability on the federal government, such an interpretation cannot provide a basis for restricting the court's decision in *Burbank*.

¹⁶⁶ 411 U.S. at 635 n.14 (emphasis added).

¹⁶⁷ See note 205 *infra*.

¹⁶⁸ *City of Burbank v. Lockheed Air Terminal, Inc.*, 457 F.2d 668, 674 (9th Cir. 1972).

¹⁶⁹ 411 U.S. at 651.

Judge Peckham conceded that Congress and the FAA *could*, but had not, adopted a regulatory system which would pre-empt the subject authority of airport proprietors.¹⁷⁰ It is this power which when coupled with *Griggs* creates the potential for subjecting an airport proprietor to liability without a corresponding ability to mitigate that liability. Such a result is inherent in *Griggs* and exists without regard to *Burbank's* resolution of the question of pre-emption. While such an inequitable burden on airport proprietors might be adequate grounds for reversing *Griggs*, it certainly cannot justify tampering with *Burbank*!

Finally, if there must be an accommodation between *Burbank* and *Griggs*, it is *Burbank* which should be favored. *Burbank* post-dated *Griggs* by eleven years, and it is appropriate to assume that the Court took that decision and its effects into consideration when reaching the *Burbank* decision. Further, the *Burbank* majority found that there was a requirement of a "uniform and exclusive system of federal regulation if the congressional objectives underlying the Federal Aviation Act are to be fulfilled."¹⁷¹ There are 766 airports in the United States which have been certified by the FAA to accept scheduled commercial flights.¹⁷² The enactment of curfews by a small number of these airports would be disruptive to the national air navigation system. The DOT-FAA ANAP noted that "a curfew at O'Hare, for example, would cause a major restructuring of most of the domestic air transport systems."¹⁷³ The majority's finding of pre-emption was founded on their perception of the adverse impact on aircraft safety and efficiency in the utilization of the navigable air space which would

¹⁷⁰ The dissent of Justice Rehnquist in *Burbank* acknowledged that "clearly Congress could pre-empt the field to local regulation if it chose, and very likely the authority conferred on the Administrator of the Federal Aviation Administration by 49 U.S.C. § 1431 is sufficient to authorize him to promulgate regulations effectively pre-empting local action." *Id.* at 424.

¹⁷¹ *Id.* at 639.

¹⁷² Statistical Abstract of the United States at 613 (1976).

¹⁷³ ANAP, *supra* note 102, at 22. As an illustration, the report noted that if a 10:00 p.m. to 7:00 a.m. curfew were imposed in New York, it would severely disrupt shipment and handling of air freight by requiring the rescheduling of 37 percent of the New York air cargo, 23 percent of the air-transported mail, and 5 to 13 percent of passenger movements. Other disbenefits of curfew would be the consequence of the resulting "bunching"; increased air congestion, delays, and noise during daylight hours; inefficient utilization of aircraft and ground equipment; and an according increase in operating costs and fares.

be the consequence of expanded municipal curfews.¹⁷⁴ The Supreme Court's determination of the intent and purpose of Congress was essential to its decision in *Burbank* and, accordingly, is mandated as dispositive of the issue until overruled by Congress or the Court. The rationale supporting the *Hayward* court's decision severely undercuts the philosophy supporting the *Burbank* majority's decision and therefore can be justifiably criticized.

Nevertheless, the decision of the *Hayward* court that an airport proprietor's right to regulate the noise emissions of aircraft using its facilities has not been pre-empted is philosophically supportable. The *Griggs* and *Burbank* decisions can be made consistent and the rights of airport proprietors protected if the pre-emption found in *Burbank* is considered as relating only to the exercise of police powers and leaving intact the powers which are appurtenant to the ownership of property. Under the pre-emption of the authority of a state or local government, such an interpretation, to regulate airport noise emissions can subject neither the federal nor local government to financial liability. *Griggs* held such liability devolved on the airport proprietor. Conversely, the pre-emption of the airport proprietor's right to control aircraft noise emissions could subject the federal government to financial liability.¹⁷⁵ From this distinction arises the differing conclusions as to pre-emption. It might be reasonably inferred that Congress left unsaid its intent to supplant the authority of local governments to exercise control over aircraft movements, noise emissions and the like. Such an enlargement of centralized authority is consistent with the purpose of Congress as perceived in *Burbank* and is free from adverse impact on the federal government. Conversely, it is unlikely (and probably unconstitutional) for Congress to passively or silently agree to exercise authority which would obligate the federal government for financial liability. Thus, it is consistent to infer that Congress in the interest of establishing a uniform system of federal aviation would pre-empt local governments from regulating all aspects of aircraft movements and at the same time leave intact the powers of an airport owner to reasonably regulate the same.¹⁷⁶

¹⁷⁴ 411 U.S. at 639.

¹⁷⁵ See notes 115-24 *supra* and accompanying text.

¹⁷⁶ The Airport and Airway Development Act of 1970, 49 U.S.C. § 1718 (Supp. V 1975), conditions federal approval and funding of any airport de-

Accordingly, there is adequate philosophical basis to support the *Hayward* decision.

In a well reasoned decision in the case of *San Diego Unified Port District v. Superior Court*,¹⁷⁷ the Fourth District of the California Court of Appeals rejected the assertion of an airport proprietor exception to federal pre-emption. The necessity to determine the extent of an airport proprietor's authority to regulate the noise of aircraft using its facilities came before the court in an unusual form, a tort action. The plaintiffs¹⁷⁸ alleged that they were damaged by the Port District's operation of its property¹⁷⁹ in a tortious manner in that the aircraft noise constituted a nuisance. They further contended that as an airport proprietor the District was unaffected by the federal pre-emption of police power and could control aircraft noise through the exercise of its proprietary powers.¹⁸⁰ The District countered that its authority to control aircraft was pre-empted by the federal government and that to the extent that it had complied with federal regulations and laws, its conduct could not constitute a common law nuisance.¹⁸¹

The appeals court noted that acceptance of the plaintiffs' asser-

velopment project on an agreement by the proprietor to operate the facility on reasonable terms and without discriminatory rules or rates. Those provisions of the Act at least infer a congressional acknowledgement of the authority of a proprietor to adopt such rules.

¹⁷⁷ 67 Cal. App. 3d 361, 136 Cal. Rptr. 557 (Ct. App.), *cert. denied*, ___ U.S. ___, 98 S. Ct. 184 (1977).

¹⁷⁸ Nine hundred thirty-six individuals and one church brought two actions against the San Diego Unified Port District. They were consolidated in *Britt v. San Diego Unified Port District*, San Diego Superior Court No. 379755. The court of appeals granted a prerogative writ to review the trial court's overruling of defendants' demurrer to the complaint. 418 F. Supp. at 425 n.13.

¹⁷⁹ The Port District is the proprietor of the San Diego Airport, Lindberg Field.

¹⁸⁰ 67 Cal. App. 3d at 366.

¹⁸¹ Defendants further contended that federal pre-emption precluded "not only local regulation by legislative action, but regulation by local judicial action as well, *e.g.*, *Luedtke v. County of Milwaukee*, 371 F. Supp. 1040, 1044 (E.D.Wis. 1974), *aff'd*, 521 F.2d 387, 390-391," and "the awarding of money damages is every bit as much a regulation of conduct by a court as the exercise of its equitable jurisdiction to regulate by injunction, *e.g.*, *San Diego Bldg. Trades Council v. Garmon*, (1959) 359 U.S. 236" 67 Cal. App. 3d at 365-66. The court concluded that federal pre-emption immunized defendants from claims of negligence, trespass or nuisance on account of any aircraft operations which complied with the federal laws and regulations. The District was *not* immune, however, from tort claims arising out of the management or maintenance of its facility. *Id.* at 377.

tion of an airport proprietor exception to federal pre-emption would produce the anomalous result that "a municipality or governmental agency may impose noise regulations in its capacity as airport proprietor which it could not impose under its police power"(W)e doubt the Supreme Court intended such a result."¹⁸² After observing that a majority of the Supreme Court in *Burbank* reasoned that the requirements of a uniform and exclusive federal regulation of aircraft noise control were essential to fulfill the objectives of Congress underlying the Federal Aviation Act, the Court noted that " 'if the great bulk of airport noise cases are not to be affected, . . . the rationale of *Burbank* is defeated,' " and " '*Burbank* becomes a decision of nearly unique application.' "¹⁸³

The court of appeals then examined the *Crotti* and *Hayward* precedents for a source of principles by which it might resolve the question. The *San Diego* court concluded that the *Crotti* decision was founded on a distinction based on the nature of the regulation and the activity regulated rather than the source of the power exercised.¹⁸⁴ "(B)oth the CNEL and SENEL regulations considered in *Crotti* were exercises of state police power, rather than proprietary power. If the category exercised were dispositive, . . . both types of regulation should have fallen."¹⁸⁵

In contrast, the court found that the rationale supporting the *Hayward* court's decision was dependent on distinguishing between the source of authority for regulation. Exercises of police powers were pre-empt; proprietarial control exempt. The appeals court endorsed the distinction between permitted and pre-empted airport proprietor regulation which had been adopted in *Crotti* "based on

¹⁸² *Id.* at 368. The court's suggestion of an anomalous result stems from its failure to distinguish between the nature of the power exercised by a state and an airport proprietor. As Justice Douglas noted, the "authority that a municipality may have as a landlord is not necessarily congruent with its police power." 411 U.S. at 635 n.14. The state's exercise of a police power emanates from the reserved powers of the Tenth Amendment; the proprietor's authority from the common law right to control the use of property which is appurtenant to property ownership. As to whether there is a distinction to this difference, see *infra* note 205.

¹⁸³ *Id.* at 368 (quoting from Warren, *Airport Noise Regulation*, 5 ENV'T'L AFF. 97, 106 (1976)).

¹⁸⁴ 67 Cal. App. 3d at 372.

¹⁸⁵ *Id.* at 374.

the nature of the regulation, i.e., land management v. air space management.¹⁸⁶ The court rejected the decision reached in *Hayward*, concluding that the result was erroneous in that it was inconsistent with the precedent of *Burbank*,¹⁸⁷ and had misinterpreted the holding of *Crotti*.¹⁸⁸ In its findings, the court stated:

We conclude the plaintiffs may not recover tort damages from the Port District for the harm caused by aircraft in flight. Of the federal decisions which have dealt with the authority of airport proprietors after *Burbank*, we accept the reasoning of the Court in *Air Transport Association of America v. Crotti*, *supra*, 389 F. Supp. 58, which distinguished between the airport land and facility use (held subject to local regulation) and aircraft in flight (held subject to federal regulation only). To authorize recovery from the proprietor of an airport for injuries caused by aircraft in flight would permit local liability for conduct within the exclusive federal control.¹⁸⁹

Thus, owing to different emphases, but based on equally supportable logic, the court of appeals reached the opposite conclusion regarding pre-emption from that adopted by the court in *Hayward*.

The contention that the Port Authority is pre-empted by federal regulation from banning Concorde from landing at JFK was the central issue at the original trial in *British Air. Bd. v. Port Auth. of N. Y.* ("Concorde I"). The airlines contended that this pre-emption was a consequence of two separate circumstances.¹⁹⁰ First, they contended that the pervasive federal regulation of aviation in general and noise emission of aircraft in particular preclude and pre-empt state and local governments from enacting conflicting regulation. Second, they contended that Secretary Coleman's decision of February 4, 1976, constituted a specific authorization for Concorde to land at JFK and thus pre-empted contrary action by

¹⁸⁶ *Id.*

¹⁸⁷ The result reached in *National Av. v. City of Hayward, Cal. supra* severely undercuts the *Burbank* decision. Five members of the Supreme Court found the *Burbank* ordinance incompatible with the perceived need for uniform and exclusive system of federal aircraft noise regulation. The City of Hayward ordinance seems equally incompatible; yet it was permitted to stand as an exercise of proprietary power.

Id.

¹⁸⁸ *Id.* at 373.

¹⁸⁹ *Id.* at 376.

¹⁹⁰ 431 F. Supp. at 1217.

the Port Authority. Judge Pollack in his decision relied exclusively on the latter grounds. After concluding that Congress had granted the Secretary of the Department of Transportation the requisite authority, Judge Pollack interpreted Secretary Coleman's February 4, 1976, decision as an order directing that landing rights at JFK be granted to Concorde.¹⁹¹

The Port Authority appealed Judge Pollack's decision to the court of appeals. In *British Air. Bd. v. Port Auth. of N. Y.* ("Concorde II"), the court of appeals reversed the trial court's decision and dismissed its underlying rationale in a perfunctory manner.¹⁹² The court's finding on this aspect of the issues received substantial support from an *amicus curiae* brief which was filed by the Justice Department at the court's request. The government brief argued that although President Carter and Secretary of Transportation Adams advocated allowing Concorde to land at JFK and endorsed former Secretary Coleman's decision, it was not the intention of that decision to pre-empt the Port Authority's regulation of noise at its facilities. The Justice Department advocated an even broader basis for its non-preemption position than that adopted by the appellate court. In its brief, the government denied that the Executive had statutory authority to preclude the Port Authority from establishing its own noise rules.¹⁹³

The government's construction of the Coleman decision was based on a reading of footnote six thereto as an expressed contemplation that the Port Authority would retain its traditional role as airport proprietor and the consonant ability to establish nondiscriminatory aircraft noise emission standards.¹⁹⁴ Additionally, the

¹⁹¹ *Concorde I*, 431 F. Supp. 1216, 1225 (S.D.N.Y. 1977).

¹⁹² 558 F.2d at 81.

¹⁹³ Brief for the United States, as *amicus curiae* at 4, *British Airways Bd. v. Port Auth. of N.Y.*, 558 F.2d 75 (2d Cir. 1977).

¹⁹⁴ The FAA is the proprietor of Dulles and it is therefore a part of my decision today to direct the Federal Aviation Administrator to permit one Concorde flight per day at Dulles by each carrier under the conditions noted. The situation with respect to JFK may be complicated by the fact that under federal policy that has hitherto prevailed a local airport proprietor had authority under certain circumstances to refuse landing rights. If for any legitimate and legally binding reason it should turn out that the JFK part of the demonstration could not go forward—and no one has indicated to me any such final disposition by JFK's proprietor—that would obviously be extremely unfortunate and would greatly diminish, but

government's position relied on the Environmental Impact Statement which was filed as a prerequisite to the Coleman decision and which states:

Regardless of the federal decision on the applications, the airlines must obtain any necessary authorization from the airport operators whose airports they propose to serve before flights could be conducted to those airports. In this instance, while FAA operates Dulles International Airport, the Port Authority of New York and New Jersey operates John F. Kennedy International Airport.¹⁹⁵

Even though the district court never reached the question of federal pre-emption because of its finding that federal supremacy was directly invoked by virtue of the "irreconcilable conflict" between the Secretary's order and the Port Authority ban, the court of appeals did rule on this issue, finding that Congress has not occupied the field of noise regulation to the exclusion of airport proprietors.¹⁹⁶

The court of appeals reviewed the *Crotti* and *Hayward* decisions and the legislative and regulatory history of Section 611 which has been central to the decisions of the other courts which have considered this question.¹⁹⁷ Moreover, the court was influenced by the position adopted in the government's *amicus* brief which avidly urged non-preemption, and by the FAA's endorsement in the Aviation Noise Abatement Policy of extensive proprietary rights and obligations to control aircraft noise emissions.¹⁹⁸

in my opinion it would not destroy, the validity of a demonstration. *Coleman Report*, *supra* note 12, at 3 n.6 (emphasis added).

¹⁹⁵ EIS at I-4 - I-5 as cited in brief for the United States, as *amicus curiae* at 16, *British Airways Bd. v. Port Auth. of N.Y.*, 558 F.2d 75 (2d Cir. 1977).

¹⁹⁶ 558 F.2d at 84.

¹⁹⁷ *Id.* at 82-84. See also notes 125-50 *supra* and accompanying text.

¹⁹⁸ *Id.* at 84. The ANAP statement recognized that airport proprietors could fulfill their responsibilities to reduce aircraft noise by adopting "restrictions on airport use that do not unjustly discriminate against any user, impede the federal interest in safety and management of the air navigation system, or unreasonably interfere with interstate or foreign commerce." ANAP at 5. Additionally, the policy statement concluded that even though the FAA had authority to pre-empt proprietor regulations, it explicitly rejected an extension of its pre-emptive power to preclude local proprietors' control of aircraft noise. The report stated, "we have been urged to undertake—and have considered carefully and rejected—full and complete federal pre-emption of the field of aviation noise abatement. In our judgment the control and reduction of airport noise must remain a shared responsibility among airport proprietors, users and governments." ANAP at 34.

Accordingly, the court of appeals found that the "Port Authority is vested . . .

Conclusions

The variant conclusions reached by the courts which have addressed the question of federal pre-emption of an airport proprietor's right to regulate the noise emissions of aircraft using its facilities are a consequence of the differing perspectives in which the question has been framed. The courts have attempted to discern the intent of Congress in this regard from alternative points of view: the source of power exercised (police power v. proprietary power); the nature of the entity attempting the regulation (airport proprietors v. state governmental agencies); or the type of controls at issue (active v. passive). Final judicial determination of the appropriate orientation from which to view this issue can only come from the Supreme Court.

It is unlikely that the Supreme Court, if it is presented the question, would sustain the pre-emption by the federal government of an airport proprietor's right to regulate the noise emissions of aircraft using its facilities. It is clear that there has not been any express pre-emption of such rights by either Congress or the FAA. Further, the existence of such an airport proprietor's right does not create the circumstances from which the Court has inferred congressional intent for pre-emption in other cases. Absent a determination (such at the *San Diego* court suggested had been made in *Burbank*) that all non-passive regulation of aircraft noise ultimately affects safety, efficiency, and the control of aircraft in direct flight,¹⁹⁹ there is no conflict between federal and local schemes of regulation which precludes compliance with both. Nor does the nature of the subject matter permit only one uniform system of regulation.²⁰⁰

Further, the pre-emption argument is not helped by application of the *Rice* standard of "pervasiveness" (even if still valid) to infer congressional intent to pre-empt local regulation. The legislative history supports the conclusion that Congress was concerned with the status of the entity exercising the regulation of aircraft noise

with the power to promulgate reasonable, nonarbitrary and nondiscriminatory regulations that establish acceptable noise levels for the airport and its immediate environment." 558 F.2d at 7.

¹⁹⁹ 67 Cal. App. 3d at 368.

²⁰⁰ See dissenting opinion of Justice Rehnquist in *Burbank*, 411 U.S. at 654 n.5.

rather than the nature of the regulation.²⁰¹ Congress recognized that airport proprietors have the obligation to obtain noise easements and, accordingly, intended to preserve the proprietors' authority to exclude aircraft from the use of their facilities based on noise considerations.²⁰² The adoption of this interpretation of congressional intent to permit proprietorial control also negates any assertion of a pervasiveness of federal regulation that leaves no room for state action.

The Supreme Court has substantially narrowed the grounds upon which congressional intent to pre-empt will be inferred and has adopted a presumption of validity of regulation which is state directed.²⁰³ The practice utilized by the majority in *Burbank* of inferring congressional intent for pre-emption from a pervasive scheme of federal regulation has probably been abandoned by the current Court and replaced with a requirement for a more explicit expression of congressional intent. Further, the other philosophical basis for a finding of pre-emption in *Burbank*, the potential conflict between multiple local curfew ordinances and the exclusive federal control of air safety and navigation, has also been restricted by the current Court.²⁰⁴ While this narrowing of the Court's ground for inferring pre-emption does not completely vitiate the importance of *Burbank*, it does make it unlikely that the Supreme Court will take the next step of extending the pre-emption finding to include airport proprietors.

Burbank is not dead, however. Even though the changing philosophy of the Supreme Court and the confirmation of an airport proprietor exemption cast doubt on the current validity of the rationale which supported the majority's decision, the practical effect of this decision still has great relevance. The case stands for the proposition that the federal government has pre-empted state and local governments from utilizing their police powers to regulate aircraft noise.²⁰⁵ Further, there is still ample philosophical basis

²⁰¹ See notes 86-109 *supra* and accompanying text.

²⁰² See notes 105-06 *supra* and accompanying text.

²⁰³ See notes 69-85 *supra* and accompanying text.

²⁰⁴ See note 79 *supra* and accompanying text.

²⁰⁵ The distinction between proprietorial power and police power suggested by the court of appeals in its decision in *Burbank*, 457 F.2d 667, 674 (9th Cir. 1972), and adverted to by Justice Douglas, 411 U.S. 635 n.14, is meaningful. Cf. Justice Rehnquist's dissent in *Burbank*, 411 U.S. at 564. To suggest that an airport pro-

to justify *Burbank's* continuing applicability. An ultimate effect upon aircraft in direct flight can rationally be postulated as a consequence of any airport use restriction.²⁰⁶ Congress has expressly reserved for the federal government the authority to regulate and manage navigable air space. The ouster of local governments from the field while at the same time preserving the right of an airport proprietor to regulate is not inconsistent with the federal scheme, the objective of which is to abate aircraft noise emissions while minimizing the adverse impact on aircraft safety and the interstate air transportation system.

Additionally, the considerations which support the partial exemption of airport proprietors from the federal pre-emption control of aircraft in flight do not have the same validity when applied to other local governmental agencies. A high degree of emotionality, subjectivity, and potential for demagoguery is associated with the issue of aircraft noise emissions. Accordingly, a non-proprietor municipality with an airport within its jurisdictional boundaries is unlikely to fairly and adequately balance the cost of aircraft noise abatement, which is borne only by the airport proprietor and the national air transport system, with the benefits of reduced noise levels. Further, conflicting or contradictory regulation is a probable

prietor's rights to control noise emissions are a consequence of the proprietor's police power is to suggest that many of the nation's airport proprietors are without authority to control aircraft noise emission at their facilities. Several of the nation's airports are located outside the physical boundaries of the municipalities which own the facilities. Ignoring the differentiation in the origins of the power would create the anomalous result that an airport proprietor which had no police powers (*e.g.*, Lockheed Air Terminal or Greater Cincinnati Airport) would be unable to exercise proprietary controls. Additionally, some airport proprietors are not instrumentalities of the state or local governments where the facilities are located and accordingly do not possess traditional police powers. Further, many airports are geographically located in more than one municipality which has no proprietary interest in the facilities. For example, Dallas/Fort Worth Regional Airport is jointly owned by the cities of Dallas and Fort Worth, but physically located in the separate independent municipalities of Irving, Grapevine and Euless. If permitted to regulate operating procedures or runway preferences under its police power, each municipality would mandate a different set of use restrictions so as to minimize the impact on its residents without regard to the effect on its neighbors. Such competing regulation could effectively close down the airport.

²⁰⁶ The limit of the residual authority of the state to indirectly control aircraft noise emissions has not been an essential issue in any litigation. The distinction suggested by the *San Diego* court, land management vs. air space management (*see supra* notes 186-89 and accompanying text), would appear to be an intelligent compromise of the potential conflict. Such a delineation is substantially the position adopted by the DOT and the FAA. ANAP, *supra* note 102, at 51.

result of permitting state or local governments to establish "active" regulation of aircraft noise.

The various courts which have considered the question of the extent of federal pre-emption of an airport proprietor's authority to control noise emissions for aircraft using its facilities have reached differing results based on their perception of the continuing vitality of *Burbank* and their interpretation of the reasoning by which the majority reached their decision. A finding of nonpre-emption of airport proprietors does not, however, undermine *Burbank* and is consistent with the current policy of the federal government.

The Department of Transportation and the Federal Aviation Administration are the agencies to which Congress has delegated the federal authority and responsibility for regulating aircraft noise. The determination of these agencies with regard to the desirability of airport proprietor involvement in the process of abating aircraft noise as articulated in ANAP was the result of a quasi-legislative process and, traditionally, will be accorded substantial weight by the Court. Under the circumstances and based on the issues raised in *Concorde*, it is difficult to construct any rationale which would support a Supreme Court finding of federal pre-emption of the Port Authority's right to establish reasonable and nondiscriminatory restrictions on airport noise emissions for aircraft using its facilities.