Federal Preemption of Local Airport Noise Regulation

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NOTES

FEDERAL PREEMPTION OF LOCAL AIRPORT NOISE REGULATION

As the airline industry has grown, the noise level in the vicinity of airports has become a considerable irritation, as well as a danger to the health of persons who live and work in these areas. Local governments have sought to curb this noise through local regulation. The federal government has also sought to regulate noise levels through its regulation of interstate commerce. Which governmental unit should have authority for promulgation of airport noise regulations has been the subject of much litigation in the past. The advocates of federal control argue that the federal government has preempted the field of airport noise regulation. Although there is no express

1. For a thorough discussion of health dangers from excessive noise, see ENVIRONMENTAL PROTECTION AGENCY, REPORT TO THE PRESIDENT AND CONGRESS ON NOISE, S. Doc. No. 63, 92d Cong., 2d Sess. (1972). See also Hildebrand, Noise Pollution: An Introduction to the Problem and an Outline for Future Legal Research, 70 COLUM. L. REV. 652, 679 (1970); Note, The Noise Control Act of 1972—Congress Acts to Fill the Gap in Environmental Legislation, 58 MINN. L. REV. 273, 277-78 (1973). The authors note that noise can impair the ability of persons to engage in their normal activities by interrupting concentration, reducing efficiency, creating irritability, and even producing changes in heart rates, respiration, gastric activity, pupil size, and sweat gland activity. They point out that a number of studies associate noise with mental disorders. See Dempsey, Noise, N.Y. Times, Nov. 23, 1975 § 6 (Magazine) at 31, for a discussion of health dangers from nonaircraft excessive noise.

2. See text accompanying notes 20-34 infra.

3. These groups include the Air Line Pilot's Association, Air Transport Association, National Organization to Insure a Sound-Controlled Environment, and the Sierra Club. Although they do not agree as to whether the Federal Aviation Administration (FAA), the Environmental Protection Agency (EPA), or the National Aeronautic and Space Administration (NASA) should have primary authority for supervising noise regulation, each group has stated that considerations of safety and uniformity dictate that the federal government should have control of this area. See Environmental Protection Agency, Legal and Institutional Analysis of Aircraft and Airport Noise and Apportionment of Authority Between Federal, State, and Local Governments, Appendix B (1973); A Muffler on Airport Noise, BUSINESS WEEK, Feb. 9, 1976, at 46.

The doctrinal foundation of the preemption concept is the supremacy clause. U.S. CONST. art. VI, § 2. Professor Engdahl has thoroughly analyzed the case law surrounding the preemption doctrine. The following discussion relies heavily on his analysis.
statutory provision for federal preemption in this area, advocates of federal control claim that because of the pervasive nature of federal regulation, local control has been preempted. Those who favor local control, however, counter that in the absence of a specific statutory provision for federal preemption, control of airport noise should remain in the hands of local governments. Proponents of this view argue that when Congress has not specifically provided otherwise, its intention must be to retain the balance between federal and state or local regulation struck by earlier legislation in the area. Accordingly, because the area of noise regulation has traditionally been one of local concern, local authority should prevail.

In 1973, the question of whether the federal government had preempted the field of airport noise regulation reached the United States Supreme Court.

See D. Engdahl, Constitutional Power—Federal and State in a Nutshell 317-45 (1974). Judicial interpretation of the clause has been necessary because of the many difficult questions that have arisen concerning federal and state regulatory provisions. The earliest decisions recognized that when a state regulation collides with a federal regulation, the state law is invalid. E.g., Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824). Some members of the Court have sought to extend Gibbons to embrace the idea that the mere grant of power to Congress to regulate interstate commerce is enough in itself to invalidate any state regulation in the field. Thus federal preemption would remain whether the state regulations in question collided with federal regulations or complemented them. See, e.g., City of New York v. Miln, 56 U.S. (11 Pet.) 102, 158-59 (1837) (Story, J., dissenting). In Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851), the Court took a more permissive approach to the problem of federal preemption. When subjects of commerce admitted only of one uniform system or plan of regulation, regulatory power was considered to be exclusively federal. On the other hand, subjects of commerce which required "that diversity [of regulation], which alone can meet local necessities" were subject to concurrent state and federal regulation. Id. at 319.

More recent cases have upheld state regulations even when Congress not only had been granted regulatory power but also had exercised its power in that field. E.g., Mintz v. Baldwin, 289 U.S. 346 (1933). Congressional intent was deemed to be the dominant factor in determining whether federal regulation was to be exclusive. E.g., Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963). The Court has developed varying standards for determining when Congress intended federal regulation to be exclusive. See, e.g., Hines v. Davidowitz, 312 U.S. 52 (1941) (when federal regulation is extensive, Congress is deemed to have intended exclusive federal regulation); Warren Trading Post Co. v. Arizona Tax Comm'n, 380 U.S. 685 (1965) (when federal agency has limited powers, inference is that Congress had a noninclusionary intent); Campbell v. Hussey, 368 U.S. 297 (1961) (when regulation sought to impose uniform standards, exclusionary congressional intent may be inferred).


6. Id.
in *City of Burbank v. Lockheed Air Terminal, Inc.* The majority found that the field had been preempted because of the pervasiveness of federal regulation. The decision applied to a unique factual setting, however, in which a municipality which was not the proprietor of an airport attempted to regulate noise through its police power. The Court declined to consider "what limits, if any, apply to a municipality as a proprietor." Since the Burbank Airport was one of probably very few privately owned airports in the country, the question of whether the field of noise regulation is federally preempted with respect to local authorities who are also the airport proprietors remains unanswered. While some courts have followed *Burbank* in cases involving municipal airport proprietors, at least one court has held that local proprietary control is not per se preempted. In addition, federal legislation has been introduced which would provide for a sizable component of local control in airport noise regulation.

This article will examine judicial developments and legislative and administrative action taken since *Burbank*. It will describe the system of federal noise regulation which now exists and discuss the reforms which have been suggested to limit airport noise and to strike a working balance between federal and local control.

I. PREEMPTION CASE LAW PRIOR TO *Burbank*

Because neither the Federal Aviation Act nor the Noise Control Act of 1972 contain express preemptive authority, courts have looked to congressional intent in their attempts to discern whether the federal government has preempted the field or whether state power is undisturbed "except as the
state and federal regulations collide." In Burbank, the Court used the tests set forth in Rice v. Santa Fe Elevator Corp. Under Rice, a purpose to preempt could be evidenced by a scheme of federal regulation which is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it"; by an act of Congress which may "touch a field in which . . . the federal system will be assumed to preclude enforcement of state laws on the same subject"; or by a state policy which would produce a "result inconsistent with the objective of the federal statute." The Burbank majority found that the scheme of regulation of airports and air traffic came within the first test enunciated in Rice.

In the years before the Supreme Court rendered its decision in Burbank, several municipalities had attempted various forms of regulation seeking to curb excessive noise levels. Their attempts, however, were successfully challenged on the ground that federal regulation had preempted the field. As a result, even before Burbank, local ordinances were, for the most part, invalidated in the courts.

The setting of minimum altitudes was one of the earliest methods of attempting to control noise. Suffering from irritating noise, the citizens of Cedarhurst, New York passed an ordinance prohibiting flights over their town at less than 1,000 feet. The United States District Court for the Eastern District of New York, in Allegheny Airlines v. Village of Cedarhurst, held the ordinance invalid even though federal regulations, like the Cedarhurst regulation, required all flights over populated areas to occur at an altitude over 1,000 feet. Finding that Congress had preempted the regulation of aircraft both above and below 1,000 feet, the court pointed out that federal regulations, unlike the Cedarhurst ordinance, did not provide that the 1,000 foot limit on overhead flight would also apply in takeoff and landing zones. Following the lead of the Cedarhurst court, the United States District Court for the District of New Jersey, in City of Newark v. Eastern Airlines, Inc., struck down an ordinance adopted by a group of New Jersey cities in the vicinity of Newark. The ordinance prohibited flights below 1,200 feet.

17. Id. at 230.
18. 411 U.S. at 633.
19. See notes 20, 25, 34 & accompanying text infra.
22. Id. at 756.
The court found that the enactment of the Civil Aeronautics Act\textsuperscript{23} clearly evidenced the intent of Congress to maintain the exclusive power to regulate and to control the field of interstate air commerce.\textsuperscript{24}

Localities have attempted to circumvent the federal preemption problem by placing an absolute limit on noise levels. This approach, however, has met with no more success than the others. In \textit{American Airlines v. Town of Hempstead},\textsuperscript{25} the Second Circuit struck down a town ordinance which prohibited excessive noise, finding that while the ordinance was not in direct conflict with federal regulation, it had the effect of diverting flight paths around the town and thus caused aircraft to deviate from flight patterns established by the Federal Aviation Administration.\textsuperscript{26} In \textit{Town of Hempstead}, the trial court had concluded that the subject matter of the ordinance had been federally preempted because "[t]he legislation 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."\textsuperscript{27} The appeals court did not find it necessary to reach the question of whether the entire field of aircraft regulation had been federally preempted because the particular ordinance could be declared invalid as an infringement upon a specific regulation.\textsuperscript{28}

A third method of aircraft noise regulation, the curfew system, met with some success prior to \textit{Burbank} but was rejected by the \textit{Burbank} Court. In \textit{Stagg v. Municipal Court},\textsuperscript{29} a California appellate court upheld a Santa Monica ordinance prohibiting jet takeoffs between 11:00 p.m. and 7:00 a.m. The court held that the doctrine of federal preemption was not applicable because the court could discern no federal or California ordinance which conflicted with the curfew ordinance.\textsuperscript{30} The \textit{Stagg} court validated Santa Monica's authority to enforce its curfew because of both its ownership of the

\begin{thebibliography}{99}
\bibitem{24} 159 F. Supp. at 755.
\bibitem{25} 398 F.2d 369 (2d Cir. 1968), \textit{cert. denied}, 393 U.S. 1017 (1969).
\bibitem{26} 398 F.2d at 371 n.1.
\bibitem{28} 398 F.2d at 375-76. The court relied upon the decision in \textit{Cedarhurst}.
\bibitem{29} 2 Cal. App. 3d 318, 82 Cal. Rptr. 578 (Ct. App. 1969). Although the curfew ordinance has been allowed to stand, another Santa Monica ordinance which would have made it a misdemeanor for fixed-wing turbo jets to land or take off from the city airport has been declared invalid by the United States District Court for the Central District of California. The court enjoined the city of Santa Monica from taking action against Federal Aviation Administration flight controllers who were assisting jet pilots at the airport. \textit{29} \textit{NOISE REG. RPRTR. A-14} (1975).
\bibitem{30} 2 Cal. App. 3d at 321, 82 Cal. Rptr. at 580.
\end{thebibliography}
airport and its police power. Though the Stagg decision was not alone in California in holding that local regulation of air transportation had not been federally preempted, the reasoning of these cases has definitely been that of the minority. The Burbank decision struck down an ordinance which contained the same curfew as the one upheld in Stagg. Thus, although pre-Burbank case law was not clear on whether local control of airport noise should be held invalid on the ground of preemption, local regulations were generally struck down.

II. INVERSE CONDEMNATION LIABILITY

As a preliminary matter, in any determination of whether local or federal authorities should regulate airport noise, consideration must be given not only to the question of preemption, but also to the question of which authority bears the liability for damage suffered by neighboring residents from excessive airport noise. Equity would seem to demand that, regardless of the constitutional and statutory considerations of the preemption issue, either federal law must give local airport operators a way to solve their noise problems, "or the Federal Government must be held liable for damage actions brought against those airports." Allowing local airport proprietors to retain some power to regulate would be logical in light of the responsibilities given local airport proprietors by the Supreme Court in Griggs v. Allegheny County. In Griggs, the Court held airport proprietors financially liable to nearby property owners for damage caused to their property by noise from commercial flights when the flights were low enough to constitute the "taking" of an air easement over the property. The airport owner, in

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31. Id. at 322-23, 82 Cal. Rptr. at 581.
33. BURBANK MUNICIPAL CODE § 20-32.1 (repealed 1972). The ordinance provided for an exception for "emergency" flights. See 411 U.S. at 626 n.1.
36. 369 U.S. 84 (1962). The doctrine of liability for a taking under a theory of inverse condemnation was first announced in United States v. Causby, 328 U.S. 256 (1946). In that case, the federal government was held liable as a partial lessor of the Winston-Salem Airport for having taken an aviation easement in the property the aircraft flew over.
37. 369 U.S. at 89.
designing the airport and constructing it, had been required to acquire some private property, but the Court concluded that because local residents suffered from airport noise, the airport owner had not acquired enough land.\textsuperscript{38} The federal government, on the other hand, was free of liability because, in planning and constructing the airport, it had "take[n] nothing."\textsuperscript{39}

The \textit{Griggs} decision had the effect of directing local landowners with complaints about airport noise to sue the local airport owners for a "taking" under the fourteenth amendment or comparable state constitutional provisions.\textsuperscript{40} Because of the potential placement of liability for noise complaints on local governments, some states acted affirmatively to control exposure to aircraft through land use control and building design. Minnesota, for example, adopted an Airport Zoning Act,\textsuperscript{41} establishing state and regional airport neighborhood planning agencies. The agencies have responsibility for promulgating regulations which will prohibit the development of incompatible land uses in areas near airports and encourage conversion of land in noise-impacted areas to compatible uses.\textsuperscript{42} Additionally, the Federal Aviation Administration (FAA), acting to maintain consistency with the \textit{Griggs} rationale, has avoided assuming responsibility for the taking of local noise easements.\textsuperscript{43} The Environmental Protection Agency (EPA), in its report to Congress in 1973, proposed that if a federal airport noise certification procedure were implemented, it might shift liability from airport owners to the federal government but many problems might result.\textsuperscript{44}

\section*{III. Post-\textit{Burbank} Preemption Case Law}

Although \textit{Burbank} was narrowly written to apply to its specific factual setting, several cases decided since \textit{Burbank} have followed its rationale on different facts. In \textit{Township of Hanover v. Town of Morristown},\textsuperscript{45} the

\begin{itemize}
\item \textsuperscript{38} \textit{Id.} at 90.
\item \textsuperscript{39} \textit{Id.} at 89.
\item \textsuperscript{40} Note, \textit{supra} note 34, at 294. \textit{See also} text accompanying notes 45-54 infra.
\item \textsuperscript{41} \textsc{Minn. Stat. Ann.} §§ 360.75-.91 (Supp. 1975). \textit{See} Environmental Protection Agency, \textit{supra} note 3, § 2, at 50.
\item \textsuperscript{42} When inconsistent with other local zoning ordinances, the regulations promulgated by these agencies have priority over the inconsistent ordinances. Environmental Protection Agency, \textit{supra} note 3, § 2, at 50.
\item \textsuperscript{43} Note, \textit{supra} note 34, at 294.
\item \textsuperscript{44} EPA \textsc{REPORT To THE SENATE COMM. ON PUBLIC WORKS}, 93d Cong., 1st Sess., \textsc{REPORT ON AIRCRAFT-AIRPORT NOISE} 112-13 (Comm. Print 1973).
court upheld a lower court ruling which had vacated an earlier court-created curfew at Morristown General Aviation Airport. Though the plaintiffs might have had an action for damages against the Morristown Airport Commission on a theory of inverse condemnation,46 the New Jersey Superior Court, relying on Burbank, held that the local government was powerless to issue the curfew because local regulation had been preempted by the federal government. Local regulation, the court stated, could seriously interfere with federal safety procedures.47

County of Cook v. Priester48 involved a local attempt to protect the public health, welfare, and safety by imposing restrictions not on noise levels but on the weight of planes landing at the local airport.49 The Priester court held that the doctrine of federal preemption controlled even though the airport in question, the Pal-Waukee Airport in Illinois, was privately owned but publicly operated. Because Federal Aviation Administration personnel operated the Pal-Waukee control tower, the court found that federal regulations controlled and that the 60,000 pound weight limit on aircraft was unconstitutional as an invasion of the Federal Aviation Administration's exclusive jurisdiction over airspace.50 In this situation, the Priester court stated, the county's use of its police power was invalid.51 In another Illinois case, Bensenville v. Chicago,52 the plaintiff sued for an injunction prohibiting further expansion of O'Hare International Airport. Dismissing the suit, the United States Court of Appeals for the Seventh Circuit held that any state or local action in the field of aircraft noise and air pollution is preempted by the Federal Aviation Act and the Noise Control Act of 1972.53 The court stated, however, that the Bensenville plaintiffs still had an action for inverse condemnation54 against the city as the airport operator.

46. See text accompanying notes 35-44 supra.
49. The county argued that it was defending public safety but did not state how the safety of the public was impaired by heavier planes. It merely suggested that heavier planes were more of a hazard to the community than lighter ones. Id.
50. Id. at 17,546.
51. Id. at 17,544.
52. 12 Av. Cas. 17,105 (7th Cir. 1971).
53. Id.
54. See notes 35-44 supra. The plaintiff's action for inverse condemnation would be consistent with section 4911 of the Noise Control Act of 1972, which provides:
   Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any noise control requirement or to seek any other relief . . . .
IV. THE EXISTING SYSTEM OF NOISE REGULATION

A. The Federal Aviation Act

Federal authority to regulate aircraft noise derives from the Federal Aviation Act and the Noise Control Act of 1972. The Federal Aviation Act states that the United States is "to possess and exercise complete and exclusive national sovereignty in the airspace of the United States . . . ." Prior to 1968, the FAA had exercised control over airport noise under its authority to promulgate "regulations governing the flight of aircraft . . . for the protection . . . of persons and property on the ground." In 1968, amid growing concern with the problem of aircraft noise and its control, the Federal Aviation Act was amended to include specific authorization for the FAA Administrator to prescribe rules and regulations for the control and abatement of aircraft noise and sonic boom and to include specific steps which must be followed by the FAA Administrator in prescribing noise abatement regulations. The amended Act was an attempt to provide some relief and protection to the public from unnecessary aircraft noise and sonic boom.

The 1972 amendments to the Federal Aviation Act, while continuing to vest primary jurisdiction for the regulation of airport noise in the Administrator of the FAA, added mandatory input by the Administrator of the then

58. Id. § 1348(c).
60. 49 U.S.C. § 1431(a) (1970), as amended, 49 U.S.C. § 1431(b)(1) (Supp. III, 1973). The 1968 amendment was further amended in 1972 to read, in pertinent part: [T]he FAA, after consultation with the Department of Transportation and with EPA, shall prescribe and amend the standards for the measurement of aircraft noise and sonic boom . . . including the application of such standards and regulations in the issuance, amendment, modification, suspension, or revocation of any certificate authorized by this subchapter.
62. See Hildebrand, supra note 1, at 681. The Federal Aviation Administrator has promulgated some regulations in the field of noise abatement pursuant to his authority under the Federal Aviation Act. One such regulation, 14 C.F.R. § 91.87(g) (1975), provides that if a pilot is assigned a noise-abatement runway by the air traffic controller, he must use it unless he finds it unsafe. Another regulation, id. § 36.1-201, prescribes noise standards for the issue of type certificates and for changes in certificates for subsonic turbojet aircraft.
newly formed EPA. The amendments provided that the EPA would submit to the FAA such proposed regulations for control and abatement of aircraft noise as the EPA considered necessary to protect the public health and welfare. The FAA was given the option of accepting, modifying, or rejecting the EPA's proposals. However, in an attempt to make the EPA opinions less easily discountable by the FAA, the 1972 amendments provide that if EPA has reason to believe that the FAA's action with respect to a regulation proposed by EPA does not protect the public health and welfare, then the EPA may consult with the FAA and may request the FAA to review its decision and report back to the EPA.

B. The Noise Control Act of 1972

The Noise Control Act of 1972 was the first comprehensive venture of the federal government into the field of noise pollution control. Under the Act, the Administrator of the Environmental Protection Agency has major responsibility for coordination of federal noise control programs in fields other than airport noise. In the field of airport noise, however, the Administrator of the Federal Aviation Administration retains the major responsibility for promulgation of standards and regulations, and the EPA is given an advisory role.

Congress, in enunciating the policy behind the new Act, noted that excessive noise presented a growing danger to the country's health and welfare, and that among the major sources of this undesirable noise were transportation vehicles. While stating that "primary responsibility for control of noise rests with State and local governments," Congress emphasized that federal action was necessary "to deal with major noise sources in commerce... which require national uniformity of treatment."

65. Id. § 1431(c)(2).
66. See Note, supra note 1, at 284.
67. The EPA has chief responsibility for controlling noise of railroads, 42 U.S.C. § 4916 (Supp. III, 1973), motor carriers, id. § 4917, products distributed in commerce, id. § 4905, as well as responsibility for identifying other sources of noise pollution, id. § 4904.
69. Id. § 4901(a)(1)-(a)(2). Indeed, the legislative history of the Act indicates that both the Senate and the House were most concerned with the problem of protecting public health and welfare in the vicinity of airports from the impact of noise from aircraft and aircraft operations. See 118 Cong. Rec. 37,317 (1972).
field of airport noise abatement, however, it merely ordered that the Administrator of the EPA,

after consultation with appropriate Federal, State and local agencies and interested persons, shall conduct a study of the (1) adequacy of Federal Aviation Administration flight and operational noise controls; (2) adequacy of noise emission standards on new and existing aircraft, together with recommendations on the retrofitting and phaseout of existing aircraft; (3) implications of identifying and achieving levels of cumulative noise exposure around airports; and (4) additional measures available to airport operators and local governments to control aircraft noise.\textsuperscript{71}

The Senate version of the bill had given the EPA responsibility for proposing noise emission standards for aircraft. But in a compromise with the House, whose bill vested sole authority for the regulation of aircraft-related noise problems in the FAA,\textsuperscript{72} the Senate provision for EPA control over aircraft noise was dropped.

\textbf{C. Problems with Current Federal Regulation}

In continuing the dominance of the FAA in the promulgation of aircraft noise standards, the Noise Control Act of 1972 gave congressional approval to what has been described critically as “at best an undistinguished record of delay and apathy toward those who are daily subjected to potentially lethal aircraft noise emissions.”\textsuperscript{73} Such criticism of the FAA is not new. Opponents of the FAA argued during congressional debates that the agency had not met its responsibilities under the Federal Aviation Act.\textsuperscript{74} Local gov-

\textsuperscript{71} Id. \textsuperscript{72} See Russell, supra note 45, at 98-99, for the view that under the Noise Control Act, the EPA may be unable “to exercise anything more than moral persuasion upon the FAA . . . .”
\textsuperscript{73} See 118 Cong. Rec. 37,088 (1972).
\textsuperscript{74} Senator Edmund Muskie pointed to the record of the FAA, and pronounced it “wholly inadequate.” 118 Cong. Rec. 35,390 (1972). Senator Muskie further charged that the FAA had yielded to aircraft industry pressure in the past by dropping noise standards it had already promulgated. \textit{Id.}

Senator Muskie’s remarks echoed remarks of Representative John Wydler in the House. While not denigrating the FAA’s competence to regulate aircraft noise, Representative Wydler questioned its desire to do so. He pointed out that in the three and one-half years since the passage of the 1968 amendments to the Federal Aviation Act,
ernment officials, also unhappy with the existing program of FAA regulation, urged that power to regulate aircraft noise control be given to the EPA. Seeking more effective control of airport noise, local officials felt that since they could not expect relief from the FAA, they might be satisfied with an EPA-administered federal program. One California official stated that “[t]he stumbling block to progress has been the FAA. They have consistently denied responsibility for noise in airport environments but will not allow local controls.” The EPA, on the other hand, was viewed as a new and “crusading” agency whose primary commitment was to protect environmental well-being.

The wishes of critics of the FAA in local governments were not complied with, however, and the airport and aircraft noise problem remains under the jurisdiction of the FAA. As a result, localities which might be content to allow the federal government to have exclusive control of the field if more

the FAA had shown “a complete and utter lack of willingness to use the authority which we [gave] them to set the limits on jet noise which they should be setting.” Id. at 6042.

Academic observers have also criticized the FAA as being more a captive than a regulator of the airline industry. It has been said that the FAA “serves only the interest of one segment of the public—the industry it was set up to regulate.” Berger, Nobody Loves an Airport, 43 S. CAL. L. REV. 631, 724 (1970).

75. The National League of Cities and the United States Conference of Mayors have stated that the EPA should be the “lead Federal agency for aircraft noise abatement efforts.” Environmental Protection Agency, supra note 3, at Appendix B.

76. According to one local official, “were meaningful Federal regulations adopted and implemented to protect residents living within proximity to various jetports, local government units would find it unnecessary to attempt local regulation.” Letter from Ralph G. Caso, Presiding Supervisor, Town of Hempstead, New York, April 4, 1968, cited in Berger, supra note 74, at 706.


78. Louisville, Kentucky's Neighborhood Organizations in Support of the Environment (N.O.I.S.E.) has gone on record requesting reassignment of authority and responsibility for controlling aircraft noise. According to them,

    based on . . . local experience, the Federal Aviation Administration is not enforcing existing legislation now on the books to protect environments surrounding airports. There is no reason to believe that the FAA's primary emphasis—promotion of air commerce and the protection of safety—will change.

Environmental Protection Agency, supra note 3, at Appendix B. N.O.I.S.E. therefore urged that the EPA be given authority to establish standards for controlling aircraft noise, with the FAA acting solely as an enforcing agency. Id.

As the EPA explained in a draft report on noise pollution, “‘. . . control of unwanted sound is not a high priority issue for virtually any Federal agency or department. Only when an agency's primary mission . . . ’” is the control of noise is action taken in the field. “‘For the FAA, aircraft noise is only an annoying interference in the basic goal of the Agency: the most efficient, safest, and swiftest air travel possible.’” 118 CONG. REC. 35,390 (1972) (remarks of Senator Muskie, quoting draft of EPA report).
effective regulation could be instituted under EPA administration continue to look for ways to assert a right to enforce local ordinances for airport noise control in the face of alleged FAA ineffectiveness.\textsuperscript{79}

The EPA, in its 1973 report to Congress, found that the criticism which had been levelled at FAA regulation of airport noise was justified.\textsuperscript{80} "Based on this Agency's studies," the report stated, "it appears that existing FAA flight and operational controls do not adequately protect the public health and welfare from aircraft noise."\textsuperscript{81} The EPA report went on to recommend that a comprehensive national program be administered by the federal government.\textsuperscript{82} Because flight safety was of paramount importance in developing various noise controls, however, the EPA concluded that it was the responsibility of the FAA, and not the EPA, to decide which specific flight and operational controls would be adopted. Therefore, the EPA reasoned, the FAA should have primary authority in the new program.\textsuperscript{83}

At the same time, however, the EPA report indicated that while the federal government should have primary power to regulate airport noise, "effective application of such powers and authorities, as are available outside the Federal Government, is a necessary component of a comprehensive aircraft noise control program."\textsuperscript{84} The EPA report advised that in developing new airports, local governments could use their powers of "land use planning, zoning, building code and building permit authority" to significantly affect the noise impact of the airport operations.\textsuperscript{85} Local powers, however, were more limited in dealing with noise at existing airports. According to the EPA, local governments had to continue to follow the expensive route of applying eminent domain powers to compensate landowners for any taking they did to convert noise-impacted residential areas to more appropriate uses, such as open spaces or industrial or commercial areas.\textsuperscript{86} Under some conditions, and depending on interpretation by the courts, airport proprietors could use other powers to place conditions on the use of airport property, such as restrictions on the type of aircraft permitted, the number of operations allowed per day, hours of operation, noise limits, or a schedule of landing fees based on noise levels generated.\textsuperscript{87} The report

\textsuperscript{79} See notes 89 & 127 infra; notes 45-54 supra.
\textsuperscript{80} EPA REPORT, supra note 44, at 14.
\textsuperscript{81} Id.
\textsuperscript{82} Id. at 108, 112.
\textsuperscript{83} Id. at 15-16. The EPA did, however, suggest some controls that it believed merited consideration by the FAA. Id. at 17-45, 77-86.
\textsuperscript{84} Id. at 105.
\textsuperscript{85} Id. at 101.
\textsuperscript{86} Id. at 103-04.
\textsuperscript{87} Id. at 113.
emphasized, however, that the local proprietors would probably be denied these powers if they resulted in a "substantial burden on interstate commerce." A definition of "substantial burden" was not given.

V. POST-BURBANK ATTEMPTS TO INTRODUCE OR APPROVE LOCAL CONTROL OF NOISE REGULATION

Despite the blow given by Burbank to municipalities in their attempts to control aircraft noise by means of local police power, proponents of local input in the regulation of airport noise have not given up their efforts to find official sanction for the right of local airport proprietors to enforce airport noise regulations. Their efforts received a boost in February 1975, when the United States District Court for the Northern District of California, in Air Transport Association v. Crotti, found that California regulations designed to achieve a gradual reduction of noise levels at airports operating under California permits were "not per se invalid as delving into and regulating a field of aircraft operation engaged in direct flight, which is preempted unto the federal government under the Constitution and the laws of the United States." The California noise control regulations regulated both cumulative noise levels for certain affected areas around airport facilities and noise directly generated by aircraft in flight.

The suit was brought by the Air Transport Association, an association comprised of virtually all intrastate, interstate, and foreign scheduled air carriers. The Association contended that the sections of the California Public Utilities Code and the corresponding regulations regarding aircraft noise were invalid and unenforceable by virtue of the supremacy and commerce clauses of the federal Constitution, and under controlling

88. Id.
90. Id. at 65.
91. See id. at 63.
93. 4 CALIF. ADMIN. CODE ch. 6 §§ 5000-80.5 (1975). These are referred to as California Noise Standards, adopted November 25, 1970. The cumulative regulations prescribed an absolute limit of 65 decibels on the level of cumulative noise which could be generated from the operation of an airport. It gave airports responsibility for monitoring noise levels to insure that the noise level limit was maintained. The regulations provided that no incompatible land use (including residential use) could exist in areas having a decibel level over 65. Several regulatory methods that airport authorities could use were suggested, but not required, and airport authorities were left free to devise and employ other methods. The direct flight prohibitions applied to inseparable features of noise generated by aircraft directly engaged in flight.
94. U.S. CONST. art. VI.
95. Id. art. I, § 8. The Burbank case was decided solely on the basis of federal
federal legislation. The court found the airlines' reliance on Burbank to be misplaced. It strictly limited the Burbank holding to a situation involving a municipality as a nonproprietor. As support for its view, the court pointed to the legislative history of the Federal Aviation Act. This history, it stated, showed that Congress had not intended to interfere with "basic airport control." The court also looked to federal regulations regarding noise standards for aircraft type and airworthiness certification. These regulations state that no determination had been made by the FAA that the noise levels it suggested were or should be taken as appropriate or required for use at, into, or out of any airport. Because no California airport had yet taken any affirmative step which might conflict with federal regulation of interstate commerce, the court held that it could not find the cumulative noise regulations invalid on preemption grounds. A consideration of whether those regulations in fact were unreasonable, arbitrary, or an abuse of local police power had to wait until such facts arose directly to present the issue before the court. The California regulations governing noise levels which occurred when aircraft were in direct flight, however, were declared to be an invasion of the exclusive federal control over aircraft flight and operations, airspace management, and utilization in interstate and foreign commerce. Thus, while granting a partial summary judgment holding invalid preemption under the supremacy clause by both the court of appeals and the Supreme Court. The district court, however, had decided that the Burbank ordinance also violated the commerce clause. It arrived at its decision by considering the impact of the adoption of flight curfews such as Burbank's on a national level. City of Burbank v. Lockheed Air Terminal, Inc., 318 F. Supp. 914, 927 (C.D. Cal. 1970).

97. 389 F. Supp. at 63.
98. "[W]e take as gospel," the court stated, "the words in footnote 14 in Burbank: 'We do not consider here what limits, if any, apply to a municipality as a proprietor.'" Id. (emphasis omitted).
99. Id. at 64. See S. REP. No. 1353, 90th Cong., 2d Sess. 7 (1968).
100. 14 C.F.R. § 36.5 (1975). The court took these regulations to mean that responsibility for determining permissible noise levels for aircraft using a specific airport remains with the proprietor of that airport. 389 F. Supp. at 64. The court distinguished passive functions of local authorities from definite affirmative action. The measures taken to date under the cumulative noise regulations, the court stated, had only been passive (monitoring noise levels at or near airports) or "patently within the local police power" (employment of shielding and ground level facility configurations, and development of compatible land uses). Id. at 64-65.
102. Id.
103. Id.
the direct flight regulations, the court declined to hold that the cumulative noise regulations were invalid on grounds of federal preemption.104

The Crotti court's view that Burbank had not established that local airport proprietors were preempted from regulating airport and aircraft noise has been shared by others. In April 1975, Representative Abner Mikva introduced a bill in the United States House of Representatives which would establish a system for the local control of airport noise problems.105 The bill, if enacted, will be called the Airport Noise Control Act of 1975. Currently under consideration by the Aviation Subcommittee of the House Committee on Public Works and Transportation, the bill proposes "that communities most directly affected by airport operations and noise should have, within limits, the ability and power to control those aspects of the operation of airports which have a substantial negative impact on their environment . . . ."106 The bill explains that localities will be able to use their power to control noise only as long as that exercise of control can be structured so as to insure the safety and commercial viability of airport facilities.107 Those local authorities to be granted power to control airport noise108 would have the power to propose and, after a comment period, to promulgate rules governing aircraft and airport operation procedures.109 Communities with high levels of aircraft noise would not exercise their powers to control airport noise through municipal governments, but would set up Noise Impact Boards, which would also have the authority to approve or

104. The EPA has recommended that the California Cumulative Noise Exposure Level (CNEL) regulations be adopted as a federal (FAA) regulation, applicable in California only, until a nationwide Federal airport noise regulation goes into effect. See Environmental Protection Agency, supra note 3, at 6-8.
106. Id. § 2(a)(2).
107. Id. § 2(b). Under the bill, each local airport authority would complete a Noise Exposure Forecast Study (NEF study). Id. § 3(a). On the basis of these studies, the areas with the highest noise exposure forecast values (values of 30 decibels or higher) would submit their studies to the EPA, FAA, CAB, and to their state environmental protection agencies for further study and possible modification. Id. Upon completion of this procedure, the areas with high NEF values would set up Community Airport Noise Impact Boards to regulate the airport under their particular jurisdictions. Id. § 4.
108. See id. § 4.
109. Id. § 5. This power would include the issuing of restrictions on the following:
   (1) the times during which takeoffs and landings may be made;
   (2) takeoff and landing procedures including approach, ascent, and power use;
   (3) jet and propeller engine use not necessary to flight;
   (4) allocation of runway use; and
   (5) designation of types and numbers of aircraft permitted to use the airport, with or without conditions.

Id. § 5(a).
reject in advance any expansion of airport facilities within their jurisdictions.\textsuperscript{110}

The bill contains a provision which permits concerned citizens to challenge regulations promulgated by the Noise Impact Boards.\textsuperscript{111} Upon such a challenge, the Federal Aviation Agency or the Civil Aeronautics Board would be empowered to hold hearings. On a finding that a challenged regulation

\begin{quote}
has a substantial adverse effect on the safety of air traffic or on the commercial viability of the airport or of an air carrier or carriers, and is not justified by the beneficial effect of the rule . . . upon the noise environment surrounding the airport,\textsuperscript{112}
\end{quote}

the agencies would be able to declare the challenged regulation invalid. In addition, on a preliminary finding by the FAA or the Civil Aeronautics Board that a local regulation would have an "imminent and substantial adverse effect on the safety of air traffic," the agencies would have the power to order the regulation suspended without a hearing.\textsuperscript{113}

While final action has not yet been taken on this bill, it is indicative of the thinking of several groups concerned about the continuing problem of airport and aircraft noise. Frustrated by the FAA's inability to curb the problem, these groups feel that a more effective solution may lie in partial local control.

\section*{VI. ADDITIONAL PROPOSALS FOR CHANGE}

Present practices do not provide an effective solution in an area which is becoming a growing source of danger to the public health and welfare. Several groups have suggested plans for alternative methods of airport noise regulation which they hope will work better than the present system. These suggestions run the gamut from systems of firmer federal control to plans for far greater local control in promulgating noise regulations.\textsuperscript{114}

\begin{flushleft}
\begin{footnotesize}
\begin{enumerate}
\item Id.
\item H.R. 6112 § 6(a), 94th Cong., 1st Sess. (1975).
\item Id. § 6(c).
\item Id. § 6(d). The agency's action must be reported in the Federal Register and the decision must be served on the challenging party within 10 days. Id. § 6(c).
\item See text accompanying notes 115-32 infra for examples of federal, state, and local plans for noise regulation.
\item Although it would be a costly procedure, there have been several recommendations that the airline industry be required to use currently available technology to retrofit older aircraft with new mechanical devices for decreasing noise. See EPA Report, supra note 44; Testimony of Representative Mikva, supra note 73. Others, however, believe that the high cost of retrofit makes it an impractical procedure. Representative Dale Milford, Chairman of the House Aviation and Transportation Subcommittee, has stated his
\end{enumerate}
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In July 1975, the Federal Aviation Administration proposed a new federal airport noise policy. Because it did not believe noise policy should "be the result or product of piece-meal judicial decisions," the agency stated that it wanted to develop a comprehensive policy that would accommodate as many interests and eliminate as many conflicts as possible between the various interstate and local authorities. The FAA identified four potential policy options it could adopt, together with the implications of each for the various local and national authorities involved in the regulation of airport noise. The first possibility was that all airport proprietors' actions would remain unconstrained by the FAA as long as the airport proprietors did not interfere with aircraft operating procedures and management and control of navigable airspace that was clearly federal. Adoption of this option, however, in the FAA's view, would result in numerous individual and unrelated court actions. The second possible policy was for the FAA to constrain completely local airport proprietors and to develop a comprehensive federal regulatory program of noise abatement. The FAA, however, thought that this would be an overreaction. Yet another option would be for local airport proprietors to establish initial noise abatement plans which would then be reviewed and approved or rejected by the FAA. Though this procedure would create a degree of national uniformity, it would be quite cumbersome and would require effective cooperation between the various federal, state, and local jurisdictions. It might also place planning demands on airport proprietors which would be beyond their means.

The final proposed option was a continuation of present policy, in which the FAA would neither support nor oppose restrictions imposed by airport proprietors unless the restrictions constituted an undue burden on interstate commerce or an unjust discrimination or interference with airport operating procedures. The fault of this option is that as an ad hoc approach,
allowing some local regulations but not others, it would not assure consistency.\textsuperscript{121} The FAA has asked for all interested persons to submit comments, after which it will decide which option to adopt.\textsuperscript{122}

The EPA has endorsed the third proposal of the FAA and will shortly propose to that agency its own similar plan.\textsuperscript{123} Under the EPA proposal, individual airport operators would be responsible for devising noise abatement plans to supplement noise reductions from federal regulations. The EPA proposal provides for the FAA to approve, modify, or reject each airport's noise plan on the basis of federal criteria. Additionally, public hearings would be required locally for each airport's plan. The EPA is now testing this proposal in pilot programs at eight airports.\textsuperscript{124}

State and local authorities also have devised new plans for the regulation of airport noise. The Maryland State Aviation Administration recently adopted an Airport Noise Control Program\textsuperscript{125} which, when implemented by individual airport proprietors, will allow the proprietors to set operational and other noise abatement procedures for their airports.\textsuperscript{126} The noise program was mandated by Maryland's Environmental Noise Act of 1974.\textsuperscript{127} The Airport Noise Control Program requires airline operators to assess the noise environment created by the operation of their airports, including projection of future usage; to delineate the noise zone, if any, and identify any impacted land use areas; and to develop a plan to reduce or eliminate

\begin{itemize}
\item 121. Id.
\item 122. Id.
\item 123. Roger Strelow, EPA Assistant Administrator for Air and Waste Management, announced that the plan would be proposed in early 1976. 37 Noise Reg. Rptr. at A-7 (1975).
\item 124. Id.
\item 125. Maryland State Aviation Administration Reg. No. 11.03.14, Airport Noise Control Program.
\item 127. Environmental Noise Act of 1974 §§ 1-13 (codified in scattered sections of articles 1a, 35, 41, 43, 662 and Natural Resources, Md. Code Ann.). The Act provides in part:
\begin{quote}
The [Maryland] Department [of Health and Mental Hygiene] shall prepare and submit environmental noise standards to the noise council for comment not later than January 1, 1975, and . . . adopt . . . standards . . .
\end{quote}
In establishing environmental noise standards, the Department shall take into consideration scientific information concerning the volume, frequency, duration and other characteristics of noise which may adversely affect public health, safety, or general welfare. Such effects shall include temporary or permanent hearing loss, interference with sleep, speech communication, work or other human activities, adverse physiological responses or psychological distress, adverse effects on animal life, devaluation or damage of property, and unreasonable interference with enjoyment of life or property. . . .
\end{itemize}
\textbf{Md. Code Ann. art. 43, § 828(a) (Supp. 1974).}
the impacted land use area. The Administrator is aiding airport proprietors with technical and financial assistance while they prepare their plans. Neither the Environmental Noise Act of 1974 nor the Airport Noise Control Program spells out specific methods proprietors may use to curb noise levels.

One local airport proprietor which has very recently promulgated an anti-noise regulation is the Los Angeles City Board of Airport Commissioners. In November 1975, the Board passed a regulation which would require each carrier at the terminal to reduce by 20 percent annually its operations which do not meet federal noise standards. The Board’s goal is to have all airport operations meet the standards by 1981. The regulation requires airlines to institute their own noise abatement programs. These could include such measures as reduction of operations, rescheduling of flights, increased use of quieter aircraft, changes in flight procedures, and retrofitting of older jets. The regulation went into effect in March 1976, although the Air Transport Association filed suit to have the ordinance enjoined and declared unconstitutional.

It does seem clear, despite the suit, that the Commissioners, confronted with liability for noise under the inverse condemnation theory and the need to comply with California’s antinoise law, had to find some way to curb the noise at Los Angeles International Airport. If the courts uphold their attempt to force the airlines to regulate themselves, they may have discovered a solution to the preemption problem. In light of the increasing acuteness of the airport noise pollution problem, numerous other state and local authorities are trying to devise schemes for noise control that can defeat preemption challenges. It is likely that in the following months, such local plans will continue to multiply.

VII. CONCLUSION

Aircraft and airport noise has become an annoyance and, indeed, a health danger to communities located near airports. Recognizing this, the federal
government has made efforts through federal legislation and regulation to curb the offending noise. Advocates of federal noise regulation contend that considerations of safety and uniformity necessitate complete federal control, be it under the FAA or some other federal agency. They argue, moreover, that by virtue of the supremacy clause and the commerce clause of the Constitution, the federal government has preempted the field of control of airport or aircraft noise. They interpret the decision in City of Burbank v. Lockheed Air Terminal, Inc. as an endorsement of total federal preemption in this area.

A careful reading of Burbank, however, reveals that it has left unanswered the question of how much authority local airport proprietors retain to regulate noise pollution at their airports. A sizeable number of concerned parties feel that these proprietors can and should have some input in the total program of airport noise regulation. Though some areas of an airport's operations, such as direct overflight of aircraft, are the exclusive domain of the federal government, there are other areas which can be locally regulated to reflect local concerns and needs without conflicting with matters under federal jurisdiction. Consideration of both these views leads one to the conclusion that what is needed to control airport noise is an effective federal program, giving real power both to the FAA and the EPA to promulgate regulations, together with a component of local regulation to reflect the needs of the local resident populations. Whether the EPA will be given real power and whether local jurisdictions will be successful in asserting some element of control over the area are questions that remain to be answered.

Judith Maloff Katz

133. See Environmental Protection Agency, supra note 3, at Appendix B.