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.

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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 1972 5 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

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

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.
¹⁴. 457 F.2d 667 (9th Cir. 1972).
¹⁵. 411 U.S. 624 (1973), (Douglas, J., writing for a 5 member majority).
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, 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. 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, 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, 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., 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.

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

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.
found a federal preemption of "airspace management." The Federal Aviation Act of 1958 was held to have established "complete and exclusive national sovereignty" of the airspace of the United States. 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. The Supreme Court, in Rice v. Santa Fe Elevator Corp., 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. 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.

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

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.
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

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).
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

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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.

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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. . . ."
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 \textit{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. \textit{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).


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. 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. There have been a few attempts to exercise such police powers subsequent to Burbank. 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. . . ." 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.

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


[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.


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).


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 string-
gent take-off and touchdown operational procedures. The other
approach involves the exercise of the municipality's fundamental pro-
prietary 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 char-
ter or incorporation document. 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." 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. This
type of control is to be provided solely by the FAA and EPA and is thus
defederally preempted.

Even this conciliatory reading of the Burbank rationale with its excep-
tional 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? 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?

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*. 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, 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. Legal commentators made similar reasonable predictions of a liability shift.

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.

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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. 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.

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. 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. 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:

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

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\(^{72}\) 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 \textit{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.


take-offs.\textsuperscript{75} Consequently, the city would not be immune from liability for failure to make adequate appropriations and provisions.\textsuperscript{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 \textit{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.\textsuperscript{77} \textit{Burbank}, was limited by its note 14\textsuperscript{78} 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 \textit{Port of New York Authority v. Eastern Air Lines, Inc.}\textsuperscript{79} and \textit{Stagg v. Municipal Court}\textsuperscript{80} or it could resort to the many options set forth in the California Public Utilities and Administrative Codes.\textsuperscript{81}

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

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


\textsuperscript{77} \textit{Aaron} v. City of Los Angeles, 40 Cal. App. 3d 471, 489 & n.12, 115 Cal. Rptr. 162, 174 & n.12 (Ct. App. 1974), \textit{cert. denied}, 419 U.S. 1122 (1975). To illustrate the equivocal nature of the legislative history, here the California appellate court, \textit{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 \textit{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, \textit{id.} at 648-50, had relied to deny the existence of a preemption.


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

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

\textsuperscript{81} \textit{CAL. PUB. UTIL. CODE} § 21669 (West Supp. 1975); \textit{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. 92 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. 93 The airline-airport lease contained no provisions of indemnification for noise pollution damages; the liability rested ultimately with the city. 94

The dollar recoveries in these suits have made headlines, 95 but inverse condemnation alone is not an adequate remedy to airport noise pollution. 96 The nearby property owners receive damages but no relief, the noise continues or worsens. 97 The cities, operating on tight, if not

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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. Dept 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. 94

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.
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].

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 air port 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. Volpe96 the federal

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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.
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).
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 Washing­
ton 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

97. Id. at 577.
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. 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, 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, 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. Ventures with joint federal and local funding have escaped NEPA controls or delayed their application until environmentally preferable alternatives were no longer practicable.

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

105. 485 F.2d 460 (9th Cir. 1973), cert. denied, 416 U.S. 961 (1974).
106. No. 74-3490 (9th Cir., May 28, 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.
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. 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. 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, in turn, detailed the objective of gradual reduction of airport noise under two headings: 1) Community Noise Equivalent Level (CNEL) 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; 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

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


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).

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 Con-
cerning 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).
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.
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 proprotionate 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-

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. 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. 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” 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

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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’l adm’r Roger Strelow).

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. 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. 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.

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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).