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THE ENVIRONMENTAL CONSEQUENCES OF MUNICIPAL AIRPORTS: A SUBJECT OF FEDERAL MANDATE?

Lee L. Blackman*
Roger P. Freeman**

I. Introduction

Section 1108(a) of the Federal Aviation Act1 (Act) states "The United States of America is declared to possess and exercise complete and exclusive national sovereignty in the airspace of the United States."2 The Act grants the Administrator of the Federal Aviation Administration (FAA) broad authority to regulate the airways and their users "in order to insure the safety of aircraft and the efficient utilization of such airspace."3

The Act does not purport to nationalize the country's local airports. While the FAA correctly regards these facilities as essential to our air transportation system, they are not "national" airports. Indeed, they exist only because local communities provided the land upon which they sit, taxed themselves so that the facilities might initially be constructed, and made a commitment to live, up to a point, with their environmental consequences. So far, the

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3 Id. at § 1348(a).
system of shared authority over the noise generated by the aircraft which use both federal airspace and local airports has left to the airport proprietor the determination of where that "point" is to be located.

The FAA's Chief Counsel, E. Tazwell Ellett, now warns us that continuation of this scheme of shared (and necessarily self-interested) authority over the airport and airspace elements of the national air transportation system has led to a "'patchwork quilt' of local airport use restrictions which may ultimately . . . strangle its vitality." It is the premise of this response that Mr. Ellett's eulogy is premature and that the present allocation of powers is: (1) logical; (2) as effective as any alternative; and (3) the only system which is consistent with the principles of federalism embodied in the Supreme Court's commerce clause cases. Moreover, so long as Congress declines to preempt local authority over the environmental consequences of aircraft operations and assume the vistas of financial liability which currently accompany airport proprietorship, airports must to be able to choose for themselves where to draw the line between the need for interstate commerce and the desire for peaceful and stable communities. This degree of local autonomy is neces-

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4 Ellett, The National Air Transportation System: Design By City Hall?, 53 J. AIR L. & COM. 1, 27 (1987). The sorts of regulations at issue include programs to exclude from the airport the loudest classes of aircraft (either all of the time or during the most noise-sensitive hours), limits on the types and number of aircraft operations, the relocation of runways, the construction of noise barriers, the expenditure of funds to acquire properties or alter them to reduce interior noise, and the encouragement of runway utilization and preferential flight track programs which limit the number of flights over residential areas. While these efforts have been pursued assiduously, the conclusion is inescapable that it is impossible, not to mention economically impractical, to satisfy everyone. Thus, local homeowners have aggressively pushed for additional noise reduction programs and for direct limitations on airport growth.

5 This "patchwork quilt" analogy was first suggested by the aviation industry in a January 16, 1979 petition by the Air Transport Association for the adoption of federal regulations precluding proprietor noise restrictions unless the FAA found them to be necessary and appropriate. 44 Fed. Reg. 52,076 (1979). Proprietors and local authorities thus usually take a skeptical view of the Air Transport Association's recently renewed claim (see FAA Rulemaking Docket 24,246, reprinted in 49 Fed. Reg. 36,186 (1984)) that the system is finally about to suffer the imminent breakdown predicted almost a decade ago.
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necessary even if it results in a national air transportation system "so inefficient and costly to operate that it would have to cease to exist as we know it today."

Since Mr. Ellett only discusses generally the present allocation of authority over noise-based restrictions on access to the nation's airports, we will endeavor to describe it in some detail, with special emphasis on two principal questions. First, to what extent has federal action preempted local discretion to control noise and access to the airport? Second, to the extent proprietors retain discretion to adopt "reasonable" regulations, whose view of reasonableness is controlling? A close examination of these subjects is essential to an understanding of the issues of federalism which are implicated in Mr. Ellett's call "to reverse the current trend [toward added local control over the environmental impacts of aircraft operations] and cure this problem before it causes major damage."

Except as discussed below, we generally accept Mr. Ellett's analysis of the roles of the various players in the process, their perceptions of their objectives, and the pressures under which they attempt to achieve their objectives.

II. SOME FURTHER BACKGROUND

Mr. Ellett suggests that a majority of the current problems of airport access and capacity, as they relate to noise, could have been avoided if local municipalities had utilized their land use planning and zoning powers effectively. To the contrary, however, the arrival of the commercial jet airplane and the nature and extent of its effects were not, and could not have been, foreseen in time "to ensure that only compatible land uses were allowed to exist around an airport." Almost all of this country's principal airports were planned and constructed during an era

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a Ellett, supra note 4, at 21.
7 Ellett, supra note 4 at 29.
9 Ellett, supra note 4, at 19.
9 Ellett, supra note 4, at 20.
of considerably smaller and quieter aircraft. Communities simply perceived no need to acquire the substantial quantities of adjacent property now needed to buffer residential communities from the consequences of the jet age. Irrespective of the foreseeability question, other circumstances guaranteed that proprietors would not be able to exercise the influence necessary to avoid exposing local communities to excessive noise. Several of the country's primary airports are neither owned nor operated by the cities or counties in which they are located. Many airports are operated by agencies which lack the powers of zoning and condemnation, and virtually all of our major airports are close enough to adjoining municipalities to burden at least some property owners whose votes cannot directly influence airport management.

Mr. Ellett's inquiry as to who should "bear the cost of solutions to problems created by local governments' failure to properly exercise this [land use] authority" thus proceeds from a questionable premise. It assumes both the foreseeability of the advent of high frequency commercial jet operations and the existence of resources sufficient to accommodate them. In any event, the issue of who should bear the costs of, and exercise authority over, the adverse consequences of noise has nothing to do with fault and everything to do with principles of federalism. These principles were at the foundation of the only Supreme Court decision to address this issue directly, the case which sets the legal context for this analysis, City of Burbank v. Lockheed Air Terminal, Inc. The inability, and the perceived lack of inclination of the private owner of the Hollywood-Burbank Airport

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10 Even in cases where the proprietor also controls local land use, the economic need for development and the political power of those who seek such permission frequently makes it difficult for cities to refuse otherwise beneficial development proposals.

11 Ellett, supra note 4, at 4.

12 411 U.S. 624 (1973). At issue in this case was the validity of a Burbank city ordinance prohibiting take offs by jet aircraft from the Hollywood-Burbank Airport between 11:00 p.m. and 7:00 a.m.
(now the Burbank-Glendale-Pasadena Airport) to avoid the problems of noise associated with the advent of air service by jets led the City Council of Burbank to use its governmental powers (generally referred to as "police powers") to reduce the environmental impacts of the airport. The effort was rejected as being contrary to the supremacy and commerce clauses of the United States Constitution. The Supreme Court determined that a municipality which neither owned nor operated an airport located within its boundaries was preempted from adopting an ordinance which would preclude jet aircraft operations at night.\(^\text{13}\)

Relying upon the Federal Aviation Act's undisputed preemption of airspace management\(^\text{14}\) and the power of the FAA to prescribe regulations to mitigate the noise of aircraft operations,\(^\text{15}\) Justice Douglas concluded, for the majority, that "the pervasive nature of the scheme of federal regulation of aircraft noise . . . leads us to conclude

\(^{13}\) See also San Diego Unified Port Dist. v. Gianturco, 457 F. Supp. 283 (S.D. Cal. 1978) (upholding a preliminary injunction forbidding the California Department of Transportation from conditioning the grant of a variance from certain state laws on the adoption of a more restrictive jet aircraft curfew), aff'd, 651 F.2d 1306 (9th Cir. 1981), cert. denied, 445 U.S. 1000 (1982); Air Transp. Ass'n v. Crotti, 389 F. Supp. 58 (N.D. Cal. 1975) (holding the State of California's in flight noise regulations to be a per se invalid exercise of police power because such regulatory power is exclusively in the federal domain); American Airlines v. Town of Hempstead, 272 F. Supp. 226 (E.D.N.Y. 1967) (holding town noise ordinance invalid as a contravention of federally granted freedom of transit through navigable airspace regardless of the fact that the ordinance was enacted for purposes related to local order and public health), aff'd, 398 F.2d 369 (2d Cir. 1968), cert. denied, 393 U.S. 1017 (1969); County of Cook v. Priester, 22 Ill. App. 3d 964, 318 N.E.2d 327 (1974) (holding a county ordinance imposing a weight limitation on aircraft invalid as a contravention of the supremacy clause), aff'd, 62 Ill. 2d 357, 342 N.E.2d 41 (1976).

\(^{14}\) 49 U.S.C. app. §§ 1348, 1508 (1982). Section 1348 provides that the Secretary of Transportation is authorized to develop plans for the use of the navigable airspace and to prescribe rules for the flight of aircraft. Id. § 1348. Section 1508, as noted at the outset, states that "[t]he United States of America is declared to possess and exercise complete and exclusive national sovereignty in the airspace of the United States." Id. § 1508.

\(^{15}\) Id. § 1431. Section 1431 provides that the FAA, after consulting with the Department of Transportation (DOT) and the Environmental Protection Agency (EPA), shall prescribe regulations to control and abate aircraft noise and sonic boom. Id.
that there is pre-emption."\(^{16}\) The apparent breadth of the Court's language, however, is limited by the majority's acknowledgment that Congress never intended to overturn the "right of a State or local public agency, as the proprietor of an airport, [to] issu[e] regulations or establish[] requirements as to the permissible level of noise which can be created by aircraft using the airport."\(^{17}\)

The exception to preemption which allows airport proprietors to adopt noise control regulations derives, at least in part, from earlier Supreme Court cases determining that the airport, rather than the operators of noisy aircraft, should be responsible for paying compensation in the event aircraft noise becomes substantial enough to constitute a taking of property under the fifth and fourteenth amendments.\(^ {18}\) Refusing to address a subject not directly raised in this case, however, the Burbank Court did

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\(^{16}\) *Burbank*, 411 U.S. at 633.

\(^{17}\) *Id.* at 635 n.14 (quoting S. Rep. No. 1353, 90th Cong., 2d Sess. 6 (1968)).

\(^{18}\) See *United States v. Causby*, 328 U.S. 256 (1946) (low flights over a chicken farm by United States' military planes made the property unusable for that purpose and constituted a "taking," in the constitutional sense, which required compensation). The Supreme Court's decision in *Griggs v. Allegheny County*, 369 U.S. 84 (1962) (wherein the airport proprietor, and not the federal government, is held responsible for noise impact problems caused by the proprietor's airport), is generally regarded as the genesis of the "proprietor exception" to the rule of federal preemption of aircraft noise control. In *Griggs*, the proprietor, and not the federal government, was held liable because the proprietor had "decided, subject to approval of the C.A.A. [Civil Aeronautics Administration, predecessor of the FAA], where the airport would be built, what runways it would need, their direction and length, and what land and navigation easements would be needed." *Id.* at 89. An obligation to acquire easements for noise was seen as an additional facet of the proprietor's duty to purchase sufficient private property to operate the airport. *Id.* The proprietor's constitutional responsibility for takings caused by aircraft noise has been the subject of many cases. See, e.g., *Nestle v. City of Santa Monica*, 6 Cal. 3d 920, 496 P.2d 480, 101 Cal. Rptr. 568 (1972); *Loma Portal Civil Club v. American Airlines*, 61 Cal. 2d 582, 394 P.2d 549, 39 Cal. Rptr. 708 (1964); *Aaron v. City of Los Angeles*, 40 Cal. App. 3d 471, 115 Cal. Rptr. 162 (1974), *cert. denied*, 419 U.S. 1122 (1975); *Thornburg v. Port of Portland*, 223 Or. 178, 376 P.2d 100 (1962); *Martin v. Port of Seattle*, 64 Wash. 2d 309, 391 P.2d 540 (1964), *cert. denied*, 379 U.S. 989 (1965). The proprietor's liability was expanded in *Baker v. Burbank-Glendale-Pasadena Airport Auth.*, 39 Cal. 3d 862, 705 P.2d 866, 218 Cal. Rptr. 293 (1985), *cert. denied*, 106 S. Ct. 1200 (1986), *Greater Westchester Homeowners Ass'n v. City of Los Angeles*, 26 Cal. 3d 86, 603 P.2d 1329, 160 Cal. Rptr. 733 (1979), *cert. denied*, 449 U.S. 820 (1980), and *Aaron*, 40 Cal. App. 3d at 471, 115 Cal. Rptr. at 162, to include nuisance and personal injury damages.
not consider "what limits, if any, apply to a municipality as a proprietor."\textsuperscript{19}

The \textit{Burbank} decision thus left open a number of important questions concerning proprietor power, including: (1) whether the municipal airport owner may exercise the police powers denied to governments which are not proprietors or is limited to the use of the rights which derive solely from its status as the owner of the property on which the airport is located;\textsuperscript{20} and (2) whether the fact that the proprietor may regulate noise only because of its status as the owner of the airport affects the presumption of validity to which its ordinances are otherwise entitled and thus the level of judicial deference to be accorded its noise regulations.\textsuperscript{21} The answers to these questions will ultimately determine whether, absent further action in Congress, federal or local decisionmakers will hold the controlling authority to dictate the extent to which interstate commerce may be burdened in the interests of local environmental quality.

\section*{III. The Present Allocation of Authority to Regulate Noise and Access}

\subsection*{A. Federal Preemption And Its Limits; Proprietor Power and Its Sources.}

The authority to control noise and access is presently\textsuperscript{19} \textit{Burbank}, 411 U.S. at 635 n.14.

\textsuperscript{20} Under the narrowest definition, elimination of the police power would leave the airport only those rights to regulate airport use which could be predicated upon the proprietor's property ownership. Absent police power, it would be obliged to attempt to negotiate lease conditions or other limitations on use of airport property in order to limit noise. The enforcement of these restrictions would be by civil suit. In these suits the state court could be limited in granting injunctive relief for the same principles which preclude non-proprietor municipalities from adopting regulations affecting aircraft operations. Enforcement of lease-based regulations by termination of leasehold interests would present an equally thorny problem, particularly where an airline with a long-term lease has paid for or participated in the financing of substantial terminal improvements, creating claims for reimbursement of substantial sums.

\textsuperscript{21} The FAA has taken this position in litigation with the City of Long Beach. See \textit{Brief of the United States as Amicus Curiae at 14 n.11. Alaskan Airlines, Inc. v. City of Long Beach (9th Cir. 1987) (No. 86-661).}
allocated under a scheme which leaves neither airport proprietors nor the federal government in clear control. Neither has unfettered discretion to achieve its goals at the expense of the objectives of the other. The allocation of authority thus institutionalizes an underlying conflict between the two levels of government. It is a classic study in federalism — the national interest in promoting transportation versus the local interest in preserving the quality of life in residential neighborhoods near airports. Unfortunately, these conflicting goals cannot be fully achieved simultaneously and the determination whether both are being adequately served depends on the perspective of the arbiter.

The scheme places virtually exclusive responsibility for the safe, orderly, and efficient utilization of the country’s airspace in the hands of the FAA. This power is uniformly understood to preempt: all local efforts to participate in the certification of aircraft, mechanics, and pilots; the establishment and maintenance of the country’s air navigation facilities; and the management and control of the nation’s airspace. As stated by Justice Jackson in another context, “[p]lanes 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 question of local authority to regulate the environmental side effects of the use of federally controlled airspace is, however, subject to considerably greater controversy.

In 1968, section 611 was added to the Act. It directed the Administrator of the FAA to “prescribe and amend such regulations as the FAA may find necessary to provide for the control and abatement of aircraft noise and sonic

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booms." The Senate Committee, which reported favorably on this amendment, adopted the following description of the preemptive sweep of the provisions of the Act relating to noise control:

[T]he courts have held that the Federal Government presently preempts the field of noise regulation insofar as it involves controlling the flight of aircraft. H.R. 3400 would not change this preemption. State and local governments will remain unable to use their police powers to control aircraft noise by regulating the flight of aircraft.

However, the proposed legislation will not affect the rights of a State or local public agency, as the proprietor of an airport, from issuing regulations or establishing requirements as to the permissible level of noise which can be created by aircraft using the airport. The issue is the service desired by the airport owner and the steps it is willing to take to obtain the service. In dealing with this issue, the Federal Government should not substitute its judgment for that of the States or elements of local government who, for the most part, own and operate our Nation's airports. The proposed legislation is not designed to do this.

While it is clear that Congress intended airport proprietors to have the power to limit noise, the language of the statute does not expressly preserve the proprietor's right to use its police powers to achieve that goal. As such, some have argued that the preservation of the airport operator's authority was limited to the sorts of rights it enjoys as a private property owner, excluding the powers exercised by reason of the municipality's status as a governmental agency.

This argument is fundamentally inconsistent with the principle that local police powers are presumed to survive

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25 S. REP. No. 1353, 90th Cong., 2d Sess. 6-7, reprinted in 1968 U.S. CODE CONG. & ADMIN. NEWS 2688, 2693-94 (emphasis added). The passage originally appeared in a letter sent to the Committee from the Secretary of Transportation. Id.
federal legislative action unless there is an explicit statement by Congress to the contrary. As the Court stated in Burbank, "we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."\(^{26}\) The argument is also contradicted by statements made in earlier congressional hearings on the problems of aircraft noise which suggest that Congress was aware that unless it acted explicitly, the proprietor's police powers would be presumed to continue. The House Committee on Interstate and Foreign Commerce, reporting on a prior version of the noise control legislation adopted in 1968, stated:\(^{27}\)

> Until Federal action is taken, the local governmental authorities must be deemed to possess the police power necessary to protect their citizens and property from the unreasonable invasion of aircraft noise. The wisdom of exercising such power or the manner of the exercise is a problem to be resolved on the local governmental level. . . . Airports in the United States, as a general rule, are operated by a local governmental authority, either a municipality, a county, or some independent unit. These airport operators are closer, both geographically and politically, to the problem of the conflict of interests between those citizens who have been adversely

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\(^{26}\) Burbank, 411 U.S. at 633 (quoting Rice v. Sante Fe Elevator Corp., 331 U.S. 218, 230 (1947)). The Burbank Court went on to state that the "[c]ontrol of noise is of course deep-seated in the police power of the States." Id. at 638. The argument that the adoption of section 611 eliminates the proprietor's police powers is also contradicted by the Senate Committee's adoption of the Secretary of Transportation's statement that the legislation will not affect the right of a local agency to issue "regulations" or "establish requirements" as to permissible levels of noise. S. REP. No. 1353, 90th Cong., 2d Sess. 6, reprinted in 1968 U.S. CODE CONG. & ADMIN. NEWS 2688, 2694. Use of the term "regulations" implies that the proprietor's police powers are at the base of its noise control authority.

\(^{27}\) H.R. REP. No. 96, 88th Cong., 1st Sess. 27 (1963) (emphasis added). When section 611 was amended in 1972 to require the Administrator of the FAA to consult with the EPA in formulating noise regulations, Congress yet again reaffirmed its refusal "to alter in any way the relationship between the authority of the Federal government and that of State and local governments that existed . . . prior to enactment of the bill." S. REP. No. 1160, 92d Cong., 2d Sess. 11, reprinted in 1972 U.S. CODE CONG. & ADMIN. NEWS 4655, 4663.
affected by the aircraft noise and the needs of the community for air commerce.

As a result of this legislative history, the DOT and FAA originally took an extremely limited view of the preemptive impact of section 611. In *Burbank*, the Solicitor General seemed to adopt this limited view, advocating the position that states and municipalities, whether or not they were airport proprietors, *could* regulate aircraft noise so long as they did not interfere with air safety or airspace management. This contention was rejected by the Court only insofar as it concerned non-proprietors.

Even after *Burbank*, DOT and FAA explicitly recognized, without using the words "police powers", that municipal proprietors may weigh environmental and economic factors in the process of deciding what types of noise regulations are appropriate at a particular airport, precisely the sort of balancing undertaken when they exercise their police powers. Indeed, by affirming the power of the proprietor to arbitrate the local need for commerce and the local desire for a quiet environment, the FAA implicitly refused to interfere with the proprietor's police powers.

Despite efforts by airlines and other aviation interests to convince the FAA and DOT to step back from this position, they have consistently refused to place additional limits on proprietor power, primarily because they do not

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28 After section 611 was enacted, the FAA and DOT promulgated rules to implement that statute. In the preamble explaining those new rules, they stated that the "[r]esponsibility for determining the permissible noise levels for aircraft using an airport remains with the proprietor of that airport." 34 Fed. Reg. 18,355, 18,355 (1969). The FAA and DOT went on to state that the new rules were "not intended to substitute federally determined noise levels for those more restrictive limits determined to be necessary by individual airport proprietors in response to the locally determined desire for quiet." *Id.*

29 *See Burbank*, 411 U.S. at 627.

30 *Id.*

31 In 1975, the FAA and DOT invited comments regarding the airport noise and restrictions issue. 40 Fed. Reg. 28,844 (1975). One of the options they presented was to maintain status quo, which meant that "[t]he initiative and responsibility for developing, establishing and implementing airport restrictions would be left to the local proprietor." *Id.* at 28,845.
wish the United States to assume liability for noise damages. As the FAA explained in the FAA and DOT Noise Abatement Policy Statement, "[w]e have been urged to undertake — and have considered carefully and rejected — full and complete federal preemption of the field of aviation noise abatement."

Notwithstanding evidence that Congress, the DOT, and the FAA have consistently refused to preempt the authority of airport proprietors to exercise their traditional police powers to regulate noise, the FAA has now moved away from recognizing that municipal proprietors may, in the exercise of their police powers, adopt regulations generally premised on a desire to preserve the quality of the environment. The reason for the effort to eliminate the proprietor's ability to use its police powers is the sheer breadth of that authority. It extends beyond the right to avoid levels of noise which result in constitutional takings.

The claim that the municipal proprietor's police powers are preempted was first directly addressed in National Aviation v. City of Hayward, where air cargo companies challenged a curfew adopted by the city, in its capacity as the operator of the airport, which precluded flights by certain comparatively loud aircraft during nighttime hours. The

32 FAA and DOT Noise Abatement Policy Statement, Nov. 18, 1976 (quoted in DiPerri v. FAA, 671 F.2d 54, 58 (1st Cir. 1982)).
33 The adoption of such inconsistent positions could result in a refusal by the courts to accord significant deference to the current views of the DOT and FAA on the preemption question. General Elec. v. Gilbert, 429 U.S. 125, 143 (1976); see also Delpro Co. v. Brotherhood of Ry. Carmen, 676 F.2d 960, 963 (3d Cir.) (normal judicial deference to an administrative decision may not be due if the agency has taken inconsistent positions in the past), cert. denied, 459 U.S. 989 (1982).
34 While police power assuredly empowers the municipality to protect neighborhoods from unlivable conditions, it also gives local governmental agencies discretion "to lay out zones where . . . the blessings of quiet seclusion and clean air make the area a sanctuary for people." Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974); see also Berman v. Parker, 348 U.S. 26, 32 (1954) ("[M]orality, peace and quiet, law and order — these are some of the more conspicuous examples of the traditional applications of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it.").
If Justice Douglas' comments regarding the need for a 'uniform and exclusive system of federal regulation' prove correct, Congress and the FAA can take the appropriate steps to provide such a regulatory system. [Footnote omitted.] However, at the present time, Congress and the FAA do not appear to have preempted the area . . . .

Congress has not, since the National Aviation decision in 1976, sought to expand the scope of federal preemption. In the Deregulation Act of 1978, Congress eliminated the pervasive power of the Civil Aeronautics Board (CAB) over routes, rates, and services. In so doing, Congress made it clear that the elimination of federal control was not intended to permit states or localities to exercise such powers. Nevertheless, Congress explicitly reconfirmed the power of municipalities, acting as proprietors, to exercise their traditional rights to regulate airport affairs.

The issue of the effect of the Act, following deregulation, on proprietor power was raised less directly in Santa Monica Airport Ass'n v. City of Santa Monica. There, representatives of non-commercial aircraft operators challenged a collection of regulations, which ranged from a limitation on training flights to an exclusion of jets, on grounds that the proprietor's powers were strictly limited to those specifically required to avoid fifth amendment liability under Griggs. The court refused to adopt that view,

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36 Id. at 424-25.
38 As stated in 49 U.S.C. app. § 1305(b) (1982):
"Nothing in subsection (a) of this section shall be construed to limit the authority of any State or political subdivision thereof or any interstate agency or other political agency of two or more States as the owner or operator of an airport served by an air carrier certificated by the Board to exercise its proprietary powers and rights."

Id.
39 659 F.2d 100 (9th Cir. 1981).
however, stating:40

The problem with this argument is that it assumes that Griggs liability is limited to Fifth Amendment takings. Nothing in Griggs indicates such a limitation. Liability may well be imposed upon a municipality on theories other than inverse condemnation. The City of Santa Monica should be allowed to define the threshold of its liability, and to enact noise ordinances under the municipal-propri- etor exemption if it has a rational belief that the ordinance will reduce the possibility of liability or enhance the quality of the city's human environment.

In sum, Congress has neither explicitly nor implicitly preempted the right of municipal airport proprietors to utilize their police powers in the effort to protect adjacent communities from excessive noise. Nevertheless, those seeking to limit the breadth of that power argue that the dominance of the federal interest in interstate commerce requires that proprietor regulations be subject to strict ju-

40 Id. at 104 n.5. The question of whether Burbank preempts state efforts to regulate noise through application of state judicial remedies for noise deemed excessive has not been finally resolved. In California, nuisance and personal injury causes of action are available in addition to inverse condemnation. See Baker v. Burbank-Glendale-Pasadena Airport Authority, 39 Cal. 3d 862, 872, 705 P.2d 866, 872, 218 Cal. Rptr. 293 (1985) (action against airport authority by nearby residents for inverse condemnation and nuisance), cert. denied, 106 S. Ct. 1200 (1986) and Greater Westchester Homeowners Ass'n v. City of Los Angeles, 26 Cal. 3d 86, 97, 603 P.2d 1329, 1337, 160 Cal. Rptr. 733 (1979) (city sued by homeowners on a nuisance theory for personal injuries sustained as a result of excessive noise from aircraft using city's airport), cert. denied, 449 U.S. 820 (1980). State nuisance liability has also been upheld in Kruger v. Mitchell, 112 Wis. 2d 88, 332 N.W.2d 733 (1983)(state court award of damages in a nuisance action for unreasonable noise levels found not to be preempted by Federal Aviation Act) and in Owen v. City of Atlanta, 157 Ga. App. 354, 277 S.E.2d 338 (1981)(nuisance and trespass claims of homeowners not preempted by federal regulations), cert. denied, 456 U.S. 972 (1983). The Seventh Circuit has determined, on the other hand, that state statutory remedies for excessive noise have been preempted. Luedtke v. County of Milwaukee, 521 F.2d 387 (7th Cir. 1975)(owners of property near airport could not maintain action for nuisance and common-law negligence under state statute). A few state courts have agreed. Bryski v. City of Chicago, 148 Ill. App. 3d 556, 499 N.E.2d 162 (1986)(nuisance and trespass claims of residents near airport were preempted by federal regulation of air commerce); Drybread v. City of St. Louis, 634 S.W.2d 519 (Mo. Ct. App. 1982)(residents and landowners near airport denied relief in suit against city for trespass, nuisance, and adverse condemnation).
dicial scrutiny, under which the proprietor bears a heavy burden of proof. This question is discussed below.

B. The Scope of Judicial Review of Proprietor Noise And Access Regulations

Having established that proprietors are empowered to adopt noise regulations in the exercise of their police powers, we must next determine the scope of those powers. As we shall see, to recite that the proprietor may not act in a manner that is irrational, discriminate invidiously, or burden commerce unduly is not to answer the question. Compelling arguments can invariably be made in support and in opposition to every ordinance which restricts commerce in the interests of environmental quality. The true scope of proprietor power, then, is effectively determined by the degree of judicial scrutiny applied when its exercise is challenged. The real issue, in other words, is what degree of deference are these noise regulations to be given when their reasonableness is attacked.

Those who regard proprietor power as a limited and easily abused exception to federal preemption point to statements by the Second Circuit in British Airways Bd. v. Port Auth. (Concorde II), as compelling close review of proprietor regulations. There, the court said that the “extremely limited role Congress has reserved for airport proprietors in our system of aviation management” re-

564 F.2d 1002 (2d Cir. 1977) [hereinafter Concorde II]. In Concorde I, the first case the Second Circuit heard involving the New York Port Authority’s effort to exclude the Concorde from Kennedy Airport, the court reversed a district court decision enjoining the Port Authority’s prohibition. British Airways Bd. v. Port Auth., 558 F.2d 75 (2d Cir. 1977) [hereinafter Concorde I]. The circuit court held that the Port Authority had the power and responsibility to establish fair, even-handed and nondiscriminatory regulations designed to abate the effect of aircraft noise on surrounding communities. Id. at 84.

Subsequently, however, the Port Authority “demonstrated total resistance in responding to the airlines’ desire to secure a fair test of [the Concorde] in New York,” and the Second Circuit, in Concorde II, enjoined further prohibition of the supersonic jet airliner. 564 F.2d at 1005. The circuit court held that this injunction was to remain in effect “until the Port Authority promulgates a reasonable, nonarbitrary, and nondiscriminatory noise regulation that all aircraft are afforded an equal opportunity to meet.” Id.
quires that the court “carefully scrutinize all exercises of local power under this rubric to insure that impermissible parochial considerations do not unconstitutionally burden interstate commerce or inhibit the accomplishment of legitimate national goals.” On the other hand, the great weight of authority adopts a much more deferential standard of review.

The two most careful opinions on the subject of the standards to be applied in testing the constitutionality of noise regulations are the district court decisions in Santa Monica and National Aviation. In the Santa Monica case, the regulations at issue were challenged under the supremacy, equal protection, and commerce clauses as unreasonable and unduly discriminatory. Judge Hill rejected the Supremacy Clause challenge for the reasons discussed above. With respect to equal protection, he stated:

Each of the ordinances in question, for equal protection purposes, must be regarded as an economic regulation. None of the five ordinances involves any suspect classification or the regulation or control of fundamental personal

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42 Concorde II, 564 F.2d at 1010-11.
43 481 F. Supp. 927 (N.D. Cal. 1976), aff’d, 659 F.2d 100 (9th Cir. 1981).
45 Santa Monica, 481 F. Supp. at 935. The ordinances attacked included city regulations imposing a night curfew, banning weekend and holiday touch-and-go, stop-and-go and low approach operations, and imposing single event noise exposure levels. Id. at 930-31. The court held that these ordinances did not violate the supremacy, equal protection, or commerce clauses. Id. at 938-43. A ban of all jet flights, however, was held to violate the equal protection and commerce clauses because some excluded jets were quieter than some permitted propeller aircraft. Id. at 943-44.
46 Id. at 935-38; see supra notes 12-40.
47 Santa Monica, 481 F. Supp. at 935; see also Hill Aircraft & Leasing Corp. v. Fulton County, 561 F. Supp. 667, 669 (N.D. Ga. 1982). The court noted in Hill Aircraft that:

[W]here no fundamental rights or suspect classes are involved, as in this case, the action of the County in treating the two operators differently need only bear a rational relationship to a legitimate interest. Where a legitimate state interest can be conceived, and where the state action is rationally related thereto, equal protection requirements are satisfied.

Id. at 679 n.10 (citations omitted).
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rights. As the Supreme Court puts it, to validate such economic regulations, it is required only that the regulations, and the classification established thereby, be found to be 'rationally related to a legitimate state interest.'

This is clearly a standard of deference to the local legislative judgment rather than a test which permits judicial reconsideration of the proprietor's policy decisions.

The commerce clause test used in Santa Monica was adopted from Judge Peckham's decision in National Aviation. There, the court stated:

[T]he first question to be determined is whether [the regulation has]... an effect on interstate commerce for if there is no effect, there is no need for further inquiry. Assuming that there is an effect, the next issue is whether the legislative body 'has acted within its province, and whether the means of regulation chosen are reasonably adapted to the end sought.' S.C. Highway Dep't v. Barnwell Bros., 303 U.S. 177, 190, 58 S. Ct. 510, 517, 82 L. Ed. 734 (1938). The inquiry here also focuses on whether the legislative action discriminates against interstate commerce. Id. at 189, 58 S. Ct. 510. It is after this point where there appears to be some conflict in the analysis to be used.

Judge Peckham then proceeded to review what he regarded as two lines of Supreme Court authority on the proper standard for determining if the burden imposed on commerce by a reasonably tailored and nondiscriminatory local ordinance would render the ordinance void.

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National Aviation, 418 F. Supp. at 425-26. The court's evaluation whether an ordinance is "reasonably adapted" to the end sought hinges on its finding that there is a reasonable nexus between the subject matter of the legislation and the result sought to be achieved. If the question is fairly debatable, the legislation must be upheld. It is not the function of the court to decide whether the regulation actually achieves its intended purpose, so long as the legislature might have reasonably believed that the adopted means would promote the desired ends. See Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 469 (1981); Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 680 (1981)(Brennan, J., concurring); see also City of Houston v. FAA, 679 F.2d 1184, 1193 (5th Cir. 1982); Western Airlines v. Port Auth., 658 F. Supp. 952, 960 (S.D.N.Y. 1985)(concluding that the "decision of the Legislature should be accepted unless [the court] can say that it is wide of any reasonable mark."')(quoting Justice Holmes' dissent in Louisville Gas & Elec. Co. v. Coleman, 277 U.S. 32, 41 (1928)).
On the one hand, the Supreme Court has articulated a test which seems to call for a weighing of the burden on commerce and the local benefit. As stated by Judge Peckham:49

The Supreme Court's most recent formulation of this standard appeared in *Pike v. Bruce Church Inc.*, 397 U.S. 137, 142, 90 S. Ct. 844, 847, 25 L. Ed. 2d 174 (1970): 'Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.'

Judge Peckham also perceived a second, and even more deferential standard, which provides that no "balancing" need be undertaken where the regulation involves a matter of "peculiarly local concern."50 In such a case, "once it is determined that the legislation is a reasonable means of achieving a nondiscriminatory, legitimate goal, it should be deemed constitutional without need for further inquiry."51 Judges Peckham and Hill assumed that avia-

49 *Id.* at 426.
51 *Id.* (citing *Brotherhood of Locomotive Firemen & Enginemen v. Chicago, R. Isl. & Pac. R.R. Co.*, 393 U.S. 129 (1968), where the Court stated:
The District Court's responsibility for making 'findings of fact' certainly does not authorize it to resolve conflicts in the evidence against the legislature's conclusion or even to reject the legislative judgment on the basis that without convincing statistics in the record to support it, the legislative viewpoint constitutes . . . 'pure speculation'. . . . Nor was it open to the District Court to place a value on the [benefits of the statute] in terms of dollars and cents, in order to see whether this value, as calculated by the court, exceeded the cost. *Id.* at 138-39.); *South Carolina Highway Dep't v. Barnwell Bros.*, 303 U.S. 177 (1938). In *Barnwell Bros.*, the Court explained that:
Congress, in the exercise of its plenary power to regulate interstate commerce, may determine whether the burdens imposed on it by state regulation, otherwise permissible, are too great, and may, by legislation designed to secure uniformity or in other respects to protect the national interests in the commerce, curtail to some extent the state's regulatory power. But that is a legislative, not a judicial function. . . . And in reviewing a state highway regulation where Congress has not acted, a court is not called upon, as are state legislatures, to determine what, in its judgment, is the most suitable restriction to be applied of those that are possible, or to choose that
tion noise control qualified under this test, thus making it unnecessary to balance the "putative local benefits" of rational and nondiscriminatory noise control ordinances against the burdens they might impose on interstate commerce. For present purposes, while airport proprietor's one which in its opinion is best adapted to all the diverse interests affected.

Id. at 189-90; accord Morris v. Duby, 274 U.S. 135, 143 (1927) ("In the absence of national legislation especially covering the subject of interstate commerce, the state may rightly prescribe uniform regulations adapted to promote safety on its highways and the conservation of their use.").

See, e.g., Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960) (air pollution); Barnwell Bros., 303 U.S. at 187 (highways "built, owned and maintained by the state or its municipal subdivisions"); Construction Indus. Ass'n v. City of Petaluma, 522 F.2d 897, 906-07 (9th Cir. 1975) (housing and zoning ordinance to control city growth), cert. denied, 424 U.S. 934 (1976). But see Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 472 (1981), where the Court adopted the Pike articulation of the commerce clause test in a case involving "environmental protection and resource conservation" (matters which certainly sound like "peculiarly local interests").

National Aviation, 418 F. Supp. at 427; Santa Monica, 481 F. Supp. at 936-38. The Supreme Court has not finally resolved the question when, if ever, the courts are to weigh the local benefits of a regulation against the burdens it imposes on interstate commerce. Compare Pike (balancing appropriate where regulation sought to improve state's reputation as a producer of superior cantaloupes) and Barnwell Bros., (rational basis sufficient where regulation concerned matter of local highway safety) with Kassel v. Consolidated Freightways Corp., 450 U.S. 662 (1981)(no test drew a majority) and Clover Leaf Creamery Co., (appearing to use balancing test in manner involving environmental conservation). Justice Rehnquist's dissent in Kassel is illuminating as to the contribution of that decision in clarifying the state of the law ("we know only that Iowa's law is invalid and that the jurisprudence of the 'negative side' of the Commerce Clause remains hopelessly confused.") Kassel, 450 U.S. at 706.

For a thoughtful and thorough review of the issue, see generally Regan, The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause, 84 Mich. L. Rev. 1091 (1986)(author concludes not only that balancing is invariably inappropriate, but that the Court has never really done so anyway). Airport proprietors who support this view will take some solace in Justice Scalia's concurrence in CTS Corp. v. Dynamics Corp. of Am., 107 S. Ct. 1637 (1987), where the Justice states that if Professor Regan is not correct, "he ought to be." Id. at 1653. In support of this view, see Kassel, 450 U.S. at 675 (plurality agreed that a regulation which does not discriminate ought generally to be accorded "special deference" because the "burden usually falls on local economic interests as well as other States' economic interests" which assures that the "State's own political processes will serve as a check against unduly burdensome regulations") and Barnwell Bros., 303 U.S. at 184-85 ("Underlying the state rule [of deference] has been the thought, often expressed in judicial opinion, that when the regulation is of such a character that its burden falls principally upon those without the state, legislative action is not likely to be subjected to those political restraints which are
will obviously prefer the standard of highest deference, it is important that both tests preclude judges from substituting their judgments on matters of legitimate legislative concern for that of locally elected officials.\textsuperscript{54}

The position advocated by those favoring heightened judicial scrutiny is further weakened by a collection of statements coming from the Second Circuit. First, the court has uniformly announced its respect for the doctrine of separation of powers and the principles of federalism which restrict federal intrusions into matters which are peculiarly local in character.

In \textit{British Airways Bd. v. Port Auth. (Concorde I)},\textsuperscript{55} for example, that court stated, "[t]he inherently local aspect of noise control can be most effectively left to the operator, as the unitary local authority who controls airport access. It has always seemed fair to assume that the operator will act in a rational manner in weighing the commercial benefits of proposed service against its costs, both economic and political."\textsuperscript{56} A similar view was taken in \textit{Global Int'l Airways v. Port Auth.},\textsuperscript{57} in which the Port Authority was permitted, against a preemption challenge, to require air car-

\footnotesize{\textsuperscript{54} It may be argued that the most deferential standard is reserved for cases where a third prerequisite is met: the ordinance must not concern a matter as to which national uniformity of regulation is inherently essential. Even assuming this is the proper view, however, the control of community noise from aircraft operations, as is demonstrated by Congress' consistent refusal to preempt the field, cannot be said to impinge on an area requiring national uniformity.\textsuperscript{55} 558 F.2d at 83. For an analysis of the \textit{Concorde I} and \textit{Concorde II} decisions, see supra note 41.\textsuperscript{56} \textit{Concorde I}, 558 F.2d at 83; see also \textit{Concorde II}, 564 F.2d at 1011 (court stating that it seemed fair "to assume that the proprietor's intimate knowledge of local conditions, as well as his ability to acquire property and air easements and assume compatible land uses, . . . would result in a rational weighing of the costs and benefits of the proposed service"). \textit{Id.} (citation omitted).\textsuperscript{57} 727 F.2d 246, modified, 731 F.2d 127 (2d Cir. 1984).}
riers to utilize newer technology aircraft in an increasing proportion of their operations.58

Moreover, in each of the cases in which the Second Circuit has addressed the issue of proprietor power, the court has adopted a formulation which allows the proprietor flexibility in addressing the problems of noise, so long as its rules are "reasonable, nonarbitrary and nondiscriminatory . . . ."59 The court did not propose that the test of preemption, or the standard for determining whether a regulation unduly burdens commerce, should be modified or applied differently in the noise context, let alone that the presumption of constitutionality generally accorded to governmental regulations ought not to prevail in this context.60 To the contrary, the purpose of giving noise regulations close scrutiny was expressly limited to the need to assure that "impermissible parochial considerations" did not lead to "undue" (and thus "unconstitutional") inter-

58 Global Int'l Airways, 727 F.2d at 252.

59 Concorde I, 558 F.2d at 84; Concorde II, 564 F.2d at 1011; see Global Int'l Airways, 727 F.2d at 250-51. On the basis of the Second Circuit decisions, the Ninth Circuit has stated that "[t]he reasonable inference, not contradicted by the legislative history, is that Congress intended to allow a municipality flexibility in fashioning its noise regulations." Santa Monica, 659 F.2d at 104-105 (citations omitted).

60 See Air Trans. Ass'n v. Crotti, 389 F. Supp. 58 (N.D. Cal. 1975). That court began its analysis of a challenge to a system of noise regulations adopted by the state of California for airports that it did not own or operate by acknowledging "the presumption of constitutionality with which [the scheme of regulation] comes to us." Id. at 63 (citations omitted); see also, Santa Monica, 659 F.2d at 105 (court stating that "[t]he principles of comity and federalism militate against our invalidating a state or local regulation unless it is written in unlawful terms, or because, on its face, it is preempted"); cf. Port of N. Y. Auth. v. Eastern Air Lines, 259 F. Supp. 745, 751 (E.D.N.Y. 1966)("When dealing with a quasi-public corporation charged with the duty of operating and managing a number of airports in the public interest and for the benefit of the entire public, including residents of the neighboring communities as well as the airlines, any doubt as to the reasonableness of its regulations should be resolved in its favor.").

ference with commerce.\textsuperscript{61}

It follows, as stated by the authors of the amendments to the Act giving the FAA power to promulgate noise regulations, that no branch of the federal government, executive or judicial, "should . . . substitute its judgment [regarding acceptable noise burdens] for that of the States or elements of local government who, for the most part, own and operate our Nation's airports."\textsuperscript{62}

IV. There Is No Threat to the Air Transport System Which Requires a Change in the Present Allocation of Authority

More than 15 years ago, the United States Supreme Court suggested that if the City of Burbank were permitted to enact a curfew on flights at an airport it neither owned nor operated, other similarly situated municipalities would likely follow suit, threatening the integrity of the national air transport system.\textsuperscript{63} Thus was born the principle that proprietors may, and non-proprietors may not, regulate the noise impacts of airport operations. In the intervening years, the scope of proprietor liability has expanded as quickly as the transportation system.\textsuperscript{64} It is hardly surprising, then, that proprietor efforts to limit noise have kept pace with their financial exposure.

There is, however, no tangible evidence that limits on airport access designed to enforce limits on aircraft noise have interdicted interstate commerce, made it impossible for passengers to travel, caused goods left on warehouse floors, or materially distorted any interstate market for goods or services.\textsuperscript{65} To be sure, so long as the system

\textsuperscript{61} Concorde II, 564 F.2d at 1011-12.
\textsuperscript{63} City of Burbank, 411 U.S. at 639.
\textsuperscript{64} See supra note 49.
\textsuperscript{65} There is, to the contrary, compelling evidence that the perceived threat to the national system has been exaggerated. Take, for example, the experience of the airport whose noise problems precipitated the leading Supreme Court decision — the Burbank Airport. Despite the fact that this airport was acquired (in
permits proprietors to share in the regulatory authority, some of the costs of air transportation previously imposed on airport neighbors in the form of adverse environmental impacts will be shifted quite directly to the users of the air transport system in the form of more costly transportation service. The users, however, are the most capable of spreading the costs among those who receive the benefits. The shifting of these costs cannot constitute an undue burden on interstate commerce in the Constitutional sense and the system of shared responsibility for noise control need not be changed in order to limit the extent to which the costs of interstate commerce may be imposed directly, rather than indirectly, on those who most immediately benefit.

1978) by a public agency formed by the Cities of Burbank, Glendale, and Pasadena, precisely so that the affected cities could adopt noise regulations, the number of flights and the level of passenger service at the airport have increased continuously and significantly (while cumulative noise in the community has reduced).

New technology (less noisy) aircraft cost substantially more than older (and noisier) airplanes. Other things being equal, it may therefore be assumed that a ticket on an airline which has acquired such planes as a result of noise restrictions will cost more as well. Even where noise restrictions exclude particular users who cannot afford the more expensive equipment, however, there are always alternatives to the specific transportation service. For example, while the number of flights, and thus the number of air carriers, at the Long Beach Airport is restricted, there is no point of destination or origin which cannot be reached from one of the other airports in the Los Angeles basin. Further, the suggestion that one of the limited number of carriers at Long Beach could abuse its oligopolistic position and gouge the traveller is belied by the availability of service from other carriers who could provide comparable travel opportunities out of Long Beach if alternate services were more profitable. Similar opportunities to utilize alternate transportation are available in each region in which airport proprietors have imposed significant noise or access regulations. Indeed, the self-checking principle discussed in Kassel, 450 U.S. at 675 and Barnwell Bros., 303 U.S. at 187, appears to have led airports in regions which have a compelling need for additional air service to refrain from adopting objectionable restrictions.

See Barnwell Bros., 303 U.S. at 187-188, where the Court stated: Congress not acting, state regulation of interstate carriers has been upheld regardless of its effects on interstate commerce. With respect to the extent and nature of local interests to be protected and the unavoidable effect upon interstate and intrastate commerce alike, regulations of the use of the highways are akin to local regulations of rivers, harbors, piers and docks, quarantine regulations, and game laws which, Congress not acting, have been sustained even though they materially interfere with interstate commerce.
Certainly the fact that litigation costs will be incurred whenever a sufficiently heated dispute arises over the adequacy of the justification for a particular noise or noise-related access restriction does not itself dictate the conclusion that the present allocation of authority is fundamentally flawed. The only way to avoid such costs would be to place extensive and unbridled authority in the hands of one of the participants in the system of shared authority. That solution, while efficient, runs counter to the continuously reinforced principles of federalism under which local governments, which are closest to the problem, and the national government, which has a broader perspective, share authority over issues having both local and national implications.\textsuperscript{68}

Mr. Ellett's suggestion that "the current allocation of responsibility and authority is inadequate," either because it does not provide all of the players the tools "to achieve their goals" or because administrative hurdles make such

\textit{Id.} (citation and footnote omitted); see also Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 127 (1978) ("interstate Commerce is not subjected to an impermissible burden simply because an otherwise valid regulation causes some business to shift from one interstate supplier to another").

\textsuperscript{68} The assertion that proprietor noise restrictions will not be the undoing of the system is not, of course, a claim that the system may not be undone anyway. There is no denying that recent growth in demand for air service has been significant. The solution to the capacity problem, however, will not come on the back of any one element of the system. The FAA will have to increase significantly the number of controllers and other FAA oversight personnel in order to enhance the capacity of the system to handle peak hour demand within the confines of safety. Use of aircraft (now operated, on average, at less than 70 percent of capacity) will have to be increased. Further de-peaking of air carrier schedules will have to occur (the substantial majority of flights now being focused within a small minority of the hours when those flights could be flown). Airport proprietors will have to make a good faith effort to reassess where the line is to be drawn between increases in service and increases in noise, and try (where appropriate) to change community attitudes toward increase in service. New airports will have to be built notwithstanding the political difficulty and enormous expense which this aspect of the solution entails. (Indeed, the unwillingness of local agencies to support new airports is a direct result of legitimate fears that if they allow a new airport to be built, the "national interest" in expansion and the power of the FAA may conspire to place the control of its environmental impacts beyond the authority of the municipality. Such a fear can hardly be considered "unreasonable parochial intransigence."
an outcome "enormously difficult," thus appears, on closer scrutiny, to be supported only by the assertion that the system does not work because it does not allow the FAA and the users of the transportation system to achieve their goals at the expense of the interests of the other participants. The call for changes in the allocation of authority or the rules under which it may be exercised is less a plea for a new process, than an effort to secure a different substantive result. It seems that Mr. Ellett does not seek an accommodation of all of the participants' interests, rather he endeavors to assure that the transportation industry's concerns are satisfied notwithstanding the contrary environmental objectives of local communities. Our system of federalism does not permit such a triumph of national interests over legitimate concerns of local communities absent a congressional mandate — an action Congress has consistently refused to take in the area of aviation noise.

V. Conclusion

E. Tazwell Ellett ascribes to airlines and other airport users a desire for "access to any airport at any time, with an aircraft the user chooses to use, and without unreasonable cost or other obstacles." His sympathy for this position is clear. What is equally apparent is that proprietors have a right, even an obligation, to place limits on those same users in order to control the proprietor's liability and the environmental effects of airport noise on surrounding communities.

Congress, of course, has the power to change the allocation of financial responsibility and contemporaneously withdraw from proprietors the correlative authority to regulate. The FAA, however, has consistently refused to support the proposal for full and complete federal preemption because of the enormous financial exposure

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69 Ellett, supra note 4, at 14.
70 Id. at 25.
which would be shifted to the federal government. Mr. Ellett correctly notes that FAA's refusal to adopt the proposal for complete preemption will permit a continuation of local restrictions which effectively raise the costs of interstate transportation. We suggest, however, that these costs will inevitably be passed on to the traveling public, resulting in a system in which the cost of an airline ticket will more closely approach the true cost of air transportation by encompassing not only the value of facilities, equipment, salaries, and fuel, but the economic and human burdens of noise as well.

71 While airport proprietors and local governments are undoubtedly split on the viability of the preemption proposal, none is prepared to allow the federal government, unless it accepts that liability, to substitute its assessment of the benefits and burdens of air commerce for that of the local proprietor.