

Airport Noise Regulation: Burbank, Aaron, and Air Transport*

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"The aircraft and its noise are indivisible"¹

Noise has been an unfortunate by-product of air transportation since its earliest days. One can humorously imagine an assistant on the sands at Kitty Hawk in 1903 with fingers poked in his ears screeching to be heard above the racket of a flimsy propeller. The growth of the air-transport industry and the development of subsonic and supersonic jetcraft have deafeningly increased and compounded aircraft noise. Large urban airports have so concentrated that noise as to threaten public health and environmental balance within a wide radius of the airport.

Attempts to abate the noise at airports have been halting and generally ineffective. One reason for this failure has been the legal uncertainty concerning whether the federal, as opposed to state and local, government has the power to control airport noise. This article will review three court challenges of California airport noise regulation and fiscal responsibility, as well as the lack of federal agency initiative, in an attempt to ascertain where that control now rests.

* 1975 winner of the Harold S. Shertz Essay Award Contest, subsequently published in 5 ENVIRONMENTAL AFFAIRS 97. Reprinted with permission of ENVIRONMENTAL AFFAIRS.

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1. *American Airlines, Inc. v. Town of Hempstead*, 272 F.Supp 226, 230 (E.D.N.Y. 1967), *aff'd*, 398 F.2d 369 (2d Cir. 1968), *cert. denied*, 393 U.S. 1017 (1969).

The first of these cases is *City of Burbank v. Lockheed Air Terminal, Inc.*,² in which the United States Supreme Court struck down a municipal ordinance enacted to abate local airport noise and declared that the Federal Aviation Act of 1958,³ the Noise Abatement Amendments of 1968,⁴ and the Noise Control Act of 1972⁵ together established an instance of federal preemption over "airspace management."⁶ *Burbank*, however, was not a definitive resolution of the allocation of the power to control noise. The rationale was founded on ambiguous legislative history and the holding provided a massive exemption for possible local control where framed as proprietary, rather than police power, restrictions.

Next, *Aaron v. City of Los Angeles*⁷ struck a financial blow to municipal proprietors of airports which had not been foreseen after *Burbank*. The shift of control of noise from traditionally local to federal government regulation should logically be accompanied by a parallel shift to the federal government of fiscal liability for damages caused by noise pollution.⁸ *Aaron*, however, held that the fiscal liability continued with the local government and consequently further defined the *Burbank* proprietary exception.

Considering the proprietary control exception of *Burbank* and the consequent fiscal liability of *Aaron*, as well as the continuing lack of federal regulation or enforcement of airport noise control, a three-judge federal district court recently held in *Air Transport Association of America v. Crotti*⁹ that certain state suggestions for local airport owner-operator regulation of noise were not per se invalid. The opinion expressly withheld final decision on the yet to be applied regulations, but it marked the first positive affirmation of local control of airport noise after *Burbank*.

I. FEDERAL PREEMPTION OF AIRSPACE MANAGEMENT: CITY OF BURBANK V. LOCKHEED AIR TERMINAL, INC.

In 1970 the Burbank City Council enacted a curfew ordinance which made unlawful jet take-offs from Hollywood-Burbank Airport between 11

2. 411 U.S. 624 (1973) [hereinafter cited as *Burbank*.]

3. 49 U.S.C. § 1301 *et seq.* (1970).

4. 49 U.S.C. § 1431 (1970), *as amended*, (Supp. III, 1973).

5. 42 U.S.C. § 4901 *et seq.* (Supp. III, 1973) and 49 U.S.C. § 1431 (Supp. III, 1973).

6. *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 627 (1973).

7. 40 Cal. App. 3d 471, 115 Cal. Rptr. 162 (Ct. App. 1974), *cert. denied*, 419 U.S. 1122 (1975) [hereinafter cited as *Aaron*].

8. EPA TO SENATE COMM. ON PUB. WORKS, 93d Cong., 1st Sess., REPORT ON AIRCRAFT-AIRPORT NOISE 56-62 (Comm. Print 1973) and W. LAKE, *Noise: Emerging Federal Control* in FEDERAL ENVIRONMENTAL LAW 1150 (Environmental Law Institute, 1974); Note, *Federal Regulation of Aircraft Noise Under Federal Aviation Act*, 15 B.C. IND. & COM. L. REV. 848 (1974); Note, *Aircraft Noise Abatement: Is There Room for Local Regulation?* 60 CORNELL L. REV. 269 (1975).

9. 389 F. Supp. 58 (N.D. Cal. 1975) [hereinafter cited as *Air Transport*].

p.m. and 7 a.m.¹⁰ Airport noise had been widely recognized as most annoying during these nighttime hours,¹¹ and the curfew was expressed as an exercise of the city's police power to protect and preserve the public health. In fact, only one flight per week—an intrastate flight Sunday nights at 11:30 p.m.—was affected. Although the municipal restriction was framed cautiously in terms of airport and not air flight control, both airport and aircraft operators could be held responsible for violations.

The airport owner and the affected airline challenged the constitutional validity of the city's curfew in federal district court.¹² The court found the ordinance unconstitutional under the Supremacy and Commerce Clauses of the United States Constitution.¹³ On appeal the Ninth Circuit Court of Appeals affirmed under the Supremacy Clause on grounds of federal preemption and conflict.¹⁴ On final appeal, the United States Supreme Court affirmed on grounds of preemption alone.¹⁵ The Federal Aviation Act of 1958,¹⁶ the Noise Abatement Amendments of 1968,¹⁷ and the Noise Control Act of 1972¹⁸ were cited as evidencing "complete and exclusive" federal sovereignty "airspace management."¹⁹

The Supreme Court holding had been foreshadowed by a series of federal and state court cases. In *Allegheny Airlines, Inc. v. Village of Cedarhurst*,²⁰ a local ordinance setting minimum altitude overflights for aircraft using nearby John F. Kennedy Airport in New York was held invalid by the Second Circuit Court of Appeals, which found that the area of navigable airspace had been federally preempted to the exclusion of other regulation. In *Loma Portal Civic Club v. American Airlines, Inc.*,²¹ an injunction sought by a group of property owners to eliminate certain flights at a neighboring airport was denied. The California Supreme Court relied

10. Burbank, Cal., Municipal Code § 20-32.1 (1970). The ordinance allowed an exception from the curfew restriction for emergency flights authorized by the Burbank police.

11. For a survey of noise pollution health studies see Comment, *Toward the Comprehensive Abatement of Noise Pollution: Recent Federal and New York City Noise Control Legislation*, 4 ECOL. L.Q. 109, 110-14 (1974).

12. The Air Transport Association, whose membership includes all nationally certified carriers, intervened as a plaintiff. The Federal Aviation Administration filed an amicus brief in support of the plaintiff and the State of California filed an amicus brief in support of the defendant municipality.

13. 318 F. Supp. 914 (C.D. Cal. 1970). U.S. CONST. art. VI, cl. 2 (Supremacy Clause). U.S. CONST. art. I, § 8, cl. 3 (Commerce Clause).

14. 457 F.2d 667 (9th Cir. 1972).

15. 411 U.S. 624 (1973), (Douglas, J., writing for a 5 member majority).

16. 49 U.S.C. § 1301 *et seq.* (1970).

17. 49 U.S.C. § 1431 (1970), *as amended*, (Supp. III, 1973).

18. 42 U.S.C. § 4901 *et seq.* (Supp. III, 1973) and 49 U.S.C. § 1431 (Supp. III, 1973), *amending* 49 U.S.C. § 1431 (1970).

19. *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 626-27 (1973).

20. 238 F.2d 812 (2d Cir. 1956).

21. 61 Cal. 2d 582, 394 P.2d 548, 39 Cal. Rptr. 708 (1964).

on *Cedarhurst* but narrowed its theory of invalidity from preemption to specific conflict with federal regulation of aviation. In *American Airlines, Inc. v. Town of Hempstead*,²² a town's "unnecessary noise" ordinance was held invalid, again by the Second Circuit, as a thinly veiled attempt to impermissibly regulate aircraft flight in conflict with Federal Aviation Agency landing and take-off regulations for Kennedy Airport.²³ The court relied on *Loma* for the theory of specific conflict, although it indicated broader preemption might have also been found. More recently, in an advisory opinion,²⁴ the Massachusetts Supreme Judicial Court cautioned the state legislature that a proposed enactment banning supersonic transports from landing in the Commonwealth would be an unconstitutional encroachment in the federally preempted area of aircraft flight. The court added parenthetically that some limited regulations might be permissible when the state or local agency was acting as airport proprietor.

Not all local ordinances regulating airport or air flight management to control noise, however, had been invalidated. In some cases, a federal preemption was not found. In such cases, if the local regulation was reasonable and it did not conflict with any existing federal law, rule, or regulation, it was allowed to stand. For example, in *Stagg v. Municipal Court*,²⁵ the enactment of a night curfew at the Santa Monica Municipal Airport was held by the California Court of Appeals to be a valid exercise of the city's police power which was not in conflict with any state or federal legislation. And in *Port of New York Authority v. Eastern Air Lines, Inc.*,²⁶ the federal district court held that the metropolitan authority's scheme of preferential runway use to abate jet aircraft noise at La Guardia Airport was reasonable and did not infringe upon a federally preempted area of regulation.²⁷

Given this background, *Burbank* appeared to settle the uncertainties of local jurisdiction to control airport noise pollution. The Supreme Court

22. 398 F.2d 369 (2d Cir. 1968), *cert. denied*, 393 U.S. 1017 (1969).

23. The District Court below had declared:

The aircraft and its noise are indivisible; the noise of the aircraft extends outward from it with the same inseparability as its wings and tail assembly; to exclude the aircraft noise from the Town is to exclude the aircraft; to set a ground level decibel limit for the aircraft is directly to exclude it from the lower air that it cannot use without exceeding the decibel limit. . . . In a word, the Ordinance does not forbid noise except by forbidding flights and it is, therefore, the legal equivalent of the invalid Cedarhurst Ordinance.

272 F. Supp. 226, 230 (E.D.N.Y. 1967).

24. Opinion of the Justices, 359 Mass. 778, 271 N.E.2d 354 (1971).

25. 2 Cal. App. 3d 318, 82 Cal. Rptr. 578 (Ct. App. 1969).

26. 259 F. Supp. 745 (E.D.N.Y. 1966).

27. Other examples include *Aircraft Owners & Pilots Ass'n v. Port Authority*, 305 F. Supp. 93 (E.D.N.Y. 1969); *Williams v. Superior Court*, 108 Ariz. 154, 494 P.2d 26 (1972); and *Parachutes, Inc. v. Township of Lakewood*, 121 N.J. Super. 48, 296 A.2d 71 (Super. Ct. 1972), *certification denied*, 62 N.J. 331 (1973).

found a federal preemption of "airspace management." The Federal Aviation Act of 1958 was held to have established "complete and exclusive national sovereignty"²⁸ of the airspace of the United States.²⁹ This federal primacy, the Court believed, was emphatically ratified by the Noise Control Act of 1972, which had been passed since the lower court rulings in *Burbank*: "That Act reaffirms and reinforces the conclusion that FAA, now in conjunction with EPA, has full control over aircraft noise, preempting state and local control."³⁰

A. THE PREEMPTION FINDING

The Court initially recognized that no express language of preemption could be found in the Noise Control Act and that a strong presumption existed that the control of noise, which had traditionally been exercised within the powers of states, would remain with the states.³¹ The Supreme Court, in *Rice v. Santa Fe Elevator Corp.*,³² however, had stated that when Congressional intent was manifest and clear, evidenced by the pervasiveness of federal regulation in the area, this presumption could be overcome and preemption could be found.³³ The *Burbank* Court illustrated the pervasiveness of federal regulation of air traffic by quoting from Justice Jackson's concurrence in *Northwest Airlines, Inc. v. Minnesota*:

Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands. The moment a ship taxis onto a runway it is caught up in an elaborate and detailed system of controls.³⁴

The Court recounted a legislative history of the 1968 Noise Abatement Amendments to the Federal Aviation Act and the Noise Control Act of

28. *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 626-27 (1973).

29. 49 U.S.C. § 1508 (1970). Airspace which was termed "navigable" by the Federal Aviation Act included airport approach and take-off paths, 49 U.S.C.A. § 1301(26) (Supp. 1975).

30. 411 U.S. 624, 633 (1973).

31. *Id.* This presumption against preemption of a power traditionally held by the states was declared by the Court in *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 243 (1959) to be basic to a form of government founded on a concept of Federalism.

32. 311 U.S. 218 (1947).

33. *Id.* at 230. The "clear and manifest purpose of Congress" could be shown by: 1) the pervasiveness of the federal regulatory scheme, 2) the dominance of federal interest in the area, 3) the objectives of the federal law which imply a uniform system of regulation, and 4) the objectives of the federal law which preclude state or local inconsistencies. These four instances broadened the traditional preemption rule which had been declared in *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 143, 152 (1851). The *Cooley* rule states that the "nature" of the area of regulation is determinative. If the area admits to only one source of control, preemption may be inferred, but if similar controls can be exercised by various levels of government, preemption may not be found unless explicitly stated in the regulatory legislation.

34. 322 U.S. 292, 303 (1944), *quoted in* *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633-34 (1973).

1972 to evidence pervasiveness and resultant Congressional intent to preempt state and local government police power controls. Included were portions of a written opinion of the Secretary of Transportation about the 1968 Amendments,³⁵ the unenacted Senate version of the 1972 Act,³⁶ arguments from the floor of Congress urging enactment,³⁷ and a statement of the President at the signing of the bill.³⁸

Despite the recital of legislative history, the Supreme Court in fact appeared to rely on actual agency behavior and practical functioning to evince the "clear and manifest" purpose of Congress to preempt the area. The Court announced that the procedures under the 1972 Act were already well under way, noting certain regulations which had already been promulgated and Federal Aviation Agency (FAA) notices that others were soon to be issued.³⁹ Practical functioning of aircraft control under the Federal Aviation Act further explained the preemption requirement:

The Federal Aviation Act requires a delicate balance between safety and efficiency 49 U.S.C. § 1348(a), and the protection of persons on the ground. 49 U.S.C. § 1348(c). . . . The interdependence of these factors requires a uniform and exclusive system of federal regulation if the congressional objectives underlying the Federal Aviation Act are to be fulfilled.⁴⁰

The Supreme Court chose to rely on the broad constitutional ground of federal preemption and not the narrower or more explicit grounds of direct conflict with federal law⁴¹ or undue burden on interstate commerce.⁴² Even though Commerce Clause implications were introduced in

35. *Hearings on S. 707 and H.R. 3400 Before the Subcomm. on Aviation of the Senate Comm. on Interstate and Foreign Commerce*, 90th Cong., 2d Sess. 62 (1968).

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

37. 118 CONG. REC. 37083 (1972) (remarks of Representative Staggers) and 118 CONG. REC. 37317 (1972) (remarks of Senator Tunney).

38. 8 WEEKLY COMP. PRES. DOCS. 1583 (1972).

39. The FAA issued a series of advance notices of proposed rulemaking which were to require entire fleet compliance with 14 C.F.R. § 36 *et seq.* (1975) (FAR 36) aircraft noise levels by July, 1978 in 35 Fed. Reg. 16980 (1970), in 38 Fed. Reg. 2769 (1973), and, after *Burbank, supra*, note 2, in 39 Fed. Reg. 11302 (1974). None of these proposed regulations has, in fact, been promulgated.

40. *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 638-39 (1973).

41. *E.g.*, [sic] *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973) (which allowed state regulation of sea-to-shore oil spill pollution unless a clear conflict with federal water quality legislation could be shown); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963) (which limited review to actual rather than hypothetical state conflicts with federal agricultural standards); and *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960) (which held a city air pollution ordinance sanctioning ship smoke stack emissions valid because it did not directly conflict with the federal navigation licensing scheme).

42. *E.g.*, *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959) (which invalidated a state statute requiring a peculiar type of mudguard on trucks using state highways as unduly burdensome on interstate commerce); *Southern Pacific Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761 (1945) (which struck down a state law limiting train length as obstructive to the free flow of interstate commerce); and *South Carolina State Highway Dep't v. Barnwell Bros.*, 303 U.S. 177

a suggestion that the Burbank ordinance and similar ordinances of other municipalities would "fractionalize" any regulatory scheme and thus "severely limit the flexibility of the FAA in controlling air traffic flow. . . ."43 The Court's ground for invalidation was solely the existence of a federal preemption.

The finding of preemption continued a trend of Supreme Court decisions and represented a particular kind of judicial lawmaking.⁴⁴ When the Court determines Congress intended by its legislation complete and exclusive federal regulation of a particular field, preemption, based on the Supremacy Clause, is declared.⁴⁵ The Court's review is limited to flat determinations of intent evidenced in legislative language, history, or administrative behavior. There is no delicate balancing of burdens and interests as in Commerce Clause cases.⁴⁶ There is no factual finding of "direct and positive" inconsistency of state law with federal law as in conflict cases.⁴⁷

A finding of preemption tends to be a perfunctory constitutional decision. It is analogous to the Court's practice of deciding a case on other than constitutional grounds if at all possible.⁴⁸ Thus, preemption allows the Court to postpone decisions on what might be difficult or close questions of law. In *Burbank*, for example, tenuous Commerce Clause implications of local regulation of aircraft have been cautiously deferred by the preemption finding. Tactically, preemption puts Congress on notice that a certain area will be exclusively federally regulated unless it acts to amend the questionable legislation which had been reviewed by the Court. Thus, Congress, and not the Court, is in the position of invalidating state or local law, and criticisms of judicial legislating are neatly parried.

(1938) (which allowed state regulation of the width of trucks using its highways as not unduly restrictive of interstate commerce).

43. *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 639 (1973). Rehnquist, J., writing in dissent abruptly dismissed any question of undue burden on interstate commerce by first stressing that commerce clause implications should be considered case-by-case and not by illusive hypotheticals and by then noting that only one flight per week was affected in this instance. 411 U.S. 624, 654 (1973).

44. For a general discussion of this trend see Hirsch, *Toward a New View of Federal Preemption*, 1972 U. ILL. L.F. 515; Note, *Pre-Emption as a Preferential Ground: A New Canon of Construction*, 12 STAN. L. REV. 208 (1959).

45. U.S. CONST. art. VI, cl. 2 reads: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land. . . ."

46. *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959); *Southern Pacific Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761 (1945).

47. *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973); *Kelly v. Washington ex rel. Foss Co.*, 302 U.S. 1, 10 (1937).

48. *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346 (1936) (concurring opinion); *Burton v. United States*, 196 U.S. 283, 295 (1905).

Unlike a finding of direct conflict which is narrow and factual, a finding of preemption is broad and presumptive. Consequently, it may present certain disadvantages or dangers. Only limited federal regulation of a particular area may exist, and many opportunities for nonconflicting or even reinforcing state and local regulations may be offered. These opportunities remain open if the court finds only conflict, but they are abruptly foreclosed if it finds preemption. In the case of preemption, until federal regulations are promulgated or until Congress amends the original legislation, there may be an absence of rules, standards, and enforcement in an area now immunized from state and local control. The result is confusion and uncertainty, at best. The developments since *Burbank* tend to confirm the dangers of choosing preemption as grounds for invalidation.

B. THE "FLAWS" OF THE BURBANK DECISION

Two major flaws in the reasoning of the *Burbank* decision have become increasingly apparent since its pronouncement in 1973 by the Supreme Court: (1) the stated reliance on legislative history as the basis for a preemption finding and (2) the stated limited applicability of the decision to municipalities (or state government agencies) in their exercise of police power over local airports to control noise.

The legislative history cited by the majority of the Court was ambiguous and failed to establish a solid and clear Congressional intent and purpose.⁴⁹ For each cite offered, Justice Rehnquist, dissenting, countered with authority that the Congressional intent was *not* to disturb the existing federal, state, and local governments balance of power.⁵⁰ The majority's evidence of preemptive intent was particularly weak given the established standard that such intent has to be strong and persuasive in order to overcome the historic presumption of the validity of state and local police power regulations.⁵¹

49. *E.g.*, the use of statements by Senator Tunney and Representative Staggers to establish Congressional intent. *Supra*, note 37. Statements made from the floor of Congress generally are not viewed as reliable indicators of intent and are often discounted as mere grandstanding. *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 642 n.1 (1973) (dissenting opinion).

50. Cited authority included *inter alia*: statements of Congressional intent in H.R. REP. NO. 842, 92d Cong., 2d Sess. 8 (1972) and S. REP. NO. 1160, 92d Cong., 2d Sess. 10-11 (1972) that the Noise Control Act of 1972 was not to alter existing federal, state and local regulatory powers; statements by the sponsor of the Federal Aviation Act of 1958 in *Hearings on S. 3880 Before a Subcomm. of the Sen. Comm. on Interstate and Foreign Commerce*, 85th Cong., 2d Sess. 279 (1958); and statements made in support of the 1968 Noise Abatement Amendments in H.R. REP. NO. 1463, 90th Cong., 2d Sess. 4 (1968) and in S. REP. NO. 1353, 90th Cong., 2d Sess. 2-3, 6-7 (1968). *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 641-50 (1973) (dissenting opinion).

51. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 243 (1959).

The applicability of *Burbank* was limited in the often cited note 14 to a municipality's exercise of its police power to control local airport noise. The decision expressly does not concern a municipality's exercise of its proprietary rights as owner and operator of the airport.⁵² In fact, the Hollywood-Burbank Airport is an anomaly; it is the *only* major national airport which is privately owned. But the holding of *Burbank* does not singly apply to that airport. It would also be determinative in those instances of one municipality's attempt to control noise at a neighboring municipality's airport.⁵³ There have been a few attempts to exercise such police powers subsequent to *Burbank*.⁵⁴ Yet in most cases the municipality or other governmental unit is the owner and operator of the local airport and therefore is not expressly prevented by *Burbank* from exercising its proprietary rights by regulating noise levels.

If the great bulk of airport noise cases are not to be affected, however, the rationale of *Burbank* is defeated. Basic to the *Burbank* holding is "[t]he interdependence of [safety, efficiency and the protection of persons on the ground which] requires a uniform and exclusive system of federal regulation. . . ." ⁵⁵ If this requirement of uniformity exists, it should make no difference whether the local regulation is based on the state's police power or the owner's proprietary power.⁵⁶

The dichotomy creates a senseless contradiction unless it may be viewed as a restriction on a kind of action rather than on a category of

52. City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 635 n.14 (1973). The note includes an excerpt from a letter of the Sec'y of Transportation which appears in full in *Hearings on S. 707 and H.R. 3400 Before the Subcomm. on Aviation of the Senate Comm. on Interstate and Foreign Commerce*, 90th Cong., 2d Sess. 62 (1968):

[T]he proposed legislation [Noise Abatement Amendments of 1968] will not affect the rights of a state or local public agency, as the proprietor of an airport. . . .

and the Court's own explication:

[W]e are concerned here not with an ordinance imposed by the City of Burbank as "proprietor" of the airport, but with the exercise of police power. . . . We do not consider here what limits, if any, apply to a municipality as a proprietor.

53. City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 635-36 n.14 (1973). *E.g.*, American Airlines, Inc. v. Town of Hempstead, 398 F.2d 369 (2d Cir. 1968), *cert. denied*, 393 U.S. 1017 (1969). The Court illustrated an extreme of this circumstance with the example of Cincinnati's airport which is located not merely in another city but in another state, Kentucky.

54. The following cases relied on the *Burbank*-declared federal preemption to invalidate one community's attempt to control the noise of another community's airport: Village of Bensenville v. City of Chicago, 16 Ill. App. 3d 733, 306 N.E.2d 562 (1973) (denied an attempt by a group of contiguous municipalities to prevent increased noise pollution incumbent with the proposed expansion of O'Hare Int'l Airport); Township of Hanover v. Town of Morristown, 135 N.J. Super. 529, 343 A.2d 792 (Super. Ct. 1975) (vacated a prior decision to enjoin certain jet flights at a town's airport which had been sought by the neighboring township).

55. City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 639 (1973).

56. Also consider that the Supreme Court does not note probable jurisdiction to hear a case unless an issue with general impact or national significance is presented. Yet if the extreme limitation of note 14 is taken literally, *Burbank* becomes a decision of nearly unique application.

airport ownership. A municipality which owns and operates an airport, in effect, may play two roles in the control of noise pollution. One role is manifested in the exercise of its police power to protect the local citizenry, by such techniques as setting altitude minimums and prescribing stringent take-off and touchdown operational procedures.⁵⁷ The other approach involves the exercise of the municipality's fundamental proprietary rights in terms of land and facilities use, equivalent to those of any individual or corporation, such as terminal and facilities leasing, take-off and landing fee levies and expansion and development plans.

The municipality's police power flows from the Tenth Amendment and from the local government's equivalent of a constitution, perhaps a city charter or incorporation document.⁵⁸ This power is exercised to protect and preserve the public health, welfare, and safety and is often enforced and sanctioned by criminal action. On the other hand, the municipality's proprietary power generally does not have a legislative base but is "a common-law right which inheres to the owner and operator of the land."⁵⁹ Proprietary restrictions are exercised to protect and benefit the owner and are enforced through civil proceedings.

The nature of control of noise through the municipality's police power flight restrictions, and not through proprietary leasing or contracting, is the legislative area which can ". . . admit only of one uniform system, or plan of regulation. . ." in the terms of the traditional preemption rule.⁶⁰ This type of control is to be provided solely by the FAA and EPA and is thus federally preempted.

Even this conciliatory reading of the *Burbank* rationale with its exceptional limitation prompts more questions than it answers. What are the contours and limits of these two roles of a local government? Don't they often overlap?⁶¹ Between the FAA and the municipal proprietor of an airport, who is to control and who is to enforce which noise restrictions? And finally, who is to bear the responsibility for non-control and non-enforcement?

57. For a general discussion of operational techniques to abate airport noise, see Comment, *Port Noise Complaint*, 6 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 61 (1970).

58. *State v. Whitaker*, 228 N.C. 352, 359, 45 S.E.2d 860, 865 (1947), *aff'd*, 335 U.S. 525 (1949).

59. Testimony of S. Goldstein of the Port of New York Authority in *Hearings Pursuant to H.R. Res. 420 Before Subcomm. on the Study of Airport Noise of the House Comm. on Interstate and Foreign Commerce*, 87th Cong., 2d Sess. 657 (1962). See also *Port of New York Authority v. Eastern Air Lines, Inc.*, 259 F. Supp. 745, 750 (E.D.N.Y. 1966) for statement of airport owner's right to enforce restrictive covenant of airport-airline lease to require preferential runway use to reduce noise.

60. *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 143, 152 (1851).

61. E.g., preferential runway systems which limit populated area overflights, number and frequency of fleet landings, and take-off restrictions.

In *Burbank* a general rule was stated: local police power attempts to control airport noise were invalid because the area of airspace management had been federally preempted. But the precision of the rule's dimensions and the nuances of its possible implications were far from clear.

II. INVERSE CONDEMNATION: AARON V. CITY OF LOS ANGELES

Local government police power legislation is not the only means available to attempt to abate airport noise pollution. Private individuals can seek property damage recoveries from the airport owner-operator and thus may spur other local attempts to lower noise levels to avoid future liability. In January, 1975, the United States Supreme Court denied certiorari in one such private property action, *Aaron v. City of Los Angeles*.⁶² The Court left standing a California Court of Appeals decision which held the city fiscally liable to its airport's neighbors for damages in reduced property values suffered from noise pollution. The trend in cases declaring exclusive federal control of airport noise regulation, set by the *Burbank* preemption decision and followed in a flurry of state and local government cases subsequent to it,⁶³ did not forewarn of this continued local liability in private property owner actions. In the Environmental Protection Agency (EPA) report of July 31, 1973, to the Senate Committee on Public Works, the administrator forecast a liability shift to the federal government collateral with its proclaimed preemption of airport noise control.⁶⁴ Legal commentators made similar reasonable predictions of a liability shift.⁶⁵

The FAA apparently had recognized the risk of incurring the cost of noise damage and in 14 C.F.R. § 36.5 issued an equivocal noise regulation standard that failed to set a noise ceiling for individual airports: "No determination is made, under this part, that these noise levels are or should be acceptable or unacceptable for operation at, into or out of, any airport." The FAA comment to accompany § 36.5 explicitly stated that the responsibility for this determination remained with the proprietor of each airport.⁶⁶

62. 40 Cal. App. 3d 471, 115 Cal. Rptr. 162 (Ct. App. 1974), *cert. denied*, 419 U.S. 1122 (1975).

63. *Village of Bensenville v. City of Chicago*, 16 Ill. App. 3d 733, 306 N.E.2d 562 (1973); *Township of Hanover v. Town of Morristown*, 135 N.J. Super. 529, 343 A.2d 792 (Super. Ct. 1975).

64. EPA TO SENATE COMM. ON PUB. WORKS, 93d Cong., 1st Sess., REPORT ON AIRCRAFT-AIRPORT NOISE 56-62 (Comm. Print 1973).

65. W. LAKE, *Noise: Emerging Federal Control in FEDERAL ENVIRONMENTAL LAW 1150* (Environmental Law Institute, 1974); Note, *Federal Regulation of Aircraft Noise Under Federal Aviation Act*, 15 B.C. IND. & COM. L. REV. 848 (1974); Note, *Aircraft Noise Abatement: Is There Room for Local Regulation?*, 60 CORNELL L. REV. 269 (1975).

66. 34 Fed. Reg. 18355 (1969).

These cases, predictions, and equivocations set the stage for *Aaron*, which presented an action in inverse condemnation by neighboring home owners against the city as proprietor of Los Angeles International Airport (LAX) to recover damages for the diminution of their property values due to airport noise.

An action in inverse condemnation is based on the Fifth or Fourteenth Amendment Due Process Clause or the Fifth Amendment Compensation Clause of the United States Constitution. It may also invoke similar, but sometimes broader, guarantees under the individual state constitutions.⁶⁷ It involves a claim and proof that the governmental defendant took certain private property for public use without the procedures or just compensation required in an exercise of eminent domain.

The California appellate court formulated the state rule governing recoveries in inverse condemnation as follows:

The municipal owner and operator of an airport is liable for a taking or damaging of property when the owner of property in the vicinity of the airport can show a measurable reduction in market value resulting from the operation of the airport in such manner that the noise from aircraft using the airport causes a substantial interference with the use and enjoyment of the property, and the interference is sufficiently direct and sufficiently peculiar that the owner, if uncompensated, would pay more than his proper share to the public undertaking.⁶⁸

The California rule is an assimilation of the legal history of compensable constitutional "takings" of air easements by local airports over their neighbors' property which had been growing in federal and state courts for thirty years.⁶⁹ From these cases, two general profiles developed as to when and under what circumstances recovery would be had. The federal courts followed a traditional trespass theory and required direct overflights or actual physical invasion of the superadjacent airspace for the property owner to recover.⁷⁰ The state courts tended to follow a nuisance theory and did not require proof of direct overflights. This approach was clearly set out by the Washington Supreme Court in *Martin v. Port of Seattle*:

67. 3 NICHOLS, THE LAW OF EMINENT DOMAIN § 8.1[3] (3d rev. ed. Supp. 1975).

68. 40 Cal. App. 3d 471, 483-84, 115 Cal. Rptr. 162, 170 (Ct. App. 1974), *cert. denied*, 419 U.S. 1122 (1975).

69. Compensable "takings" of air easements were at issue in *Griggs v. Allegheny County*, 369 U.S. 84 (1962); *United States v. Causby*, 328 U.S. 256 (1946); *City of Boston v. Massachusetts Port Authority*, 444 F.2d 167 (1st Cir. 1971); *Batten v. United States*, 306 F.2d 580 (10th Cir. 1962), *cert. denied*, 371 U.S. 955 (1963); *Bennett v. United States*, 266 F. Supp. 627 (W.D. Okla. 1965); *Thornburg v. Port of Portland*, 233 Or. 178, 376 P.2d 100 (1962); and *Martin v. Port of Seattle*, 64 Wash. 2d 309, 391 P.2d 540 (1964), *cert. denied*, 379 U.S. 989 (1965).

70. *E.g.*, *Batten v. United States*, 306 F.2d 580, 584 (10th Cir. 1962), *cert. denied*, 371 U.S. 955 (1963).

We are unable to accept the premise that recovery for interference with the use of the land should depend upon anything as irrelevant as whether the wing tip of the aircraft passes through some fraction of an inch of the airspace directly above the plaintiff's land. The plaintiffs are not seeking recovery for a technical trespass, but for a combination of circumstances engendered by the near-by flights which interfere with the use and enjoyment of their land.⁷¹

In all cases, the owner and operator of the airport was held liable, not the federal government, even though a federal agency had set the standards, approved the plans and designs, and sponsored the construction or expansion of the airport.⁷²

Aaron held that no overflight requirement was necessary for recovery in California. The court cited the above passage from *Martin* to emphasize that such a requirement was arbitrary and unreasonable. The requirement was found not scientifically sensible in an age when accurate noise measurement technology is available.⁷³ Further, it was not necessary under the state constitutional definition of a "taking" of private property. Unlike the narrow United States constitutional concept of the "taking" of property for public use by eminent domain, the California Constitution and Code of Civil Procedure broadened the state definition of compensable "taking" to include damaging or interfering with the use and enjoyment of property.⁷⁴

The City of Los Angeles raised as a defense in *Aaron* the *Burbank* federal preemption of aircraft and airport noise regulation. The city contended that if the federal government had the right of exclusive control of airport noise, it must consequently bear sole liability for its resultant damage. The court denied this defense and held first that in terms of navigable airspace, the federal preemption of *Burbank* did not alter in any way the city's responsibility as airport owner and operator to acquire the necessary land and air easements for safe aircraft approaches and

71. 64 Wash. 2d 309, 316, 391 P.2d 540, 545 (1964), *cert. denied*, 379 U.S. 989 (1965).

72. In *Griggs v. Allegheny County*, 369 U.S. 84, 89 (1962), the Supreme Court denied an argument that the federal agency regulating aviation rather than the airport owner-operator was responsible for "taking" an air easement over neighboring property:

The Federal Government takes nothing; it is the local authority which decides to build an airport *vel non*, and where it is to be located. We see no difference between its responsibility for the air easements necessary for operation of the airport and its responsibility for the land on which the runways were built.

73. The California court recognized that distinctions could be drawn between substantial and minimal interferences and thus proper damages and just awards could be determined. For a general discussion of the Noise Exposure Forecast System and compensation considerations, see CERCHIONE & SIMS, *In Search of an Aviation Master Plan*, in PLANNING, ENVIRONMENTAL SCIENCE, AVIATION 133 (A.B.A. 1974) and Van Alosty, *Just Compensation of Intangible Detriment: Criteria for Legislative Modifications in California*, 16 U.C.L.A. L. REV. 491 (1969).

74. CAL. CONST. art. 1, § 14; CAL. CODE OF CIVIL PROC. § 1239.3 (West 1972).

take-offs.⁷⁵ Consequently, the city would not be immune from liability for failure to make adequate appropriations and provisions.⁷⁶ Second, the court held that in terms of noise control, the federal preemption did not relieve a municipal proprietor of an airport of its traditional liability in inverse condemnation to neighboring property owners. The court built on the flaws in the reasoning of the *Burbank* decision (the equivocal legislative history and the exceptional limitation of the decision's application) to establish this unchanged municipal liability.

The California court declared that the legislative history of the Federal Aviation Act of 1958 and the Noise Control Act of 1972 revealed a Congressional intent to leave untouched the traditional areas of state and local government proprietary control and concomitantly the areas of local owner-operator liability.⁷⁷ *Burbank*, was limited by its note 14⁷⁸ to a municipality's exercise of its police power and not its exercise of proprietary powers and the consequential liabilities it bore as owner and operator of an airport.

The court indicated the city was not powerless, as it claimed, to control airport noise. As proprietor it could establish reasonable restrictions for airport use as in *Port of New York Authority v. Eastern Air Lines, Inc.*⁷⁹ and *Stagg v. Municipal Court*⁸⁰ or it could resort to the many options set forth in the California Public Utilities and Administrative Codes.⁸¹

With this statement of alternatives available to the city, the *Aaron* court appeared to widen *Burbank's* note 14 distinction between the municipality

75. "Navigable airspace" includes airspace necessary for safe airport approach and take-off paths, 49 U.S.C.A. § 1301(26) (Supp. 1975).

76. The California court cited the following "inverse condemnation" cases to underscore the city's responsibility and resultant fiscal liability: *Griggs v. Allegheny County*, 369 U.S. 84 (1962); *Loma Portal Civic Club v. American Airlines, Inc.*, 61 Cal. 2d 582, 394 P.2d 548, 39 Cal. Rptr. 708 (1964); *City of Oakland v. Nutter*, 13 Cal. App. 3d 752, 763 n.12, 92 Cal. Rptr. 347, 353 n.12 (Ct. App. 1970); *Thornburg v. Port of Portland*, 233 Or. 178, 376 P.2d 100 (1962); and *Martin v. Port of Seattle*, 64 Wash. 2d 309, 391 P.2d 540 (1964), *cert. denied*, 379 U.S. 989 (1965).

77. *Aaron v. City of Los Angeles*, 40 Cal. App. 3d 471, 489 & n.12, 115 Cal. Rptr. 162, 174 & n.12 (Ct. App. 1974), *cert. denied*, 419 U.S. 1122 (1975). To illustrate the equivocal nature of the legislative history, here the California appellate court, *id.*, relied on S. REP. No. 1353, 90th Cong., 2d Sess. 6-7 (1968) to demonstrate that local proprietary liability for noise damage was unaffected by the Noise Control Act. This is the same Senate report on which the majority had relied in *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 634-35 (1973) to establish a federal preemption of airspace management, and on which the dissent, *id.* at 648-50, had relied to deny the existence of a preemption.

78. *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 635-36 n.14 (1973). See accompanying text at note 52 *supra*.

79. 259 F. Supp. 745 (E.D.N.Y. 1966) (which allowed a system of preferential runway use to abate airport noise).

80. 2 Cal. App. 3d 318, 82 Cal. Rptr. 578 (Ct. App. 1969) (which permitted an airport flight curfew to stand).

81. CAL. PUB. UTIL. CODE § 21669 (West Supp. 1975); CAL. ADMIN. CODE §§ 5000-5080.5 (1975).

in its exercise of police power and the municipality in its exercise of proprietary rights. *Port of New York Authority* and *Stagg* were of questionable validity in 1974 after the *Burbank* preemption decision. Further, the California statutory restrictions and administrative regulations had been adopted after *Burbank*, were not scheduled to be fully effective until 1985, and were as yet unchallenged in the courts. But the California Court's recommendations suggested the municipal proprietor's right, in theory, to exercise some control over the noise pollution for which it was now held liable.

Cases subsequent to *Aaron* have defined and affirmed the municipal proprietor's liability. For example, *City of Los Angeles v. Japan Air Lines, Co.*⁸² held, pursuant to a cross-complaint by Los Angeles against all the licensed airlines using LAX, that the city could not recover its disbursement in damages awarded in *Aaron* under a theory of equitable indemnity.⁸³ The airline-airport lease contained no provisions of indemnification for noise pollution damages; the liability rested ultimately with the city.⁸⁴

The dollar recoveries in these suits have made headlines,⁸⁵ but inverse condemnation alone is not an adequate remedy to airport noise pollution.⁸⁶ The nearby property owners receive damages but no relief, the noise continues or worsens.⁸⁷ The cities, operating on tight, if not

82. 41 Cal. App. 3d 416, 116 Cal. Rptr. 69 (Ct. App. 1974).

83. The doctrine of equitable indemnity is applied when the conduct or occurrence is removed by situs or subject matter from the provisions of a contractual indemnity. *People ex rel. Dep't of Public Works v. Daly City Scavenger Co.*, 19 Cal. App. 3d 277, 281, 96 Cal. Rptr. 669, 671 (Ct. App. 1971). But when the parties have expressly contracted to indemnify the conduct or occurrence in issue, the provisions of the contract are determinative and the doctrine of equitable indemnity may not be applied. *Markley v. Beagle*, 66 Cal. 2d 951, 961, 429 P.2d 129, 136, 59 Cal. Rptr. 809, 816 (1967).

The airlines in *City of Los Angeles v. Japan Air Lines Co.*, 41 Cal. App. 3d 416, 428 & n.3, 116 Cal. Rptr. 69, 77-78 & n.3 (Ct. App. 1974) had expressly contracted in the lease agreement to indemnify certain harm caused by aircraft take-offs and landings at LAX, but the lease provisions did not include damages resulting from noise pollution. The conduct, aircraft take-off and landing, expressly covered in the contract was therefore dispositive and the doctrine of equitable indemnity would not be applied.

84. See also *Parker v. City of Los Angeles*, 44 Cal. App. 3d 556, 118 Cal. Rptr. 687 (Ct. App. 1975), which granted recovery in inverse condemnation for diminution of private property values in another community contiguous to LAX.

85. L.A. Times, Jan. 21, 1975, § II, at 1, col. 1; L.A. Times, Jan. 26, 1974, § I, at 1, col. 2.

86. Even *Aaron v. City of Los Angeles*, 40 Cal. App. 3d 471, 491, 115 Cal. Rptr. 162, 175 (Ct. App. 1974), *cert. denied*, 419 U.S. 1122 (1975) cautioned:

Obviously a final solution to the problem will require numerous different approaches to it and the cooperation of airplane manufacturers, the airlines, federal, state and local government [footnote omitted].

See also Lesser, *The Aircraft Noise Problem: Federal Power But Local Liability*, 3 URB. LWYR. 175 (1971).

87. Comment, *Federal Preemption of Aircraft Noise Regulation and the Future of Proprietary Restrictions*, 4 N.Y.U. REV. L. & SOC. CHANGE 99, 103 (1974).

deficit budgets, are plainly unable to absorb these enormous demands for damages.⁸⁸ Yet the air transportation industry and the FAA escape virtually unscathed and unpressured to reduce noise levels.

III. FAA AND EPA REGULATION

With few exceptions therefore, the local governments as proprietors of the airports were to bear the fiscal responsibility for damages due to noise pollution, but the federal government was to make the rules to control and abate it. The legal assumption of effective federal rule-making and enforcement was not, however, grounded in reality.

Section 611 of the Federal Aviation Act, as inserted in 1968,⁸⁹ required the FAA to promulgate noise abatement regulations. There was not only a significant delay in the promulgation of these regulations,⁹⁰ but when finally issued the regulations addressed *aircraft* certification and not *airport* standards.⁹¹ By statutory directive, only those standards, rules, or regulations which were "economically reasonable, technologically practicable, and appropriate" were to be issued.⁹² As a result the standards, rules, and regulations were remarkably lenient. Further, they contained many broad exceptions. They did not apply to military aircraft, supersonic aircraft, carriers in international commerce, or model types of carriers already in service when the regulation was issued. Consequently, the regulations covered less than 10% of the aircraft in service.⁹³ The woefully inadequate standards posed a harsh threat to the public health ". . . that could have been prevented with stricter regulations."⁹⁴

But even if the regulations had been adequate, the FAA has a poor record of enforcement.⁹⁵ In *Virginians for Dulles v. Volpe*⁹⁶ the federal

88. Under the Airport and Airway Development Act of 1970, 49 U.S.C. § 1701 *et seq.* (1970) [hereinafter AADA] some inverse condemnation fees may be reimbursable as "allowable project costs," 49 U.S.C. § 1720 (1970), if the airport was constructed or expanded under an AADA grant.

89. 49 U.S.C. § 1431 (1970), *as amended*, (Supp. III, 1973).

90. Sec. 611 was added by Pub. L. No. 90-411, § 1, July 21, 1968; proposed regulations were published the following January, 34 Fed. Reg. 453 (1969); but final regulations were not issued until November, 34 Fed. Reg. 18364 (1969), to be effective December 1, 1969.

91. NOISE STANDARDS, 14 C.F.R. § 36 (1975). Part 36 of the Federal Aircraft Regulations is often referred to as "FAR 36."

92. 49 U.S.C. § 1431(b)(4) (1970), *as amended*, 49 U.S.C. § 1431(d)(4) (Supp. III, 1973).

93. EPA TO SENATE COMM. ON PUB. WORKS, 93D CONG., 1ST SESS., REPORT ON AIRCRAFT-AIRPORT NOISE 31-32 (COMM. PRINT 1973). More recently R. Strelow, EPA ass't adm'r for Air & Waste Management admitted in an address before the annual meeting of the Airport Operators Council on October 21, 1975 in Puerto Rico that the forecasted noise reduction under FAR 36 would not adequately protect health and welfare of the nation's city dwellers. 6 ENV. REP. CURRENT DEV. 1079 (1975).

94. Statement of Mathias Lukens, Pres., Airport Operators Council Int'l., N.Y. Times, Nov. 16, 1969, § L, at 88, col. 2 (city ed.).

95. For an overview of FAA regulations and enforcement inadequacies see: Comment, *Toward the Comprehensive Abatement of Noise Pollution: Recent Federal and New York City*

district court denied a citizens' class action for relief of noise at Washington National Airport but noted ". . . a certain timidity on the part of the FAA in enforcing operational guidelines for the airlines at the airport, [the evidence showing] not a single instance of a pilot being disciplined for violations of a voluntary or regulatory limitation"97 On occasion a court has compelled the FAA to abide by its own policies and regulations. A federal district court in *City of Boston v. Coleman*,98 enjoined the FAA from approving an airport layout plan until the Agency complied with its own interim order that approval be conditioned upon an environmental review.

Resort to court action for FAA enforcement, however, is expensive, time-consuming, and not always successful. Although citizens' suits are authorized under the Noise Control Act,99 courts sometimes decline jurisdiction, particularly when promulgation and enforcement of a specific regulation is discretionary with the Agency under the Federal Aviation Act.100

The new combination of the Environmental Protection Agency (EPA) with the FAA by the Noise Control Act in the federal scheme of aircraft-airport noise regulation was, at first, an encouraging sign. The general framework of the EPA is designed to center pollution control in one agency which does not have the additional and often conflicting task of encouraging development of an industry.101 But the EPA participation in noise control regulation is limited to a role as a compiler of studies and maker of recommendations and has been further reduced by severe agency budget cuts.102 The EPA has also been accused by certain Senators and environmentalists of "willful non-enforcement" of the Noise Control Act.103

Noise Control Legislation, 4 *Ecol. L.Q.* 109 (1974); Comment, *Port Noise Complaint*, 6 *HARV. CIV. RIGHTS-CIV. LIB. L. REV.* 61 (1970).

96. 344 F. Supp. 573 (E.D. Va. 1972).

97. *Id.* at 577.

98. *City of Boston v. Coleman*, Nos. 74-1781-S, 74-1798-S (D. Mass. July 18, 1975).

99. 42 U.S.C. § 4911 (Supp. III, 1973).

100. *Corace v. Butterfield*, No. 74-C-619 (E.D.N.Y. January 13, 1975). *But see* *Illinois v. Butterfield*, No. 74-C-2410 (N.D. Ill. June 13, 1975), which held that a federal court had jurisdiction to hear a noise pollution challenge to the proposed O'Hare Int'l Airport expansion under the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* (1970), the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* (1970), and the federal question jurisdictional statute (28 U.S.C. § 1331 (1970)).

101. 42 U.S.C. §§ 4321, 4331 (1970).

102. A freeze on funding was offered as the reason for proposed regulation deferments by EPA Director Train, 5 *ENV. REP. CURRENT DEV.* 1053 (1974). The Senate and House threatened a complete cut-off of EPA funding under the Noise Control Act for the agency's failure to show any progress, but finally approved a short term extension of the EPA appropriations with the proviso that the Senate would begin EPA noise abatement oversight hearings. 5 *ENV. REP. CURRENT DEV.* 1835 (1975); 6 *ENV. REP. CURRENT DEV.* 1353 (1975).

103. 5 *ENV. REP. CURRENT DEV.* 651, 946 (1974).

In fact, it was only in February, 1975, that the Administrator finally submitted the long-promised noise regulation recommendations for aircraft.¹⁰⁴ The Agency is still reviewing airport noise control proposals.

The slack in affirmative action by the EPA has not been taken up by citizen suits under the National Environmental Policy Act (NEPA) attacking airport noise pollution. These environmental suits have generally failed either on their facts or because of NEPA loopholes. In *Life of the Land v. Brinegar*,¹⁰⁵ the Ninth Circuit Court of Appeals refused to enjoin a runway extension under construction at Honolulu Airport because the Environmental Impact Statement (EIS) projected a noise reduction rather than an increase through this diversion of approaches and take-offs. In *Friends of the Earth, Inc. v. Coleman*,¹⁰⁶ the Ninth Circuit refused to enjoin construction of facilities expansion at San Francisco International Airport for lack of an environmental impact statement because the project was not totally federally funded.¹⁰⁷ Ventures with joint federal and local funding have escaped NEPA controls or delayed their application until environmentally preferable alternatives were no longer practicable.¹⁰⁸

One final hope for EPA leadership in airport noise control may have expired with the issuance of a recent directive by EPA Administrator Train.¹⁰⁹ Regulations were to be limited to those required by statute and tailored with acceptability to the regulatee in mind.¹¹⁰ Regulations concerning noise pollution were specifically included in the list.

The FAA, consistently, and the EPA, more recently, have failed to make adequate rules or even effectively enforce less-than-adequate ones in the area of airport noise control. This failure is particularly bitter when it is remembered that the Supreme Court through all its obfuscation ultimately grounded the federal preemption decision in *Burbank* on evidence of agency preliminary action. One might wonder whether the finding would be the same today after three years of agency inaction.

IV. TENTATIVE SIGNS OF FEDERAL/STATE/LOCAL GOVERNMENT COOPERATION: AIR TRANSPORT ASSOCIATION OF AMERICA V. CROTTI

In February, 1975, in *Air Transport Association of America v. Crotti*,¹¹¹ a

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104. 40 Fed. Reg. 8218 (1975).
 105. 485 F.2d 460 (9th Cir. 1973), *cert. denied*, 416 U.S. 961 (1974).
 106. No. 74-3490 (9th Cir., May 28, 1975).
 107. *Accord*, *City of Romulus v. County of Wayne*, No. 74-72118 (E.D. Mich. March 31, 1975).
 108. Brown, *Applying NEPA To Joint Federal and Non-Federal Projects*, 4 Env. Aff. 135 (1975).
 109. N.Y. Times, Sept. 28, 1975, at 1, col. 1 (city ed.).
 110. *But see* 42 U.S.C. §§ 4321, 4331 (1970), which declare the policy and purpose of NEPA in terms of the public's health and welfare, not in terms of an industry's receptivity.
 111. 389 F. Supp. 58 (N.D. Cal. 1975).

glimmer of hope for limited state and local regulation of airport noise, notwithstanding the federal preemption of "airspace management" was revealed. This case established that if the local control were proprietary in nature, passive, and not in direct conflict with the preeminent federal scheme, it was not per se invalid.

The action was filed by an association representative of virtually all licensed air carriers against the Director of Aeronautics for the State of California and several county and city officials in their role as operators of local airports.¹¹² The suit, brought before a three judge federal district court, challenged the constitutional validity of California aircraft and airport statutes and administrative regulations. The court declined to abstain, although the case required a determination of state law, since the plaintiff's contention and the ultimate issue involved the federal preemption doctrine of *Burbank*.

The statutes in question directed the California Department of Aeronautics to promulgate noise regulations to govern the operation of California airports and the aircraft using those airports.¹¹³ Violations of the regulations by aircraft operators would carry misdemeanor sanctions and would be enforced by the local counties. Violations by airport operators would carry the risk of temporary or permanent loss of essential state operating permits.

The challenged implementing regulations,¹¹⁴ in turn, detailed the objective of gradual reduction of airport noise under two headings: 1) Community Noise Equivalent Level (CNEL)¹¹⁵ which prescribed the maximum airport noise profile to be achieved by December 31, 1985, for continued airport operation, the monitoring and measurement techniques to scrutinize noise levels, and some suggested means of reducing these noise levels which were available to local operators;¹¹⁶ and 2) Single Event Noise Exposure Levels (SENEL), which prescribed the maximum individual aircraft noise emission level for carriers in flight and were specifically addressed to the problem of sonic booms.

The state thus set required noise limits and issued suggested means of compliance which were available to the local owner-operators. The

112. The United States, representing in particular the interests of the FAA and the EPA, appeared as amicus curiae.

113. CAL. PUB. UTIL. CODE §§ 21669-69.4 (West Supp. 1975).

114. CAL. ADMIN. CODE §§ 5000-80.5 (1975).

115. CNEL level is based on actual monitoring data, uses the decibel unit (dB), measures noise levels of separate events and the frequency of events each day and night against certain normalizing constants. For a general introduction to CNEL and other noise level description systems see CERCHIONE & SIMS, *In Search of an Aviation Master Plan*, PLANNING, ENVIRONMENTAL SCIENCE, AVIATION 133 (A.B.A. 1974).

116. *Methodology for Controlling and Reducing Noise Problems*, CAL. ADMIN. CODE § 5011 (1975).

power of the state to regulate its political subunits is well settled and a local airport authority can reasonably be considered one of those political subunits.¹¹⁷ That the state and not the municipality set maximum noise levels does not alter the right of the local authority to issue certain regulations to reduce its airport noise and not to issue others.¹¹⁸ The question to be decided was, what are legitimate local regulations and what are not?

The court in *Air Transport* held the SENEL regulation was per se invalid. SENEL, the court stated, was an unlawful attempt to exercise local government police power to control aircraft in flight, a control which had been declared federally preempted in *Burbank*. The court, however, held that the CNEL regulations were not per se invalid but apparently a lawful attempt to exercise local government proprietary powers to mitigate consequent damages for which it was ultimately liable. As to the CNEL regulations, ". . . the Airlines' total reliance upon *Burbank* [was] misplaced."¹¹⁹

Alluding to the presumption favoring constitutional validity of state statutes and regulations,¹²⁰ and mindful of the legal and fiscal reality of an airport proprietor's responsibility for noise pollution,¹²¹ the court of appeals built once more on what have been identified as the flaws in reasoning of the *Burbank* decision to reach its conclusion of the validity of the CNEL regulations. Concerning the stated reliance in *Burbank* on legislative history, the court cited the same Senate report used by the majority and the dissent in *Burbank* to deny the existence of an intention by Congress to alter federal/state/local power relationships in the area of proprietorship control.¹²² The lack of Congressional intent was further evidenced by the FAA's failure to set definitive noise levels for individual airports.¹²³ Concerning the stated limitation of the *Burbank* holding, which included a municipality's exercise of its police power to control aircraft flight, but

117. *City of Trenton v. New Jersey*, 262 U.S. 182, 185-87 (1923); *Trans World Airlines, Inc. v. City & County of San Francisco*, 228 F.2d 473, 477 (9th Cir. 1955).

118. *Air Transport Ass'n of America v. Crotti*, 389 F. Supp. 58, 63-64 (N.D. Cal. 1975).

119. *Id.* at 63.

120. *Id.* The court cited a series of cases premised on this presumption: *Flemming v. Nestor*, 363 U.S. 603, 617 (1960); *Bibb v. Navajo Freight Lines*, 359 U.S. 520, 524 (1959); *Davies Warehouse Co. v. Bowles*, 321 U.S. 144, 153 (1944); *Davis v. Department of Labor & Indus.*, 317 U.S. 249, 257 (1942); and *South Carolina State Highway Dep't v. Barnwell Bros.*, 303 U.S. 177, 191 (1938).

121. *Air Transport Ass'n of America v. Crotti*, 389 F. Supp. 58, 63 (N.D. Cal. 1975). The court cited the inverse condemnation cases *Griggs v. Allegheny County*, 369 U.S. 84 (1962); *United States v. Causby*, 328 U.S. 256 (1946); *Aaron v. City of Los Angeles*, 40 Cal. App. 3d 471, 115 Cal. Rptr. 162 (Ct. App. 1974), *cert. denied*, 419 U.S. 1122 (1975); and by reference all the state court precedents relied on in *Aaron*.

122. *Air Transport Ass'n of America v. Crotti*, 389 F. Supp. 58, 64 (N.D. Cal. 1975) (citing S. Rep. No. 1353, 90th Cong., 2d Sess. 6-7 (1968)). See note 77 *supra*.

123. 14 C.F.R. § 36.5 (1975).

expressly excluded a municipality's exercise of its proprietary power as owner-operator of an airport, the court declared in unequivocal terms: "[W]e take as gospel the words in footnote 14 in *Burbank*" ¹²⁴

A tone of praise for the state's airport noise control efforts generally underlay the *Air Transport* opinion and specifically premised the CNEL holding. ¹²⁵ The CNEL requirements for monitoring and measuring noise levels were justified "passive" functions of local operators which were "innocuous to aircraft traffic." ¹²⁶ The CNEL suggestions for land and facilities use and development were unmistakably within the bounds of local control. ¹²⁷ Only § 5011(d), a curfew restriction overly reminiscent of Burbank Municipal Code § 20-32.1, appeared suspect to the court.

In summarizing its position the court contracted the breadth of its holding. It reserved jurisdiction to determine whether those regulations which were valid on their face, once implemented, would also be valid in effect. The requirements and regulations, in fact, might prove to be "unrealistic, arbitrary and unreasonable," "an abuse of police powers" or an undue "burden on interstate and foreign commerce." ¹²⁸ The bounds of each of the CNEL regulations would not be considered hypothetically, but would be determined later in actuality when their implementation was under way. Thus not only was a decision on these specific regulations postponed but, more significantly, a specific enumeration of the municipal proprietor's powers to control airport noise was also delayed.

CONCLUSION

How far can a municipal proprietor go to abate the airport noise for which it will be held financially responsible? After *Air Transport* the question still has not been fully answered. The outer limits of permissible regulation by a municipal proprietor have been set out, but determinations of the validity of intermediate controls have not been made.

A municipal proprietor can monitor and measure airport noise levels. But airport noise data is of little use if subsequent controls can not be applied to reduce those levels, if noisier jets can not [sic] be banned or at least assessed landing fees proportionate to the noise generated, if number and frequency of flights can not be determined and reworked with the carriers, or if towing can not [sic] replace excessive taxiing.

The municipal proprietor of an airport can not [sic] sanction exces-

124. *Air Transport Ass'n of America v. Crotti*, 389 F. Supp. 58, 63 (N.D. Cal. 1975).

125. The court identified the legislation as: ". . . a commendable progressive state-sponsored effort toward the future safety and protection of its citizenry from the ever increasing aircraft produced noise nuisances." *Id.* at 62.

126. *Id.* at 64.

127. *Id.* at 65.

128. *Id.*

sive noise emissions, specifically sonic booms, of aircraft in flight. But whether it can prescribe a system of preferential runway use for take-offs and landings over its less inhabited periphery or require a series of operational procedures to limit the expanse of noise pollution is still unresolved.

Air Transport or a similar challenge arising in another state may reach the United States Supreme Court for review and a definitive statement of a municipal proprietor's powers may then be had.¹²⁹ A blanket exclusion of all local proprietary controls similar to the federal preemption over police power controls in *Burbank* would be straightforward but tragic if the FAA and EPA continue their inadequate regulation and enforcement procedures.¹³⁰ An alternative of case-by-case review of local regulations in the courts or before regional FAA-EPA panels would be slower but ultimately fairer to the airport owner-operator and more satisfactory to its neighbors. Determinations then would be of specific and actual conflict with federal law, not general presumptive fiat based on an overbroad preemption finding. They would be based on the problems of an individual airport and its periphery.

Burbank would not have to be discredited. The limitation of note 14 would simply have to be taken "as gospel"¹³¹ and not as an uncertain disclaimer. It would also be read as a limitation on a kind of action and not merely a category of airport ownership. The *Burbank* preemption of noise control regulations governing aircraft flight under the Federal Aviation Act and the Noise Control Act would ultimately be sustained by recognition of the need for a uniform system for practical and safe functioning of air commerce, not by reliance on a selective and unpersuasive legislative history. Airport land and facilities use, however, would be subject to

129. The three-judge federal district court in *Air Transport* granted partial summary judgment on the SENEL regulations but reserved jurisdiction pending further implementation of the CNEL regulations. The parties have exchanged a new series of interrogatories and the next step appears to be a trial at that level before an appeal can be taken to the Supreme Court. (Jan. 12, 1976 conversation with Lawrence King, Sacramento, Cal., counsel for defendant.)

Legislation similar to the California airport noise control laws has been enacted or at least filed in several states, including Illinois, Minnesota, New York, and Pennsylvania. AIRCRAFT/AIRPORT NOISE STUDY—TASK GROUP 1 REPORT, *Legal & Institutional Analysis of Aircraft & Airport Noise & Apportionment of Authority Between Federal, State and Local Governments*, 41, 43 & n.190 (NTID 73.2 July 1973); and 23 COUNCIL OF STATE GOVERNMENTS, *Suggested State Legislation* 10-21 (1974). Individual airport operators, including the Mass. Port Authority, have proposed or instituted noise level restrictions for their airports. MASS. PORT AUTHORITY, *Draft Master Plan for Logan International Airport* 16-32 (Jan. 1976). Court challenges may arise from any of these or other noise abatement attempts.

130. The enormous physical psychological, and economic damages due to aircraft/airport noise would only be compounded. Today, greater than 12% of the population of the United States (over 16 million people) are adversely affected by this noise. 6 ENV. REP. CURRENT DEV. 1079 (1975) (quoting EPA ass't adm'r Roger Strelow).

131. *Air Transport Ass'n of America v. Crotti*, 389 F. Supp. 58, 63 (N.D. Cal. 1975).

proprietary restrictions. The proprietary restrictions could not be unreasonable, discriminatory, unduly burdensome on interstate commerce or inconsistent with "airspace management."

EPA Assistant Administrator Strelow recently introduced a possible third alternative: federal regulations which would include participation of the airport operator in the preparation of noise profiles and constraints for each airport.¹³² This alternative would be similar to a case-by-case review for direct conflict in its individual airport consideration but would be more advisory than adversarial. Again it must be remembered that under the Noise Control Act the EPA can make only recommendations, not final promulgations, of regulations.¹³³ In light of past performance it is questionable whether ultimate FAA restrictions would have any substance or effect. Perhaps the increased threat of local legislation and litigation would provide the incentive necessary to overcome the agency's former lenience in regulation making and reticence in regulation enforcing.

132. This alternative was introduced in the Assistant Administrator's October 24, 1975 address to the Airport Operators Council in Puerto Rico, 6 ENV. REP. CURRENT DEV. 1079 (1975).

133. *E.g.*, 42 U.S.C. § 4906 (Supp. III, 1973).

