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Case Notes

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reasonableness by considering the exigency of hijacking under facts not warranting the application of that test. There is simply no hijacking threat when the suspect is not attempting to board an airplane. Furthermore, in its consideration of the threat of hijacking, the court permitted minimal self-verification of an anonymous tip to create the reasonable suspicion required to justify taking Migdall into custody. Without the threat of hijacking, the reasonable suspicion would have been reduced to "mere" suspicion and a resulting determination that such an extensive stop was illegal.

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CONSTITUTIONAL LAW—THE TWENTY-FIRST AMENDMENT—State Law Relating to Sale of Alcoholic Beverages Applies to AMTRAK. *National R.R. Passenger Corp v. Miller*, 358 F. Supp. 1321 (D.C. Kan. 1973), *aff'd.*, 414 U.S. 948 (1973). *National R.R. Passenger Corp. v. Harris*, 354 F. Supp. 887 (W.D. Okla. 1972), *rev'd*, 490 F.2d 572 (10th Cir. 1974).

On July 18, 1972, an AMTRAK train, en route from Chicago, Illinois, to Los Angeles, California, was boarded in Kansas by state officers who seized its liquor inventory and records. They also arrested the conductor, a lounge car attendant, and a dining car waiter. The seizures and arrests resulted from alleged violations of Kansas statutes which forbid, *inter alia*, the sale of liquor by the drink. AMTRAK sought an injunction to restrain defendants from enforcing the statutes arguing they were an undue burden on interstate commerce, an unreasonable exercise of state police power, a denial of equal protection, and in conflict with the supremacy clause. *Held:* For the defendants. Under the twenty-first amendment states have the power to regulate AMTRAK's liquor operations. *National R.R. Passenger Corp. v. Miller*, 358 F. Supp. 1321 (D.C. Kan. 1973), *aff'd*, 414 U.S. 948 (1973).

An identical fact situation occurred in Oklahoma City, Oklahoma, on the same date as the Kansas incident when an AMTRAK train was boarded by state and county officers who confiscated its liquor and records and arrested the lounge car attendant. AM-

TRAK sought a declaratory judgment that the Oklahoma laws did not apply, based on the theories that AMTRAK was under the exclusive control of the federal government, that the state law was an undue burden on interstate commerce, and that the law was discriminatorily enforced. AMTRAK also requested a permanent injunction to effectuate the decree sought. *Held*: For AMTRAK. The liquor operations of AMTRAK do not fall within the twenty-first amendment. On appeal—*Held*: For the appellant. Citing the Supreme Court's affirmance in *Miller*, the Tenth Circuit Court of appeals stated that under the twenty-first amendment states possess the power to regulate AMTRAK's liquor operations. *National R.R. Passenger Corp. v. Harris*, 354 F. Supp. 887 (W.D. Okla. 1972), *rev'd*, 490 F.2d 572 (10th Cir. 1974).

The cumulative impact of *Miller* and *Harris* accentuates the heretofore undefined power conflict between the twenty-first amendment and the commerce clause and arouses related constitutional considerations. The issues raised and the arguments proffered merit meticulous scrutiny for not only do they reveal the escalating struggle between two clauses of the Constitution but they also foretell the outcome of similar litigation should a state attempt to prohibit the serving of liquor on interstate aircraft.

AMTRAK was created by Congress whose authority to legislate in the area derives from the commerce clause of the United States Constitution.[1] The instigation of this train system stemmed from the desire to provide modern, efficient, interstate rail passenger service[2] which utilized, as part of its service, dining cars and lounge cars serving liquor. The problem, however, is that the states of Kansas and Oklahoma, through which AMTRAK travels, prohibit the sale of liquor by the drink in both their constitutions[3] and statutes.[4]

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[1] "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States. . . . " U.S. CONST. art. 1, § 8, cl. 3.

[2] Rail Passenger Service Act of 1970, 45 U.S.C. §§ 541 *et seq.*, 546 (c), 641 (1970).

[3] KAN. CONST. art. 15, § 10:

> . . . [T]he open saloon shall be and is hereby forever prohibited.

OKLA. CONST. art. 27, § 4:

> Prohibition of Open Saloon—Retail Sales by Package Stores—Restrictions
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> The open saloon, for the sale of alcoholic beverage as commonly known prior to the adoption of the Eighteenth Article of Amendment to the Constitution of the United States of America, is hereby prohibited.

The state laws of both Kansas and Oklahoma are grounded in section two of the twenty-first amendment of the United States Constitution:

> The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

This provision was intended to assure the dry states that they could retain that status, unhampered by the repeal of prohibition and unfettered by the commerce clause. As a further guarantee, the control of liquor regulations was deemed primarily the province of the individual states rather than the federal government. Thus, section two allows the states, via their police powers, to regulate liquor free of the congressional commerce power.[5]

That the states may wield this vast authority over alcoholic beverages has long been acknowledged by the Supreme Court. In *Ziffrin, Inc. v. Reeves*[6] the Court specified that:

> The Twenty-First Amendment sanctions the right of a State to legislate concerning intoxicating liquors brought from without unfettered by the Commerce Clause.[7]

> The words "open saloon" shall mean:
> Any place, public or private, wherein alcoholic beverage is sold or offered for sale, by the drink; or sold, offered for sale, or kept for sale, for consumption on the premises.
> Retail sales of alcoholic beverage shall be limited to the original sealed package, by privately owned and operated package stores, in cities and towns having a population in excess of two hundred. . . .

[4] KAN. STAT. ANN. tit. 41, § 803 (1949):

> It shall be unlawful for any person to own, maintain, operate or conduct either directly or indirectly, an open saloon. For the purposes of this section, the words "open saloon" mean any place, public or private, where alcoholic liquor is sold or offered for sale or kept for sale by the drink or in any quantity of less than one-half pint, or sold, offered for sale, or kept for sale for consumption on the premises where sold.

OKLA. STAT. ANN. tit. 37, § 538 (1961):

> (h) Any person who shall violate the open saloon prohibition as defined by Article XXVII of the Oklahoma Constitution shall be guilty of a misdemeanor and, upon conviction, shall be punished by a fine not to exceed Five Hundred Dollars ($500.00), or imprisoned in the county jail not to exceed six (6) months, or both such fine and imprisonment.

[5] Comment, *The Concept of State Power Under The Twenty-First Amendment*, 40 TENN. L. REV. 465, 471-73 (1973). This article also contains an excellent review of the history of the twenty-first amendment.

[6] 308 U.S. 132 (1939).

[7] *Id.* at 138.

This holding was reiterated in *Carter v. Virginia*:[8]

> By interpretation of this Court the Amendment has been held to relieve the states of the limitations of the Commerce Clause over such transportation or importation.[9]

While it might appear that the twenty-first amendment would consequently be controlling in both *Miller* and *Harris*, its power was circumvented in the latter case. Notwithstanding its subsequent reversal, the conclusions of the *Harris* court expose assumptions about the dominance of congressional power while simultaneously disparaging the states' plenary power over liquor regulation.

To remove the case from the domain of the twenty-first amendment, the *Harris* court employed untested versions of two basic arguments:

> (i) Pre-emption
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> By the enactment of the Rail Passenger Service Act of 1970 . . . the Congress . . . by the authority of the Commerce Clause of the Constitution has preempted for the Federal Government exclusive authority to regulate and control the interstate rail passenger service provided by AMTRAK. . . .[10]
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> (ii) Enclave Exemption
>
> Sale of liquor on the interstate vehicle can logically be compared to sale within a Federal enclave located within the State of Oklahoma which the State has no power to prohibit.[11]

The basis of the *Harris* court's findings that Congress pre-empted the regulation of AMTRAK to the exclusion of the states was 54 U.S.C. § 546(c) (1970):

> The Corporation shall not be subject to any State or other law pertaining to the transportation of passengers by railroad as it relates to rates, routes, or service.

The *Harris* court interpreted the statute as evidencing such pervasive federal regulation that even though no federal statute specifically permitted the sale of liquor on AMTRAK, state control had

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[8] 321 U.S. 131 (1944).

[9] *Id.* at 137.

[10] 354 F. Supp. at 892.

[11] *Id.*

been pre-empted.[12] In *Harris* the rationale for pre-emption was the need for uniformity of services.[13] Conversely, the court in *Miller*, when confronting an identical fact situation, held that if "service" is to be construed as including the sale of liquor by the drink, the statute would be a "clear violation of the Twenty-First Amendment" since there can be no pre-emption of state legislation which is grounded on the Constitution.[14] In order to prevent the federal statute from being declared unconstitutional the *Miller* court concluded the word "service" must be construed to exclude the serving of intoxicating liquor in violation of state law.[15] This interpretation was based upon the tenet of construction that when a statute is susceptible of a constitutional construction as well as an unconstitutional one, the court will adopt the meaning which will save the act.[16]

Previous decisions addressing the relation between the twenty-first amendment and the commerce clause did not involve congressional action; rather, they dealt with the influence of state legislation on interstate commerce. In *Heublein, Inc. v. South Carolina Tax Commission*[17] the Supreme Court indicated that it had never squarely determined how the twenty-first amendment affects congressional power under the commerce clause.[18] Two theories do exist, however, that provide guideposts to a plausible resolution.

A court could give the twenty-first amendment the reading approved in *California v. LaRue*.[19] There it was unsuccessfully argued that state regulations allowing suspension of a liquor license of a nightclub with bottomless female entertainers violated the first amendment.[20] Since the regulations were grounded on the twenty-first amendment, they were upheld by the Court. Consequently, *LaRue* affirmed the state's power to control liquor making its au-

[12] On pre-emption *see* 2 C. ANTIEAU, MODERN CONSTITUTIONAL LAW § 10.24 (1969).

[13] 354 F. Supp. at 892.

[14] 358 F. Supp. at 1329.

[15] *Id.* The *Miller* court found nothing in the legislative history of the twenty-first amendment or the federal statute that required another interpretation.

[16] NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937).

[17] 409 U.S. 275 (1972).

[18] *Id.* at 282 n.9.

[19] 409 U.S. 109 (1972).

[20] *Id.* at 123-39 (Marshall J., dissenting).

thority almost absolute and precluding pre-emption by the federal government.[21]

A second and seemingly more apropos theory is reflected in *Epstein v. Lordi*[22] and *Hostetter v. Idlewild Bon Voyage Liquor Corp.*[23] both of which explored the interaction of the twenty-first amendment and the commerce clause. In *Hostetter* the Court reasoned that the twenty-first amendment and the commerce clause are such that each must be considered in the light of the other and in the context of the issues and interests at stake in any given fact situation; in short, a balancing test becomes mandatory.[24] In *Epstein* the court read *Hostetter* as requiring a two-pronged test that first necessitated a determination of whether the twenty-first amendment applied to the liquor in question (*i.e.*, whether the liquor had entered the state "for delivery or use therein") while the second phase called for a case by case weighing of the national interests protected by the commerce clause and the state interests protected by the twenty-first amendment.[25] Whether the state law is pre-empted would thus depend upon an examination of the nature of the competing interests.

The district court in *Harris* appears to have relied on the latter theory: the fact that the liquor sales were made only to bona fide passengers and that no liquor was served while the trains were momentarily stopped in the stations is emphasized. Additionally, the effect of liquor sales on the "welfare, health, peace, temperance, and safety of the citizens of Oklahoma" was not deemed of sufficient consequence to outweigh the need for national uniformity of service.[26]

In contrast, the *Miller* court's reliance on the *LaRue* decision[27] leaves little doubt but that it perceived the state's power as being

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[21] Comment, *State Power to Regulate Liquor: Section Two of the Twenty-First Amendment, Reconsidered*, 24 SYRACUSE LAW REV. 1131, 1153 (1973). While the twenty-first amendment does give the states great power in the control of liquor, this power is not absolute. *See* Wisconsin v. Constantineau, 400 U.S. 433 (1971), where the state statute was found to deny the due process requirements of the fourteenth amendment.

[22] 261 F. Supp. 921 (D.N.J. 1966).

[23] 377 U.S. 324 (1964).

[24] *Id.* at 332.

[25] Epstein v. Lordi, 261 F. Supp. 921, 933 (D.N.J. 1966).

[26] 354 F. Supp. at 890, 892-93.

[27] 358 F. Supp. at 1330.

unequivocal. The Supreme Court's affirmance of the *Miller* court's decision without comment[28] clearly reasserts the strength of the twenty-first amendment. In so doing, the Supreme Court has said, by implication, that not only were the state laws in question a valid application of police power but also that liquor cannot be served on AMTRAK trains in violation of state law since Congress lacks the power to pass legislation permitting such sales.[29]

The *Harris* court's second explanation excluding AMTRAK from the state laws and the twenty-first amendment does not appear in *Miller* but it nonetheless requires examination due to its potential impact on interstate airlines. In contending that AMTRAK trains should be accorded the same status as federal enclaves,[30] the *Harris* court has produced a neoteric proposition. Federal jurisdiction of areas within a state is based on U.S. Const. art. I, § 8, cl. 17.[31] The Supreme Court has repeatedly held that where the federal government has acquired property, either by purchase or by condemnation, and the state has ceded its jurisdiction, the federal government has exclusive control with the exception that the state may qualify its cession by reservations not inconsistent with government uses.[32] In *Johnson v. Yellow Cab Transit Co.*[33] and again in *Collins v. Yosemite Park & Curry Co.*,[34] the Court reasoned that where exclusive jurisdiction is in the federal government, the twenty-first amendment is inapplicable.

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[28] 414 U.S. 948 (1973).

[29] 358 F. Supp. at 1329-30.

[30] National R.R. Passenger Corp. v. Harris, 354 F. Supp. 887, 892 (W.D. Okla. 1972). Although this theory was not advanced in *Miller*, AMTRAK did raise the issue of federal instrumentality in that case. The *Miller* court refused to grant AMTRAK that status. National R.R. Passenger Corp. v. Miller, 358 F. Supp. 1321, 1330 (D. Kan. 1973), *aff'd*, 414 U.S. 948 (1973).

[31] U.S. CONST. art. 1, § 8, cl. 17:

> [A]nd to exercise like Authority [exclusive legislation] over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings; . . . .

[32] *E.g.*, James v. Dravo Contracting Co., 302 U.S. 134, 146-47 (1937); Collins v. Yosemite Park & Curry Co., 304 U.S. 518, 528 (1938).

In OKLA. STAT. ANN. tit. 80, §§ 1, 2, 4, 8 (1965), Oklahoma consents to the purchase or condemnation of any land within the state by the U.S. Government for the purposes described in the U.S. CONST. art. 1, § 8, cl. 17, and cedes to the U.S. its jurisdiction. Rights are reserved for service of process and taxation of corporations on military reservations.

[33] 321 U.S. 383 (1943).

[34] 304 U.S. 518 (1938).

As with the pre-emption theory, the explication for bestowing the status of an enclave on AMTRAK is terse. The *Harris* court declared:

> Sale of liquor on the interstate vehicle can logically be compared to sale within a Federal enclave located within the State of Oklahoma which the State has no power to prohibit. . . . AMTRAK's lounge cars and aircraft engaged in the interstate transportation of passengers, being Federally regulated vehicles, may well be termed peripatetic Federal enclaves created by the Congress.[35]

Two possible interpretations may be given to this declaration. The *Harris* court either is affirming that AMTRAK trains are in fact federal enclaves or is asserting that they are to be accorded the same status because the logic that applies to federal enclaves should by analogy apply to AMTRAK. No precedent supports the construction that the trains are a type of federal enclave. Since exclusive federal jurisdiction becomes possible only through the federal ownership of the property, this reading lacks plausibility.[36]

The alternative contention that the trains could logically be compared to enclaves and should consequently be granted identical standing is logical but equally unprecedented. AMTRAK, though not a government agency,[37] does possess genuine similarities to such an agency since it was created by Congress and at least in its inception resembled one. It is controlled by the federal government and provides a nationwide service. More importantly, the Rail Passenger Service Act of 1970 allows the Interstate Commerce Commission to order railroads to allocate tracks and facilities at the request of AMTRAK conditioned upon just payment.[38] This provision gives AMTRAK a power akin to condemnation which results in exclusive federal jurisdiction, absent a reservation. If AMTRAK can procure for its use the tracks and facilities of private railroads, it possesses what amounts to a property interest therein. This property interest plus its quasi-governmental character make the enclave theory tenable if somewhat uncomfortable.

Although *Harris* dealt only with AMTRAK trains, it is significant

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[35] 354 F. Supp. at 892.

[36] *See* note 32 *supra* and accompanying text.

[37] 45 U.S.C. § 541 (1970) provides: "The Corporation will not be an agency or establishment of the United States Government."

[38] 45 U.S.C. § 562 (1970).

that the district court in *Harris* would also extend enclave status to aircraft engaged in interstate transportation.[39] This gratuitous inclusion of aircraft illuminates potential ramifications of *Harris* and, more significantly, of *Miller*: the possibility of a state's prohibiting the serving of liquor on interstate aircraft.[40]

While state air traffic regulations have regularly been deemed invalid where they conflict with federal laws, it is important to note that this supremacy of federal power is grounded in the commerce clause[41] rather than in federal jurisdiction of airspace.[42] The federal control of interstate air traffic as well as federal control of AMTRAK has its basis in the commerce clause—the constitutional provision which the twenty-first amendment was specifically designed to counteract.[43] Thus, any congressional attempt to legalize the sale of liquor on aircraft based upon the commerce clause would conflict with *Miller*, since "before a federal law may preempt state legislation, the federal statute must be free from constitutional infirmity."[44] Of equal likelihood is the failure of a pre-emption argument based on the pervasiveness of federal regulation.

The "peripatetic enclave" argument of *Harris* did not surface in the Tenth Circuit Court of Appeals, and thus remains an untested theory lacking the authority of precedent. In addition, the district court's effort to extend enclave status to the airlines strains awkwardly under the incongruity of comparing a moving aircraft to Fort Sill. The problematical matter of ownership also arises; AMTRAK, despite its profit motives, is a creation of Congress whereas the airlines are purely private organizations. Hence, a dubious label

[39] 354 F. Supp. at 892.

[40] An opinion of the Attorney General of Texas, Apr. 26, 1968, espoused the position that it was unlawful for an air carrier to sell intoxicating liquor in the air above Texas, regardless of the point of destination or point of origin of the flight. 3 AV. L. REP. ¶ 23,167.

[41] Allegheny Airlines v. Village of Cedarhurst, 238 F.2d 812, 814 (2d Cir. 1956).

[42] Even though the Supreme Court in *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624, 626-27 (1973) alludes to the notion of complete and exclusive federal sovereignty in the airspace of the U.S. based on 49 U.S.C. § 1508 (1972), the Court preferred to rely on the pervasive nature of the federal regulation in finding pre-emption. One court has specifically held that nothing in 49 U.S.C. § 1508 (1972) indicates an intent to pre-empt the traditional functions of state law (in this case, tort liability), McEntire v. Estate of Forte, 463 S.W.2d 491, 494 (Tex. Civ. App. 1971), *writ ref'd n.r.e.*

[43] *See* notes 6-9 *supra* and accompanying text.

[44] 358 F. Supp. at 1329.

attached to vehicles like AMTRAK becomes even more dubious when attached to interstate aircraft. If a state were to attempt enforcing its liquor laws on interstate aircraft, it seems apparent that an airline argument employing pre-emption and/or the commerce clause would fail with the "peripatetic enclave" concept offering only marginal comfort.

Nevertheless, the holding in *Miller* is not necessarily dispositive since a credible argument for airline autonomy can be derived from the interpretation of the interaction between the twenty-first amendment and state police power. It can be persuasively argued that the twenty-first amendment does not grant unlimited power to the states to regulate liquor since it was designed to prevent the commerce power of Congress from overwhelming state police powers in this area.[45] As such it should be seen not as a grant of power but as a protection of extant authority.[46] In order to constitute a valid exercise of a state's police power, a statute must bear some rational relationship to legitimate state purposes.[47] Although the Supreme Court has shown a degree of deference to state legislatures and to the validity of state statutes,[48] it has been increasingly willing to strike down statutes using the reasonableness test.[49] Clearly, the difficulty in perceiving any deleterious impact upon the citizens of a state from liquor sales aboard a moving train increases substantially when applied to such sales aboard an aircraft and arguably bears no relationship to any legitimate state purpose.

However, it must be recalled that the Court declared in *LaRue* that:

> [T]he broad sweep of the Twenty-First Amendment has been recognized as conferring something more than the normal state authority over public health, welfare, and morals.[50]

How much "more" is unclear. Perhaps the twenty-first amendment has evolved into a grant of power to the states distinct from their

[45] Comment, *The Concept of State Power Under The Twenty-First Amendment*, 40 TENN. L. REV. 465, 471-73 (1973).

[46] It must be remembered that the United States Constitution grants powers to the federal government, not to the states.

[47] San Antonio Independent School Dist. v. Rodriguez, ___ U.S. ___, 93 S. Ct. 1278, 1308 (1973).

[48] *Id.*

[49] Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972).

[50] 409 U.S. at 114.

police powers—a power whose limits are as yet undefined but apparently reached in neither *Miller* nor *Harris*.

The Supreme Court's affirmance of *Miller* accords the states authority to regulate the sale of liquor on AMTRAK and in so doing spurns the argument for pre-emption. While the "peripatetic enclave" concept of *Harris* remains untested, it is relevant that this theory was not raised in *Miller* or addressed on appeal in the Tenth Circuit, indicating its uncertain status. Of equal import, however, are the judicial trends herein examined. Whereas the older decisions refused to permit the circumvention of state liquor laws by application of the commerce clause,[51] more recent decisions seem reluctant to elevate one provision of the Constitution over another.[52] Apparently, the states' plenary power to control liquor now assumes virtually absolute precedence although this preeminence of state power spawns essential questions concerning its strength and its limits.

Resolutions to the controversy may eventually be found should the states attempt to force the airlines to observe their liquor regulations. Since aircraft, like AMTRAK trains, are mobile entities within state boundaries, they might presumably also be subjected to local control. The standard arguments for excepting airlines from state law—burden on interstate commerce and pre-emption—have been crippled if not destroyed by *Miller*. In addition, if the twenty-first amendment is something "more" than police power, a question exists as to the need to show a valid application of such power. Though the outcome of such a case remains conjectural, one factor is predictable: the Supreme Court's affirmance of *Miller* as well as the Tenth Circuit's holding in *Harris* are quantum steps towards allowing states to regulate the sale of liquor on interstate aircraft. Currently dormant interest in this area may be due for an awakening.

Peter B. Heister

[51] *See* notes 6-9 *supra* and accompanying text.

[52] *See* notes 22-25 *supra* and accompanying text.

CLASS ACTION—MASS ACCIDENT LITIGATION—Class Action is Appropriate Procedure for the Determination of Severed Liability Issue in Mass Accident Litigation Arising Out of a Mid-Air Collision. *Petition of Gabel*, 350 F. Supp. 624 (C.D. Cal. 1972).

On June 6, 1971, a collision between an Air West DC-9 jet liner enroute from Los Angeles and a United States military jet near Duarte, California, resulted in 50 deaths. Individual tort actions were filed against the United States, Air West and Lt. Schiess, the surviving co-pilot of the military jet. The actions remained severed as to damages but were consolidated on the issue of liability in the California district court. Glenda Gabel, individually and in her capacity as guardian of her two minor children, petitioned the California district court to try the consolidated tort actions as a class suit—the class to consist of all persons having a compensable interest as a result of the death of any passenger killed in the collision. *Held, so ordered*: The severed liability issue from a mass accident arising out of a mid-air collision may be maintained as a class action when the prerequisites of rule 23(a)[1] and 23(b)[2] of the Federal Rules of Civil Procedure are met. *Petition of Gabel*, 350 F. Supp. 624 (C.D. Cal. 1972).

Several prominent authorities have maintained that mass accidents are generally inappropriate for class action treatment.[3] The Federal Rules Advisory Committee in 1966 suggested that a class suit for personal injury claims might degenerate into multiple, separate suits.[4] Professor Kaplan, the Committee's Reporter, later questioned the "superiority" of a class action when compared with other procedural devices for handling mass accident litigation.[5]

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[1] FED. R. CIV. P. 23(a).

[2] FED. R. CIV. P. 23(b).

[3] Weinstein, *Revision of Procedure: Some Problems in Class Actions*, 9 BUFF. L. REV. 433, 469 (1960); *see also* notes 4 & 5 *infra*.

[4] A 'mass accident' resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple law suits separately tried.

FED. R. CIV. P. 23, Advisory Comm. Note, 39 F.R.D. 69, 103 (1966).

[5] Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 393 (1967).

Other authorities, however, challenge the position taken by the Federal Rules Advisory Committee.[6] Professor Moore argues that "class action treatment is particularly strong in cases arising out of mass disasters such as an airplane crash in which there is little chance of individual defenses being presented."[7] Professors Wright and Miller agree and further state that "the fact that damages may raise highly individual issues that depend on such factors as the claimant's age, earning capacity, and other personal considerations, should not always require the disallowance of a class action (in mass accident situations)."[8]

Typically the initial prerequisites of rule 23(a) are satisfied by a mass accident case. The number of plaintiffs arising from the common disaster is usually large enough to support a determination by the court that joinder of all members is impractical.[9] Furthermore, the number of class members is multiplied when deaths result from a mass accident such as an air crash. By severing the liability issue[10] and allowing the class members to litigate the issue of damages in their chosen forums, the prerequisites of common questions of law or fact are met.[11] Finally, it is strictly within the court's discretion to select the class member who will best represent and protect the interests of the class.[12]

Since the prerequisites of rule 23(a) are ordinarily satisfied by a mass accident, it may seem peculiar that comparatively few mass accident cases have employed the class action device. Prior to the revision of rule 23 in 1966, however, class actions were not appropriate for mass accident litigation because the rights of all parties,

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[6] *See* notes 7 & 8 *infra.*

[7] 3B J. MOORE, FEDERAL PRACTICE, 23.45(3), at 23-311 n.33 (2d ed. 1969).

[8] 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1783, at 117 (1972).

[9] FED. R. CIV. P. 23(a)(1) provides that the court must determine that the class is so numerous that joinder of all members is impracticable.

[10] *See* Weinstein, *Routine Bifurcation of Jury Negligence Trials: An Example of the Questionable Use of Rule Making Power,* 14 VAND. L. REV. 831 (1961); 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2388, at 279-81 (1971).

[11] FED. R. CIV. P. 23(a)(2) provides that the court determine that there are questions of law or fact common to the class. FED. R. CIV. P. 23(a)(3) directs that the court determine that the claims and defenses of the representative parties are typical of the claims and defenses of the class.

[12] FED. R. CIV. P. 23(a)(4) directs that the court determine that the representative parties will fairly and adequately protect the interests of the class.

including those not before the court, could not be conclusively determined by the class suit.[13] Furthermore, in order for the action to be tried as a federal class suit under revised federal rule 23, not only must all the prerequisites in subdivision (a) be satisfied, but so also must at least one of the categories of subdivision (b).[14]

Rule 23(b) is comprised of three subdivisions with each subdivision denoting a distinct variety of class suit. Those authorities who support class action treatment for mass accident litigation generally agree that only subdivision (b) (3) of rule 23 is appropriate.[15] Subdivision (b) (3) requires that questions common to the class predominate over any individual questions and that the class action be superior to any alternative methods for the fair and efficient adjudication of the controversy.[16] A major reason for the parsimonious use of the class action in personal injury tort cases has been a judicial tradition approving alternative procedures.[17] This tradition is predicated on arguments concerning the magnitude and very personal nature of each individual claim.[18] Moreover, the contingent fee concept generally makes it feasible for claimants to obtain attorneys regardless of their financial resources. In rare instances, however, subdivision (b) (3) has been applied to deter-

[13] Under the old rule, a mass accident class action was "spurious" and absent class members were not bound by an adverse judgment. Pennsylvania R.R. v. United States, 111 F. Supp. 80, 90-92 (D.N.J. 1953).

[14] FED. R. CIV. P. 23(b).

[15] *See* notes 7 & 8 *supra.*

[16] Only if there is some equally promising alternative can class action treatment ordinarily be denied. Korn v. Franchard Corp., 456 F.2d 1206 (2d Cir. 1972).

[17] Alternative procedures include: (i) separate individual actions with agreement for "test case" disposition, *see* Doherty v. Bress, 262 F.2d 20 (D.C. Cir. 1958); (ii) separate individual actions, with pretrial consolidation under 28 U.S.C. § 1407 (1970), followed by transfer for all purposes under 28 U.S.C. § 1404 (1970) and consolidation under FED. R. CIV. P. 42(a), *see In re* Multidistrict Civil Actions Involving Air Crash Disaster Near Hanover, N.H., 342 F. Supp. 907 (D.N.H. 1971); *In re* Mid-Air Collision Near Fairland, Ind., 309 F. Supp. 621 (Jud. Pan. Mult. Lit. 1970); *In re* Mid-Air Collision Near Hendersonville, N.C., 297 F. Supp. 1039 (Jud. Pan. Mult. Lit. 1970); (iii) separate individual actions, wih applicaion of expanding concepts of collateral estoppel, *see In re* Air Crash Disaster, Dayton, Ohio, 350 F. Supp. 757 (S.D. Ohio 1972); United States v. United Air Lines, Inc., 216 F. Supp. 709, 728 (E.D. Wash. & D. Nev. 1962), *aff'd sub nom.* United Air Lines, Inc., v. Weiner, 335 F.2d 379 (9th Cir.), *petition for cert. dismissed, sub nom.* United Air Lines, Inc. v. United States, 375 U.S. 951 (1964).

[18] FED. R. CIV. P. 23(b)(3)(A) directs the court to consider the interest of members of the class in individually controlling the prosecution or defense of separate actions.

mine the liability issue in mass accident cases.[19] All of these early applications of mass accident class actions have involved only damage to property.[20]

The first case to consider the propriety of the class action to an air crash mass accident was *Hobbs v. Northeast Airlines.*[21] In *Hobbs* the plaintiff's decedent was one of thirty-two people killed in a crash of a Northeast Airlines plane in 1968 near Hanover, New Hampshire. The plaintiff sued Northeast Airlines and Fairchild-Hiller, the plane's manufacturer, in the United States District Court for the Eastern District of Pennsylvania. The defendants impleaded two manufacturers of component parts, and the United States, as the party exercising control over the airport facilities. The district court denied the plaintiff's motion to proceed as a class action under rule 23 (b) (3). Although the district court agreed with the plaintiffs that the use of the class action device would produce substantial economies in judicial resources and expenses of trial preparation,[22] it concluded that the plaintiff's choice of forum was not appropriate for the class as a whole. Only the named plaintiff had any connection with Pennsylvania. The other potential class members resided in various New England states. The defendants were Massachusetts and Maryland corporations.

The parties in *Hobbs* were joined for trial in *In re Multidistrict Civil Actions Involving Air Crash Disaster Near Hanover, New Hampshire.*[23] In *Hanover* the United States District Court for the District of New Hampshire found that the liability issue was identical for all plaintiffs and all defendants. Additionally, the district court determined that the convenience of the parties and witnesses and the interests of justice would best be served by a single trial on the issue of liability. Therefore, although no party moved for maintenance of the suit as a class action, the district court nevertheless ordered that the consolidated cases be tried in the same manner as

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[19] American Trading & Prod. Corp. v. Fischbach & Moore, Inc., 47 F.R.D. 155 (N.D. Ill. 1969); Hall v. Union Oil Co., Civil No. 69-889-ALS (C.D. Cal., filed May 8, 1969); Masterson v. Union Oil Co., Civil No. 69-331-ALS (C.D. Cal. filed Feb. 19, 1969).

[20] *See* cases cited note 19 *supra.*

[21] 50 F.R.D. 76 (E.D. Pa. 1970).

[22] *Id.* at 79-80.

[23] 342 F. Supp. 907 (D.N.H. 1971).

a class action.[24] The district court viewed the damages issue as distinct for each individual plaintiff, and thus the plaintiffs were not compelled to litigate the damages issue in the liability forum.[25] The procedure followed in *Hanover* indicates that had the plaintiff in *Hobbs* sought his class action in New Hampshire, a state with more substantial contacts with the case,[26] he might have met a more receptive court.

Petition of Gabel[27] is the first mass accident case involving multiple deaths to approve the class action. In *Gabel* the United States District Court for the Central District of California determined that only the liability issue could be determined by reference to a common set of facts. Therefore the district court severed the liability issue for trial as a class action leaving the choice of forum for the damages issue to each individual plaintiff. By confining the class action to the liability issue, the district court concluded that the prerequisites of rule 23 (a) were satisfied. The district court determined that (i) it would be impracticable to try the case on the issue of liability since the class of plaintiffs numbered in excess of 100 with more than 30 sets of lawyers representing their interests;[28] (ii) there were common questions of law and fact as to liability;[29] (iii) the claims of all the plaintiffs and likewise the defenses of the United States, Air West and Lt. Schiess were typical as each had to rely

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[24] The cases . . . will be tried in the same manner as a class action. The plaintiffs' attorneys will determine which of them will try the case. For purposes of trial, the court considers the appearance of an attorney in one case as an appearance in all cases. Settlement prior to trial of the particular case in which the selected trial counsel appears will not bar that attorney from acting as trial counsel if plaintiffs desire him to do so.

In re Multidistrict Civil Actions Involving Air Crash Disaster Near Hanover, N.H., 342 F. Supp. 907, 908 (D.N.H. 1971).

[25] Two factors that caused the New Hampshire district court to reject trying the damages issue in its district were: (i) that each plaintiff stood on separate footing and that the convenience of the parties and witnesses would probably best be served by trial in the district where the case originated, and (ii) that separate trials on damages would impose a sizeable burden on the New Hampshire district and result in the postponement of many cases already scheduled for trial.

[26] The crash occurred in New Hampshire and the cases relating to the crash had been transferred to the district of New Hampshire under 28 U.S.C. § 1407 (1970) for pretrial consolidation.

[27] 350 F. Supp. 624 (C.D. Cal. 1972).

[28] *Id.* at 629.

[29] *Id.*

upon the same set of operative facts;[30] and (iv) the representative parties and their counsel would fairly and adequately represent the class.[31]

The federal district court in *Gabel* further qualified the case as a class action under subdivisions (b) (1) (A), (b) (1) (B) and (b) (2) of federal rule 23. The *Gabel* court totally ignored subdivision (b) (3). This was unusual since the (b) (3) class suit was approved in previous property damage mass accident cases[32] and was sought by the plaintiff in *Hobbs v. Northeast Airlines.*[33]

In the situation to which subdivision (b) (3) relates, class action treatment is not as clearly called for as in those described in subdivision (b) (1) or (b) (2), but it may nevertheless be convenient and desirable.[34] Subdivision (b) (3) encompasses those cases in which a class action would achieve economies of time, effort and expense and promote uniformity of decision as to persons similarly situated without sacrificing procedural fairness. Because the (b) (3) class suit is often more for convenience than for necessity, the (b) (3) class suit provides two procedural safeguards in order to insure due process for each class member. First, the (b) (3) class suit requires that individual notice be sent to those class members who can be identified[35] and, secondly, upon receipt of such notice a class member may elect to remove himself from the class.[36] Thereafter any judgment for the class is *res judicata* only as to those members of the class who have not elected to remove themselves from the class. Subdivisions (b) (1) and (b) (2) have no corresponding provisions of notice and removal, but simply provide that all those whom the court determines to be members of the class are bound by the decision.[37]

In sustaining the maintenance of the class suit under subdivision (b) (2), the United States District Court for the District of New

[30] *Id.* at 629-30.

[31] *Id.* at 630.

[32] *See* cases cited note 19 *supra.*

[33] 50 F.R.D. 76 (E.D. Pa. 1970).

[34] 59 AM. JUR. 2d *Parties* § 66, at 449 (1971).

[35] FED. R. CIV. P. 23(c)(2).

[36] *Id.*

[37] FED. R. CIV. P. 23(c)(3); *see also* Van Gemert v. Boeing Co., 259 F. Supp. 125 (S.D.N.Y. 1966); *accord,* Johnson v. City of Baton Rouge, 50 F.R.D. 295 (E.D. La. 1970).

Hampshire noted in *Gabel* that the "United States [had] failed and refused to act on the claims of the plaintiffs filed under 28 U.S.C. § 2675 within the six months' period . . . and that [s]uch inaction [made] it appropriate [for] . . . corresponding *declaratory* relief with respect to the class as a whole."[38]

The failure of the United States to act presupposes that the United States has a duty to act on the claims of the plaintiffs within the six month period. This, however, is not the case. The Federal Torts Claim Act[39] under which these plaintiffs seek to recover against the United States requires the claimant to submit his tort in writing to the appropriate federal agency before litigation. Failure of the agency to act on the claim constitutes a constructive denial for purposes of permitting suit. Since the United States is not obligated under the statute to respond to the plaintiffs' claims within the six months, its inaction could not provide a basis for the (b) (2) action in itself.[40]

There were, however, additional facts in *Gabel* which may have prompted the district court to qualify the case as a (b) (2) class action. During the discovery proceeding, the *Gabel* court granted a requested stay to the defendants, United States and Air West. The defendants informed the district court that they had arrived at a percentage contribution of settlement. The district court granted the stay conditioned on the defendants' diligent and good faith attempt to settle all claims arising from the crash. At the expiration of the stay, defendants had settled few cases. The district court took note of this failure to settle and resumed discovery proceedings on the liability issue. These facts in conjunction with the United States'

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[38] 350 F. Supp. at 630.

[39] The plaintiffs seek to recover against the defendant, United States, under the Federal Torts Claims Act. An absolute condition precedent to the institution of a Federal Torts Claims Act suit in federal district court is the administrative submission by the claimant of his tort claim in writing to the appropriate federal agency. A second condition precedent to the filing of suit, after the administrative submission of the claim, is a denial of that claim by the federal agency to which the claim was submitted. Denial may occur in one of three ways: (i) the claim may be disapproved in writing by the agency to which it was presented and sent by registered or certified mail to the claimant; (ii) the federal agency to which the claim was submitted may make an offer to the claimant less than the amount claimed; or (iii) inaction by the federal agency for a period of six months may be deemed, at the option of the claimant, a constructive denial for the purpose of permitting suit; 28 U.S.C. § 2675(a) (1970).

[40] *Id.*

failure to settle the plaintiffs' claims under 28 U.S.C. § 2675 were apparently sufficient to satisfy the (b) (2) requirement.

The major problem with the district court's application of subdivision (b) (2) is that the subsection is not intended to apply to situations in which the appropriate final relief relates exclusively or predominantly to money damages.[41] Accordingly, the word "corresponding" in subdivision (b) (2) is used to limit application of the subdivision to actions in which the declaratory relief has the effect of an injunction.[42] Although declaratory relief will be involved as an interim measure in *Gabel,* it will not be the final remedy should the class prevail. In that instance final relief will be each plaintiff's individual award of damages.

With respect to the applicability of subdivision (b) (1) (B), the federal district court in *Gabel* concluded that

> [a]djudications exonerating any one of the defendants would as a practical matter certainly impair or impede the ability of the other plaintiffs to recover against the defendant who might be exonerated. In fact, if the doctrine of *res judicata* were strictly applied in such an instance, it would not only impede or impair that ability, but deny it entirely.[43]

This language is indeed a broad interpretation of the doctrine of *res judicata.* The general rule is that a previous judgment has no binding effect on anyone not a party to the previous action.[44] Even though the defendants, Air West and the United States, might succeed in defeating the claims of one plaintiff, the remaining plaintiffs, not having had a full and fair opportunity to litigate the issue of the common defendant's liability, cannot be bound by the previous determination.

The district court in *Gabel* may have feared that some expanded theory of collateratal estoppel might be applied to subject subsequent plaintiffs to a previous decision exonerating the common defendants. The courts have on occasion abandoned the mutuality concept of collateral estoppel.[45] Furthermore, it has been said that

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[41] FED. R. CIV. P. 23, Advisory Comm. Note, 39 F.R.D. 69, 102 (1966).

[42] *Id.*

[43] 350 F. Supp. at 630.

[44] *See, e.g.,* Strong v. Aetna Cas. & Surety Co., 52 F. Supp. 787 (N.D. Tex. 1943).

[45] *See, e.g.,* Bernhard v. Bank of America, 19 Cal.2d 807, 122 P.2d 892 (1942).

the trend in the federal courts is away from the rigid requirements of mutuality of estoppel.[46]

While the trend may favor the abandonment of mutuality, it has not extended to the application of prior judgments to subsequent litigants not parties to the previous litigation. In fact, such an application would violate due process.[47] The doctrine of collateral estoppel permits application of a prior judgment to preclude relitigation of an issue previously determined on its merits, but the prior judgment can only be applied against a party to the previous action.[48]

With respect to the applicability of subdivision (b) (1) (A) the district court in *Gabel* stated that

> prosecutions of separate actions by the individual plaintiffs would create a risk of . . . inconsistent or varying adjudications on the question of liability, in which event there would be established incompatible standards of conduct for the defendants.[49]

To permit maintenance of a class action under subdivision (b) (1) (A), the court must determine that allowing members to proceed on their own will expose the common defendant to a serious risk of being put into a conflicted position.[50] It has been suggested that this requirement encompasses more than a risk that separate judgments would oblige the opposing party to pay damages to some class members but not to others or to pay them different amounts.[51] Generally the phrase "incompatible standards of conduct" refers to the situation in which different results in separate actions would impair the opposing party's ability to pursue a uniform continuing course of conduct.[52] Despite these constructions of rule 23 (b) (1) (A), the district court's literal interpretation of this subdivision in *Gabel* has a great deal of merit. The scope of an action maintainable under subdivision (b) (1) (A) is unclear.[53] In light of the

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[46] Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation, 402 U.S. at 326 (1971).

[47] *Id.* at 329.

[48] Humphreys v. Tann, 487 F.2d 671 (6th Cir. 1973).

[49] 350 F. Supp. at 630.

[50] Kaplan, *supra* note 5, at 388.

[51] 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL, § 1773, at 9 (1971).

[52] *Id.* at 9-10.

[53] Hernandez v. Motor Vessel Skyward, 61 F.R.D. 558, 561 n.8 (S.D. Fla. 1974).

expanding concept of collateral estoppel and the judicial trend toward the abandonment of the doctrine of mutuality of estoppel, the spirit of rule 23 (b) (1) (A) is fulfilled in that the class action will "provide a ready and fair means of achieving unitary adjudication."[54] By allowing each plaintiff a separate trial against the common defendants,

> it is conceivable that the defendants would be taken to task by one passenger after another until a judgment against the defendants was obtained. At that point, future plaintiffs could call the doctrine of collateral estoppel into play to bind the defendants on the issue of (liability) . . .[55]

This conclusion is suggested by recent decisions of the United States Supreme Court and the United States Court of Appeals for the Fifth Circuit which have to a great extent repudiated the doctrine of mutuality heretofore inherent in the principles of *res judicata* and collateral estoppel.[56]

The courts have increasingly abandoned the doctrine of mutuality of estoppel in order to conserve time and thereby relieve the strain of congested dockets. In commenting on the demise of the doctrine of mutuality, the United States Supreme Court said that

> [t]he courts have often discarded the rule while commenting on crowded dockets and long delays preceding trial. Authorities differ on whether the public interest in efficient judicial administration is a sufficient ground in and of itself for abandoning mutuality, but it is clear that more than crowded dockets is involved. The broader question is whether it is any longer tenable to afford a litigant more than one full and fair opportunity for judicial resolution of the same issue.[57]

The offensive use of collateral estoppel,[58] however, induces sep-

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[54] *Id.*

[55] *Id.* at 561.

[56] *See* Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation, 402 U.S. 313 (1971); Rachal v. Hill, 435 F.2d 59 (5th Cir. 1970).

[57] Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation, 402 U.S. 313, 327 (1971).

[58] Collateral estoppel is asserted offensively when a prior judgment against the defendants is held to be conclusive as to issues also raised in a later suit between a similarly situated plaintiff and the same defendant.

Comment, *Mass Accident Class Actions*, 60 CALIF. L. REV. 1615, 1628 n.89 (1972).

aration of actions,[59] and therefore would appear to consume more court time and consequently burden more court dockets when used in place of the class action. One court in one trial could establish the issue of a common defendant's liability. The liability issue thus determined would be *res judicata* as to all members of the class, and the home forum selected by each plaintiff would only determine the relatively simple and less time consuming damages issue.

Almost invariably when the requirements of subdivision (b) (1) and (b) (2) are met, the requirements of the (b) (3) are met also.[60] The district court in *Gabel* may not have considered the (b) (3) class action because of the accepted view that where the requirements of (b) (1), (b) (2), and (b) (3) are all met by the facts of the case, the case should be tried as a (b) (1) or (b) (2) class suit.[61] Therefore, once the *Gabel* court determined that the class action was maintainable under (b) (1) and (b) (2), it was unnecessary to discuss the appropriateness of the (b) (3) provision.[62] It also seems quite likely that the district court in *Gabel* favored the (b) (1) or (b) (2) class suit because of the opt out procedural safeguard built into the (b) (3) class action. The opt out provision would be very damaging to the mass accident class suit since the clever plaintiff would prefer to excuse himself from the class, knowing that should the class prevail, he might still have the opportunity to apply the decision to his benefit in a later individual suit through the offensive use of collateral estoppel.[63]

Since subdivision (b) (1) (A) compels a single trial on the liability issue, the class members could not remove themselves from the class, thereby destroying the benefits of the class suit. Savings to the courts in time and reduced docket congestion however are not the only benefits to be derived from the class action. Savings

[59] *Id.* at 1628.

[60] It seems apparent that virtually every class action that meets the requirements of 23(b)(1) or 23(b)(2) will also meet the less severe requirements of 23(b)(3). However where the stricter requirements of 23(b)(1) or 23(b)(2) are squarely presented by the plaintiffs' claims, rule 23(b)(3) is not applicable.
Van Gemert v. Boeing Co., 259 F. Supp. 125, 130 (S.D.N.Y. 1966).

[61] *Id.*

[62] Hernandez v. Motor Vessel Skyward, 61 F.R.D. 558, 561 n.8 (S.D. Fla. 1974).

[63] It has been urged that a plaintiff who chose to withdraw from a class action should not be allowed to assert offensively a judgment for the class. C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS, § 72, at 314 (1970).

are also passed along to the plaintiffs and defendants in the form of reduced litigations costs.

Perhaps the greatest single saving to the plaintiffs and the defendants is reduced attorney's fees. Under the alternatives to the class action,[64] the court cannot set the attorney's fee. In those situations the attorney is ordinarily working on a contigent fee and the court cannot disturb the attorney-client contract. On the other hand, representation of the class by counsel is not a result of a private contract but results from an opportunity to represent the class by judicial determination.[65] By declaring the suit a class action and by appointing the attorney who best represents the interest of the class, the court receives the right to determine what the attorney's "fair and reasonable" fee will be, thereby relieving the plaintiffs of the higher cumulative sum of contingent fees to individual attorneys.[66] Since the defendant will not be compelled to litigate the issue of his liability again and again, his litigation costs should also be diminished.

It appears that class suits conducted under subdivisions (b) (1) (A), (b) (1) (B), and (b) (2) of rule 23 are the most efficient for mass accident litigation because they compel a single trial on the liability issue. The applicability of subdivisions (b) (1) (B)

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[64] *See* note 17 *supra.*

[65] FED. R. CIV. P. 23(a)(4).

[66] Only reasonable charges for fees and expenses should be authorized upon approval by the court. . . .

If the litigation is concluded by determination on the merits, the court should expressly provide in the judgment, or in one of the earlier class management orders, for control by the court of the charges for attorneys' fees and expenses. . . .

Once adequate compensation sufficient to provide the motive for representation of classes is provided, no further incentive is required. In this connection, while any fee allowed in the case of a settlement or recovery through litigation may constitute a percentage of the total amount recovered, the reasonableness of the fee arrived at should not rest primarily on the selection of a percentage of the total recovery. Although the results obtained in representing the class should be given consideration as provided in the Code of Professional Responsibility, there should also be an emphasis upon the time and labor required and the effect of the allowance on the public interest and the reputation of the courts. In no event should representation of a judicially determined class be allowed on the same basis as in a contingent fee contract between competent contracting counsel and client.

MANUAL FOR COMPLEX LITIGATION, *Control of Attorney Fees and Expenses in Class Actions*, Pt. I, § 1.47, at 49-50 (1973).

and (b) (2) to future mass accident situations, however, is dubious. Subdivision (b) (1) (B) would require an extremely broad interpretation of *res judicata*.[67] Subdivision (b) (2) is limited to actions which seek injunctive or corresponding declaratory relief as a final remedy and is therefore not applicable to mass accident litigation. Subdivision (b) (3) is a possible candidate for future use in mass accident litigation. Here, however, the possibility of wholesale defection of class members through the opt out provision is that method's drawback. If large numbers of the class elect to remove themselves, the class action will prove ineffectual and the court will have wasted, rather than conserved, its valuable time. The (b) (1) (A) class suit is the most desirable for future mass accident litigation. The major problem facing such an application of subdivision (b) (1) (A) is that the decided weight of authority has construed this subdivision to be inappropriate for mass accident litigation.[68] Nevertheless, it appears that the spirit of rule 23 is fulfilled by just such an application.

Charles Bennett Lord

FIFTH AMENDMENT TAKING—INVERSE CONDEMNATION —Before a Taking Under the Inverse Condemnation Theory Will Be Found, Permanence Must Be Established Both in the Federal Activity Alleged to Have Caused the Damage and in the Resulting Burden Placed on Private Property. *Wilfong* v. *United States*, 480 F.2d 1326 (Ct. Cl. 1973).

Plaintiff, a chicken farm owner, instituted an action in the Court of Claims against the United States to recover damages, claiming that his property rights in the airspace superadjacent to his farm had been inversely condemned. He asserted that this "taking" was accomplished when frequent, violent, and noisy overflights of military aircraft directly over his property disrupted and impaired his commercial egg and poultry business; the complaint alleged that the overflights damaged plaintiff's henhouses and injured his flock,

[67] *See* notes 45-48 *supra* and accompanying text.

[68] *See* notes 50-52 *supra* and accompanying text.

thereby diminishing the value of his land. *Held, complaint dismissed for lack of jurisdiction*: To constitute a fifth amendment taking, permanence must be established both in the federal activity complained of and in the resulting effect on private property. *Wilfong* v. *United States,* 480 F. 2d 1326 (Ct. Cl. 1973).

Jurisdiction of the Court of Claims to hear an inverse condemnation action presented a problem for plaintiff in *Wilfong*. The statute governing the jurisdiction of the Court of Claims provides that the court only has jurisdiction to hear and determine "any claim against the United States founded either upon the Constitution . . . or upon any express or implied contract with the United States . . . not sounding in tort."[1] The Court of Claims has jurisdiction over a claim for relief based on inverse condemnation, which is not considered a tort but a fifth amendment taking. Since the court found in *Wilfong* that plaintiff's claim sounded in tort, it had no choice but to dismiss the complaint for lack of jurisdiction.[2] *Wilfong* therefore gives new significance to the prerequisite of permanence in inverse condemnation theory, a prerequisite that heretofore had not been a problem for property owners seeking relief from aviation overflights that lessened the value of their property, and introduces the concept of permanence in aviation "taking" cases as a jurisdictional mechanism to deny the property owner his claim for relief.

The power of eminent domain is of ancient origin. One theory developed to justify the power is that possession and enjoyment of all property are derived from a grant of the sovereign and thus subject to an implied right of reclamation by the sovereign at a later time.[3] The power of eminent domain, broadly defined as the power to take private property for public use,[4] has been said to be essential to the very existence of government.[5] There are two limitations on this power. First, the fifth amendment dictates that private prop-

[1] 28 U.S.C. § 1491 (1970).

[2] The fact that the Court of Claims did not deny the existence of consequential damages is interpreted to mean that the plaintiff may proceed under a theory of trespass or nuisance in a federal district court under the Federal Tort Claims Act. 28 U.S.C. § 1346(b) (1970).

[3] Templer, *A Landowner's View of Federal Eminent Domain in Kansas,* 18 U. KAN. L. REV. 907 (1970).

[4] BLACK'S LAW DICTIONARY 616 (4th ed. rev. 1968).

[5] Kohl v. United States, 91 U.S. 367 (1875).

erty cannot be appropriated for public use unless compensation is paid by a governmental entity.[6] The second limitation on the power of the sovereign is that the taking must be for a public use.[7]

A taking of private property may be accomplished either by condemnation or by inverse condemnation. Conventional condemnation is exercised by the appropriate condemning authority with the extent and purpose of the acquisition depending on numerous legislative and administrative factors. The landowner's remedies for such a taking are extremely limited since he may not challenge a congressional determination that the taking is necessary. The acquiring agency has the power to determine when the proceeding will be instituted and the quality and quantity of the estate to be taken. Upon commencement of proceedings in a court of law the issue of compensation is normally the only real question that the landowner may raise. There is in fact little that he can do to impede the process of formal eminent domain proceedings.

Inverse condemnation, on the other hand, describes a *de facto* taking of property by governmental activity such as the overflight of aircraft. The benefits of formal eminent domain proceedings are denied the property owner in this situation since the use of the property has already been appropriated or destroyed.

Since the arrival of the airplane as a convenient mode of travel, there has been continuing controversy over who is entitled to primary use of airspace—the aircraft or the subadjacent property owner.[8] An invasion of the superadjacent airspace by dangerous, low-flying aircraft often affects the use of the surface itself. When private property has been taken in this manner by a governmental authority, the landowner, in the exercise of his constitutional rights, may maintain an inverse condemnation action to obtain just compensation for the property taken.

[6] The fifth amendment states " . . . nor shall private property be taken for public use, without just compensation," U.S. CONST., amend. V.

[7] Note, *Techniques for Preserving Open Spaces*, 75 HARV. L. REV. 1622, 1631 (1962).

[8] At least five theories have been advanced to correlate the landowner's right to his corresponding airspace: (i) a landowner owned all of the airspace from the heavens to the depths of the earth; (ii) a landowner owned all of the airspace, but was subject to a public easement for flight; (iii) a landowner owned that amount of airspace fixed by statute; (iv) a landowner owned airspace to the extent that he could effectively possess it; and (v) a landowner owned all the airspace that he could actually occupy. Russell, *Recent Developments in Inverse Condemnation of Airspace*, 39 J. AIR L. & COM. 81 (1973).

An essential issue in any inverse condemnation suit is whether there has been a "taking" in the constitutional sense. The common law actions available to the landowner for invasion of his land by intruding aircraft operations were largely restricted to trespass[9] and nuisance.[10] In 1946 the United States Supreme Court in *Causby v. United States*[11] charted a new theory of recovery based on the fifth amendment by introducing the concept of inverse condemnation to the law of airspace. Departing from the established common law theories, the Court combined elements of trespass with those of nuisance. In *Causby* the Court distinguished the legalized nuisance cases by finding an actual invasion of the plaintiff's property.[12]

In *Causby,* the plaintiff lived near the end of a runway of an Air Force base, and bombers repeatedly swept over his land at altitudes of less than one hundred feet. Plaintiff's chicken farm operation was severely damaged by these overflights. The Court declared that even though the airspace is a public highway,[13] low and frequent flights by government aircraft that interfere with the enjoyment and use of property are takings, notwithstanding the absence of formal condemnation proceedings.[14] Thus, the Court determined that when an aircraft interferes with the normal use and enjoyment of the owner's land, the operation is a taking for which the land owner is entitled to just compensation.[15] Inverse condemnation has been

[9] For a trespass theory to be successful, there must be an actual unprivileged and unpermitted physical invasion of the property of the party bringing the suit. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 63-79 (4th ed. 1971).

[10] A nuisance may arise without a physical invasion if the activity unreasonably interferes with the use and enjoyment of the property. *See* W. DEFUNIAK, HANDBOOK OF MODERN EQUITY 59-74 (2d ed. 1956).

[11] 328 U.S. 256 (1946).

[12] Some legalized nuisance cases are: Richards v. Washington Terminal Co., 233 U.S. 546 (1913); Baltimore & P.R.R. v. Fifth Baptist Church, 108 U.S. 317 (1883); Chicago G.W. Ry. v. First Methodist Episcopal Church, 102 F. 85 (8th Cir. 1900).

[13] "The air is a public highway, as Congress has declared. Were that not true, every transcontinental flight would subject the operator to countless trespass suits. Common sense revolts at the idea." 328 U.S. at 261.

[14] *Id.* at 266.

[15] The superadjacent airspace at this low altitude is so close to the land that *continuous* invasions of it affect the use of the surface of the land itself. We think that the landowner, as an incident to his ownership, has a claim to it and that invasions of it are in the same category as invasions of the surface.

Id. at 265 (emphasis added). *See also* Eubank, *The Doctrine of the Airspace Zone of Effective Possession,* 12 BOSTON U.L. REV. 414 (1932).

widely used as a theory of recovery since its introduction in *Causby*.[16]

Ordinarily, the term "taking" connotes something more than destruction, for one cannot appropriate what one destroys. The courts, however, have chosen to liberalize construction of the term so that the deprivation of the former owner rather than the accretion of a right to the soverign constitutes a taking. Governmental action short of actual occupancy or possession of title has been held to amount to a taking if the effect is to deprive the owner of all or most of his interest in the subject matter.[17] Three crucial factors must be present to sustain a claim for relief for a taking. A plaintiff must sustain the burden of proof that there has been (i) a direct and immediate interference with the enjoyment and use of the land;[18] (ii) a direct physical overflight;[19] and (iii) permanence in both the federal activity and in the consequences imposed upon the private property.[20]

The first factor that is a prerequisite to recovery is couched in terms of substantial interference with the plaintiff's use and enjoyment of his land.[21] It has been held that under the *Causby* rationale, a plaintiff must show that overflights interfere with the existing use of the land or that they occur in airspace which might be occupied by the landowner.[22] It is sufficient to show a taking if the overflights are frequent and low enough to interfere with a potential use of the land.[23] If substantial interference is explained in terms of duration in time rather than in terms of a single destructive occurrence, the concept of taking under the fifth amendment is more easily comprehended. The principle enunciated in *Wilfong* is that the word "permanence" encompasses a servitude of continuous duration, not just a single occurrence.

The second factor *"taking"* involves the question of what consti-

[16] Harvey, *Landowner's Rights in the Air Age: The Airport Dilemma*, 56 MICH. L. REV. 1313 (1958).

[17] *See* Richards v. Washington Terminal Co., 233 U.S. 546 (1913); United States v. Welch, 217 U.S. 333 (1909).

[18] *See* note 11 *supra.*

[19] Batten v. United States, 306 F.2d 580 (10th Cir. 1962).

[20] *See* note 11 *supra.*

[21] Mock v. United States, 164 Ct. Cl. 473 (1964).

[22] Nestle v. City of Santa Monica, 6 Cal. 3d 920, 496 P.2d 480, 101 Cal. Rptr. 568 (1972).

[23] *Id.*

tutes a taking of airspace. In *Batten* v. *United States*[24] the Tenth Circuit Court of Appeals defined a taking as "governmental action short of occupancy . . . if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter."[25] The court in *Batten* denied recovery because there was no direct physical trespass. Thus, recovery is precluded, absent a physical invasion of airspace,[26] and many courts impose an overflight requirement.[27] In addition, some courts have applied a "500-foot rule" of overflight, which requires that the taking involve not only a physical trespass of the airspace, but also that the overflight be less than 500 feet above the surface.[28]

[24] 306 F.2d 580 (10th Cir. 1962). The plaintiffs did not live in a direct overflight path of the jet aircraft, but based their damages on the noise, vibration and smoke emissions emitted by the aircraft. The plaintiffs argued that since *Causby* allowed recovery for vertical sound and shock waves, recovery for horizontal waves should also be allowed. *See also* Note, *Government Not Required to Compensate Homeowners When Damage from Airplane Operations Not Due to Direct Overflights*, 63 COLO. L. REV. 755 (1963).

[25] 306 F.2d at 585.

[26] The majority opinion in *Batten* has engendered criticism in several recent cases. *See* Nestle v. City of Santa Monica, 5 Cal. 3d 920, 496 P.2d 480, 101 Cal. Rptr. 568 (1972); Thornburg v. Port of Portland, 244 Ore. 69, 415 P.2d 750 (1966); Martin v. Port of Seattle, 64 Wash. 2d 309, 391 P.2d 540 (1964), *cert. denied*, 379 U.S. 939 (1965). For a complete history of cases, *see* Lesser, *The Aircraft Noise Problem: Federal Power But Local Liability*, 3 URBAN LAW. 175 (1971); Comment, *The Airport Cases: Condemnation by Nuisance and Beyond*, 7 WAKE FOREST L. REV. 271 (1971). These state courts have generally tended to follow the rationale of the dissenting opinion in *Batten* by Chief Judge Murrah. The judge stated:

> As I reason, the constitutional test in each case is first, whether the asserted interest is one which the law will protect; if so, whether the interference is sufficiently direct, sufficiently peculiar, and of sufficient magnitude to cause us to conclude that fairness and justness, as between the State and the citizen, requires the burden imposed to be borne by the public and not by the individual alone.

306 F.2d at 587. Thus the decisions following the *Batten* dissent hold that there is no requirement of an overflight nor of direct physical invasion of airspace over the complainant's land to maintain an action for a "taking" of land. Several authorities have also urged that the *Batten* minority is the better reasoned analysis. *See* Note, *Nuisance Actions Against Municipal Airports*, 48 WASH. L. REV. 904 (1973). *See* Comment, *Inverse Condemnation in Washington—Is the Lid Off Pandora's Box?*, 39 WASH. L. REV. 920 (1965).

[27] *See, e.g.*, Creel v. Atlanta, 399 F.2d 777 (5th Cir. 1968); East Haven v. Eastern Airlines, Inc., 331 F. Supp. 16 (D. Conn. 1971); Schubert v. United States, 246 F. Supp. 170 (S.D. Tex 1965). The court in *Wilfong* did not consider the overflight requirement as it was established that the military aircraft flew directly over the plaintiff's property.

[28] Schubert v. United States, 246 F. Supp. 170 (S.D. Tex. 1965). *See also* 49 U.S.C. § 1301(24) (1970). The court in *Wilfong* did not consider this to be a barrier to recovery even though the minimum flight level was 500 feet. The

The third factor in establishing a "taking" under the fifth amendment is permanence. Until the *Wilfong* decision the fifth amendment "taking" decisions involved only two types of factual situations involving aircraft: (i) those in which take-off and landing procedures intruded upon the landowner's superadjacent airspace[29] and (ii) those in which supersonic aircraft caused damage to the surface.[30] The factual situation in *Wilfong* is unique because it presents a case of first impression involving damages caused by level overflights originating from a distant source.[31] The take-off and landing cases involved a glide angle pattern of ascent and descent of aircraft while departing from or arriving at an adjacent permanent airport with the result that the aircraft inevitably crossed the land beyond the runway at low altitudes. Since the military flights in *Wilfong* did not involve descending and ascending aircraft nor sonic boom damage, the Court of Claims had to consider specifically the factor of permanence.

The prerequisite of permanence in an inverse condemnation suit is not a new concept. In *Wilfong* the Court of Claims referred to a series of cases dealing with the taking of riparian property rights by permanent or periodic flooding caused by federal dam projects. In one line of riparian cases plaintiffs' property became permanently submerged by frequent overflows.[32] The Supreme Court declared that there was no difference in kind, but only degree, between a permanent condition of continual overflow by backwater and a permanent liability for intermittent but inevitably recurring overflows.[33] In principle the right to compensation arises in both situations, but if there is any use of the land remaining to the owner, the taking may be treated "as a partial instead of a total divesting

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minimum flight level was raised to 1500 feet and finally to 2000 feet. 480 F.2d at 1328.

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

[30] Kirk v. United States, 451 F.2d 690 (10th Cir. 1971).

[31] 480 F.2d at 1326. The Air Force reconnaissance aircraft in question were stationed in South Carolina many miles away from the plaintiff's farm in North Carolina. The pilots flew from target to target discharging their basic missions of training experienced pilots to take reconnaissance photographs of selected ground targets from low levels at high speeds.

[32] United States v. Kansas City Life Ins. Co., 339 U.S. 799 (1950); Jacobs v. United States, 290 U.S. 13 (1933); United States v. Cress, 243 U.S. 316 (1917); United States v. Lynah, 188 U.S. 445 (1903).

[33] United States v. Cress, 243 U.S. 316, 328 (1917).

of his property in the land."[34] In a second line of decisions recovery was precluded by plaintiffs' failure to prove inevitability of recurrence.[35] In one situation the plaintiff failed to prove that floods which occurred in the spring of one year would "inevitably recur."[36] In three successive decisions, the Court of Claims found that despite the flooding of the plaintiff's power plant on three separate occasions within a seventeen year period, no permanent burden had been placed on the plaintiff's property.[37] Thus, to establish taking, plaintiff had to show the effect of the flooding to be permanent rather than a randomly recurring event.

The court in *Wilfong* drew support for its ruling from another decision[38] relating to aerial invasions of private property caused by federal action. There, it was found that if the plaintiff's property is subjected to invasions caused by governmental action whenever the government chooses to act, then the subordination of the property to that use imposes a servitude. This philosophy was borrowed from *Causby* in which the United States Supreme Court placed great emphasis on the frequency of the overflights, despite the temporary nature of each overflight.[39]

The decision in *Wilfong* must also be analyzed by comparison with a series of lease cases.[40] During World War II the federal gov-

[34] *Id.*

[35] National By-Products, Inc. v. United States, 405 F.2d 1256 (Ct. Cl. 1969); North Counties Hydro-Electric Co. v. United States, 170 Ct. Cl. 241 (1965).

[36] National By-Products, Inc. v. United States, 405 F.2d 1256, 1274 (Ct. Cl. 1969).

[37] North Counties Hydro-Electric Co. v. United States, 170 Ct. Cl. 241, 247 (1965). *See also* North Counties Hydro-Electric Co. v. United States, 151 F. Supp. 322 (Ct. Cl. 1957); North Counties Hydro-Electric Co. v. United States, 70 F. Supp. 900 (Ct. Cl. 1947).

[38] Portsmouth Harbor Land & Hotel Co. v. United States, 260 U.S. 327 (1922). The government had constructed a gun battery and intermittently fired such batteries over the plaintiff's property for a period of years.

[39] On remand in *Causby*, the lower court found a compensable taking for a four and a half year period. Causby v. United States, 109 Ct. Cl. 768 (1948). The lower court holding indicates that a fifth amendment taking encompasses not only permanent servitudes, but also temporary occupancy. *See also* United States v. Improved Premises, 80 F. Supp. 55 (S.D.N.Y. 1948); United States v. 412.715 Acres of Land, 53 F. Supp. 143 (N.D. Cal. 1943); Anderson v. Port of Seattle, 49 Wash. 2d 528, 304 P.2d 705 (1956).

[40] United States v. General Motors, 323 U.S. 373 (1945); Gershon Bros. v. United States, 248 F. 849 (5th Cir. 1922); United States v. Improved Premises, 54 F. Supp. 469 (S.D.N.Y. 1944); United States v. Entire Fifth Floor, 54 F. Supp. 258 (S.D.N.Y. 1944); Leonard v. Autocar Sales & Serv. Co., 392 Ill. 182, 64 N.E.2d 477 (1946), *cert. denied*, 327 U.S. 604 (1946).

ernment occupied numerous leased buildings through the exercise of its eminent domain power. In *United States v. General Motors*[41] the United States Government condemned and possessed property for a period of one year in a lease of twenty years. There was no question that a taking had occurred and just compensation was due. One difference between *General Motors* and *Wilfong* is the duration of interference with the property use. In *General Motors* the taking was for a one year period while in *Wilfong* the government's action was considered tortious in nature because of the brief duration of the taking.[42] It is clear that the decision in *Wilfong* places a premium on duration of occupancy.

Another distinction between *Causby* and *Wilfong* is the element of substantial interference. In *Causby* the character of the invasion, not the monetary value of damage resulting from it, as long as the damage was substantial, determined the issue of whether there was a taking.[43] The character of the invasion—low-flying aircraft—was similar in both fact situations. But the damage to the use of the property differed in that the plaintiff in *Wilfong* had a one-time personal property loss of chickens, whereas the plaintiff in *Causby* had a continuing loss of the use of the real property for a four and one-half year period. The court in *Wilfong* was arguably correct in its denial of relief under the fifth amendment for an insignificant invasion. The judiciary must draw the line of recovery at some point for a fifth amendment taking as opposed to a tort action. The fifth amendment does not comprehend recovery on a cause of action sounding in tort. Congress has provided other avenues of recovery, such as the Federal Tort Claims Act[44] to deal with such situations as occurred in *Wilfong*.

The element of permanence has been implicitly if not expressly found in all aviation taking cases.[45] The decision in *Wilfong* makes inroads into the denial of a plaintiff's claim for recovery when the

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[41] 323 U.S. 373 (1945).

[42] A factual finding of the period of interference was narrowed to a three month period of overflight. 480 F.2d at 1331.

[43] 328 U.S. at 266.

[44] 28 U.S.C. § 1346(b) (1970).

[45] Bacon v. United States, 295 F.2d 936 (Ct. Cl. 1961); Dick v. United States, 144 Ct. Cl. 424 (1959); Adaman Mut. Water Co. v. United States, 181 F. Supp. 658 (Ct. Cl. 1958); Highland Park, Inc. v. United States, 161 F. Supp. 597 (Ct. Cl. 1956).

property is distant from any airport. The factor of permanence is necessarily present when the claimant resides near an airport, in that departing and arriving aircraft continuously cross claimant's property as long as the runway is in use. A plaintiff such as the plaintiff in *Wilfong* will clearly have difficulty proving permanence when the interfering aircraft do not habitually fly near the landowner's property. Even if the aircraft interferes with the landowner's airspace, the decision in *Wilfong* restricts the inverse condemnation theory by requiring permanency both in the federal activity complained of and in the consequences imposed on the private property.

In emphasizing the prerequisite of permanence for a finding of "taking," *Wilfong* virtually precludes any chance of recovery upon the inverse condemnation theory asserted by a damaged plaintiff distant from an aviation field. This decision and its emphasis on permanence, however, overlooks the underlying policy reasons for recognizing an action for inverse condemnation to compensate the landowner for the substantial damage and interference in use of the property. The court did not rule out alternative theories of recovery via private tort actions based on traditional theories of nuisance and trespass but intimated that the fifth amendment concept of "taking" was not meant to be easily invoked but, rather, applied only in situations when substantial interference with the use of the property was incurred. The factor of permanence demands that the *Causby* rationale be applied only when the plaintiff sustains a heavy burden of proof by showing permanence in both the federal activity and upon the consequences imposed upon the private property.

Martin C. Ruegsegger

FEDERAL PRE-EMPTION—AVIATION NOISE CONTROL—The Federal Aviation Administration, Monitored by the Environmental Protection Agency, Has Full Control Over Aviation Noise, Preempting State and Local Control, Including a Municipal Ordinance Which Imposed a Curfew on Certain Jet Take-offs During Certain

Night-time Hours. *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973).

The city of Burbank, California, adopted an ordinance making "pure jet" aircraft take-offs from the Hollywood-Burbank Airport between 11:00 p.m. and 7:00 a.m. unlawful and prohibiting the operator of that airport from allowing such take-offs (except in certain emergency cases) during the prohibited hours.[1] The operator of the airport, Lockheed Air Terminal, Inc.,[2] brought suit to enjoin the enforcement of the ordinance. The injunction was granted by the United States District Court for the Central District of California[3] and the Court of Appeals for the Ninth Circuit affirmed.[4] The United States Supreme Court noted jurisdiction,[5] then decided the case without reaching the interstate commerce or conflict of laws questions considered by the lower courts.[6] *Held, affirmed*: The Federal Aviation Administration, monitored by the Environmental Protection Agency, has complete authority and responsibility for aviation noise control under the Federal Aviation Act of 1958, preempting state and local governmental control of aviation noise. *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973).

The relationship of federal and state authority in the regulation

[1] BURBANK, CAL. MUNICIPAL CODE § 20-32.1 (1970), quoted in 318 F. Supp. at 916-17, provides:

> (a) It shall be unlawful for any person at the controls of a pure jet aircraft to take off from the Hollywood-Burbank Airport between 11:00 P.M. of one day and 7:00 A.M. the next day.
> (b) It shall be unlawful for the operator of the Hollywood-Burbank Airport to allow a pure jet aircraft to take off from said airport between 11:00 P.M. of one day and 7:00 A.M. the next day.
> (c) This section shall not apply to flights of an emergency nature if the City's Police Department is contacted and the approval of the Watch Commander on duty is obtained before take-off.

[2] The airport operator was joined by several carriers as co-plaintiffs and the FAA as *amicus curiae*.

[3] Lockheed Air Terminal, Inc. v. City of Burbank, 318 F. Supp. 914 (C.D. Cal. 1970).

[4] Lockheed Air Terminal, Inc. v. City of Burbank, 457 F.2d 667 (9th Cir. 1972). The Court of Appeals decided the case on the issues of pre-emption and conflict of state and federal authority, 457 F.2d at 675, whereas the District Court had relied on pre-emption and a finding that the ordinance constituted an undue burden on interstate commerce. 318 F. Supp. at 930.

[5] 409 U.S. 840 (1972).

[6] 411 U.S. 624 (1973). *See* note 4 *supra*.

of commerce has been characterized by controversy over which authority shall prevail: the federal government's commerce power or the states' police power. Pre-emption of state regulation is generally defined as manifest congressional intent to control an activity to the exclusion of state regulation. The federal commerce power has preempted the states' police power in the fields of railway safety equipment,[7] interstate shipment of food products,[8] and registration of aliens.[9] Concurrent regulation, however, has been permitted in areas involving the interstate shipment of fresh fruits,[10] the control of striking workers,[11] and the regulation of equipment and operating standards for ships on navigable waters.[12] Throughout all these decisions, the courts have struggled to devise a standard for determining when federal pre-emption has occurred. This determination is not difficult when there is an expressed congressional intent that the field be regulated exclusively by the federal government, but this is seldom the case, and the courts must make a determination of the implied intent of Congress. In *Rice v. Santa Fe Elevator*,[13] the Supreme Court articulated a test that was a synthesis of the standards utilized in previous cases. In *Rice*, a case concerning the federal and state regulation of grain elevators, the Court recognized the gravity of a finding of pre-emption of the state police power and required a showing of clear and manifest intent by Congress that the federal regulation should preempt the state authority before the state authority could be set aside. Recognizing that the intention of Congress to preempt may not be apparent on the face of the statute, the Court established a three-pronged test to determine the intention of Congress if none were directly evident.

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[7] Napier v. Atlantic Coast Line R.R., 272 U.S. 605 (1926).

[8] Cloverleaf Butter v. Patterson, 315 U.S. 148 (1942).

[9] Hines v. Davidowitz, 312 U.S. 52 (1941).

[10] Florida Lime & Avocado Growers v. Paul, 373 U.S. 132 (1963) (California statute specifying the minimum oil content of fresh avocados entering the state held valid).

[11] Allen Bradley Local 1111, United Electrical Workers v. Wisconsin Empl. Rel. Bd., 315 U.S. 740 (1942) (state statute regulating public demonstrations held not repugnant to National Labor Relations Act, 29 U.S.C. § 151 *et seq.* (1970)).

[12] Huron Portland Cement Co. v. Detroit, 362 U.S. 440 (1960) (city anti-pollution ordinance held applicable to vessels operating on navigable waterways subject to federal license requirements).

[13] 331 U.S. 218 (1947).

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

(i) if the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it, or,
(ii) if the act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude the enforcement of state laws on the same subject, or,
(iii) if the state law may produce a result inconsistent with the federal statute, the federal measure must prevail.[14]

Federal pre-emption in the field of noise control and abatement has been much discussed in recent years as air carriers have employed increasing numbers of jet aircraft and the noise problems associated with the mushrooming air transport industry have affected more and more lives across the nation. The two cases prior to *Burbank* most directly addressing the problem of airport noise abatement were *Allegheny Airlines v. Village of Cedarhurst*[15] and *American Airlines v. Town of Hempstead.*[16] Both cases involved attempts by suburban cities neighboring Kennedy Airport to control the noise created by planes taking off from the airport. The Cedarhurst ordinance prohibited flights over the Village at altitudes less than 1000 feet. The United States Court of Appeals for the Second Circuit held that this was an encroachment on the federally-preempted domain of air traffic control since the ordinance conflicted with federal regulations.[17] The Town of Hempstead enacted an ordinance prohibiting the production of noises in certain noise spectra inside the town limits. Planes departing Kennedy were in violation of the ordinance on normal take off. The federal district court held that this ordinance was even broader than the ordinance

[14] *Id.* at 230. These three tests had been formulated in other cases in part: (i) federal regulatory scheme is so pervasive as to leave no room for the states to complement it, Pennsylvania R.R. v. Public Serv. Comm'n, 250 U.S. 566 (1919); Cloverleaf Butter Co. v. Patterson, 315 U.S. 148 (1942); (ii) dominant federal interest, Hines v. Davidowitz, 312 U.S. 52 (1941); Napier v. Atlantic Coast Line R.R., 272 U.S. 605 (1926); and (iii) state and federal regulation inconsistent; Hill v. Florida, 325 U.S. 538 (1945). *Rice* marked the first presentation of these factors as a consolidated test.

[15] 238 F.2d 812 (2d Cir. 1956).

[16] 272 F. Supp. 226 (E.D.N.Y. 1967).

[17] 238 F.2d at 814.

in *Cedarhurst* because it theoretically could affect flying at altitudes greater than 1000 feet, and therefore the ordinance, like that in *Cedarhurst*, conflicted with the federal regulations and was thereby preempted.[18] Both of these cases were decided with reference to the federal air traffic control regulations and not the noise abatement statutes which were at issue in *Burbank*. Thus, *Burbank* was the first case to reach the Supreme Court on the issue of pre-emption of aviation noise abatement.

The federal statute[19] at issue in *Burbank* is part of the overall statutory scheme enacted by Congress to regulate aviation. The genesis of the modern scheme was the Civil Aeronautics Act of 1938,[20] enacted to consolidate and streamline the federal functions in the field of aviation.[21] The regulatory functions of the federal government were marshalled under the newly created Civil Aeronautics Authority (CAA) for a coordinated and effective federal effort. The 1938 Act contained a new section, Title VI, concerning safety of flight.[22] There was no express manifestation of congressional intent to preempt the field of aviation safety regulation, but subsequent decisions have established that the federal government has in fact preempted the states' authority in the field of aviation safety. The federal authority has been held to be plenary in the requirement of airworthiness certificates for aircraft,[23] and airmen[24] as well as in age limitations for airmen.[25] In these situations the courts have recognized the intent of Congress to preempt aviation safety regulation. Although the Civil Aeronautics Act of 1938 was superseded by the Federal Aviation Act of 1958,[26] the 1958 act retained the safety provisions of Title VI[27] and the noise abatement provision at issue in *Burbank* was inserted in Title VI in 1968.[28]

[18] 272 F. Supp. 227.

[19] 49 U.S.C. § 1431 (1972).

[20] Act of June 23, 1938, ch. 601, 52 Stat. 706.

[21] H.R. REP. No. 2254, 75th Cong., 3rd Sess. 1 (1938).

[22] Although the pressing problems of the aviation industry were primarily economic ones, the 1938 Act created a far-sighted overall regulatory scheme for the field of aviation.

[23] Rosenhan v. United States, 131 F.2d 932 (10th Cir. 1942).

[24] United States v. Drumm, 55 F. Supp. 151 (D. Nev. 1944).

[25] ALPA v. Quesada, 276 F.2d 892 (2d Cir. 1960).

[26] Act of August 23, 1958, Pub. L. No. 85-726, 72 Stat. 731.

[27] 49 U.S.C. § 1421 *et seq.* (1970).

[28] 49 U.S.C. § 1431 (1972).

While the inclusion of the noise abatement provision in Title VI would seem to indicate a congressional intent that the noise abatement provisions be preemptive, state court decisions have been to the contrary.

For example, operations at a New Jersey airport were enjoined for certain periods in *Town of Hanover v. Town of Morristown*[29] where a New Jersey state court held that the legal and equitable rights of citizens could be protected without offense to federal regulation of aviation noise. *Hanover* was followed in *Parachutes, Inc. v. Township of Lakewood*[30] where plaintiff was unsuccessful in his attempt to enjoin enforcement of an ordinance that effectively prohibited his operation of a plane utilized for dropping parachutists. The court held that the federal government had not preempted regulation of flights during which the engine was repeatedly stopped and restarted over the township as each parachutist was dropped. A California state court has held[31] that state regulations which affect certain aspects of flight operations are not precluded because of an extensive pattern of federal regulation in the field of aviation and that regulation of a local matter such as noise control would be invalid only if clearly in conflict with federal regulations. In *Williams v. Superior Court*,[32] the Supreme Court of Arizona held that the mere fact that the remedies available under state law might infringe upon Federal preeminence was not a valid reason to deny state courts the power to hear a case involving regulation of flight and noise abatement.

Although there was no express congressional intent in the passage of the Federal Aviation Act in 1958 or in the 1968 amendment[33] to preempt the field of aviation noise control, the legislative history of the 1968 amendment shows consideration of the possible clash of state and local regulation. The Senate committee report[34] recognized the possible conflict between state and local government. While disclaiming any intention to affect the existing apportionment of regulatory powers between the state and federal govern-

[29] 108 N.J. Super. 461, 261 A.2d 692 (1969).

[30] 121 N.J. Super. 48, 296 A.2d 72 (1972).

[31] Loma Portal Civic Club v. American Airlines, Inc., 39 Cal. Rptr. 708, 394 P.2d 548 (Cal. 1964).

[32] 108 Ariz. 154, 494 P.2d 26 (1972).

[33] Act of July 21, 1968, Pub. L. No. 90-411, 82 Stat. 395.

[34] S. REP. No. 1353, 90th Cong., 2d Sess. (1968).

ments,[35] the committee accepted the Secretary of Transportation's assessment of the existing apportionment. In a letter to the committee,[36] the Secretary, citing *Hempstead*, stated that the federal government had preempted the field of aviation noise regulation. The committee did not question this assessment, but simply added to its report the statement that the noise abatement regulations were not designed to deprive the local airport owner of the power to regulate, without discrimination, the operations at his airport, including the denial of use of aircraft noisier than those currently operating there.[37] Apparently the committee anticipated that airport operators would not, on the basis of noise abatement, curtail use by aircraft currently using the facility. The committee report is silent on the broad powers given the FAA to regulate aviation noise control, but the matter was specifically addressed in the House hearings.[38] The general counsel[39] for the Air Transport Association of America[40] pointed out that the proposed legislation not only required the FAA to regulate the noise characteristics of new equipment, but also gave the FAA broad powers to regulate present operations for noise abatement. By disregarding such proposals to regulate equipment design only, and by accepting the Secretary of Transportation's assessment of the federal preemption of the field of aviation noise abatement, Congress opted to imply pre-emption rather than to address itself to the question of the states' police power. As indicated above, the only qualification of the federal

[35] *Id.* at 5.

[36] *Id.* at 5, 6. The letter stated that:

> [T]he courts have held that the Federal government presently preempts the field of noise regulation insofar as it involves controlling 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. [Citing *American Airlines v. Town of Hempstead*]. The legislation [the 1968 amendment] operates in an area committed to Federal care, and noise limiting rules operating as do those of the ordinance must come from a Federal source. [The amendment] would merely expand the Federal Government's role in a field already preempted.

[37] *Id.* at 6.

[38] *Hearings on H.R. 3400 Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce*, 90th Cong., 1st Sess. ser. 90-35 (1967).

[39] John E. Stephen, General Counsel, Air Transport Association of America.

[40] The members of the association are the scheduled airlines.

regulation of aviation noise implied by the committee was the power reserved to an airport operator to govern, on a nondiscriminatory basis, the use of the facility. This qualification was apparently observed by the Court in *Burbank*, since the holding was limited to the actions of state and local governments not as proprietors but as local governments in exercise of the police power.[41]

The Supreme Court in *Burbank* concluded that there was federal pre-emption of the field of aviation noise control not because aviation safety required it but solely because the federal statutory scheme was so pervasive as to foreclose the possibility of compatible state regulation.[42] This finding is based on the determination that congressional intent was to preempt the field as discussed above.[43]

The federal noise abatement statutes and the regulations promulgated thereunder are designed to cover the entire aviation industry and not merely the design of new planes and equipment as the dissenting opinion suggests. The pervasive federal plan includes regulation of equipment design, flight regulations and techniques, runway and flight preference orders, and even approval of land use and the physical layout of the airports themselves. This overall plan would be unduly hobbled if there were differing local ordinances affecting each airport.

An additional argument relied on by the majority was suggested by the district court's postulation that if all airports in the country were subject to a similar ordinance, there would be a threat to the safety of interstate commerce caused by the natural tendency for flights to "bunch" before and after the curfew hours.[44] This reasoning is founded on the cumulative effect analysis that aggregates the effects of the many localities and examines the overall effect on interstate commerce on a national level.[45] This analysis is especially effective here to show the impact of cumulative local control as opposed to an integrated and coordinated national plan for the control of aviation noise. Noise control at the national level is interrelated with safety considerations, the economic regulation of

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[41] 411 U.S. at 635-36 n.14.

[42] 411 U.S. at 633.

[43] *See* note 34 *supra* and accompanying text.

[44] 411 U.S. at 627-28.

[45] *See* Wickard v. Filburn, 317 U.S. 111 (1942).

carriers and routes, and the service available to shippers and travelers.

The language of the congressional reports indicates that the airport proprietor is free to limit use of his airport in the interest of noise abatement just as he may limit the use of his airport by not building longer runways capable of accommodating larger planes.[46] The congressional reports imply a right to refuse service to noisier planes, but do not consider the possibility of an airport's refusing service during certain hours to the same planes that it has served in the past; thus such a refusal is apparently permissible. Whether the holding in *Burbank* would permit such action by an airport proprietor is unclear. If the airport's refusal to serve aircraft at certain times is found to interfere with the safety and free flow of interstate commerce, or is found to be an undue burden on interstate commerce, that refusal might not stand in light of *Burbank*. One tends to think not. The Supreme Court, following a tenet of construction, decided only the limited case before it and did not consider the broader interstate commerce questions potentially raised by *Burbank*.[47] It seems clear that interstate commerce is not to be the victim of noise abatement actions by local government. The burden of effective noise abatement, therefore, is on the FAA and the federal response must be an effective compromise between the competing demands of the air carriers and those persons who live in the flight paths and noise corridors near the nation's airports. The FAA is in an unenviable position; aggressive noise control will be attacked by the air carriers while agency inaction might spawn a rash of divergent local airport rules disruptive to the industry and costly to its customers. A less abrasive course for the FAA to pursue is to issue uniform guidelines for noise abatement in current operations, to conduct additional but timely research efforts in search of cost effective designs for quieter aircraft, and to closely scrutinize both existing and proposed airports as well as the land use plans for the surrounding land in order to seek novel solutions for noise abatement problems.

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[46] S. REP. No. 1353, *supra* note 34, at 6.

[47] Airports having governmental proprietors are by far in the majority over privately owned or operated airports, as the Court pointed out. 411 U.S. at 635-36 n.14.

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