1978

Local Regulation of Aircraft to Reduce Noise: Santa Monica Tests the Limits of *Burbank*

William B. Cassel

*University of Nebraska College of Law*

---

Follow this and additional works at: [https://digitalcommons.unl.edu/nlr](https://digitalcommons.unl.edu/nlr)

**Recommended Citation**

William B. Cassel, *Local Regulation of Aircraft to Reduce Noise: Santa Monica Tests the Limits of Burbank*, 58 Neb. L. Rev. 494 (1979)

Available at: [https://digitalcommons.unl.edu/nlr/vol58/iss2/5](https://digitalcommons.unl.edu/nlr/vol58/iss2/5)

---

This Article is brought to you for free and open access by the Law, College of at DigitalCommons@University of Nebraska - Lincoln. It has been accepted for inclusion in Nebraska Law Review by an authorized administrator of DigitalCommons@University of Nebraska - Lincoln.
Local Regulation of Aircraft to Reduce Noise: Santa Monica Tests the Limits of Burbank

I. INTRODUCTION

The number of aircraft flight operations increases each year in the United States. Although manufacturers of business jet and propeller driven aircraft have become more sensitive to the noise created by these airplanes in the vicinity of airports, present technology does not indicate a substantial decrease in engine noise in the near future. Although the large jet aircraft operated by commercial airlines have drawn most of the attention, ninety-eight percent of the civil aircraft in the United States are general aviation aircraft; this category includes all aircraft except those operated by the airlines.

1. "In the period 1939 to 1969, domestic air transport passenger plus cargo traffic increased at an average annual growth rate of about 18.1 percent. This rate of increase exceeded by four times the growth rate of the general U.S. economy and all other modes of domestic travel." EPA, THE ECONOMIC IMPACT OF NOISE 9 (1971) [throughout this article, Environmental Protection Agency is referred to as EPA]. See also ADMINISTRATOR, EPA, REPORT ON AIRCRAFT-AIRPORT NOISE 4-6 (1973) [hereinafter EPA REPORT].

2. See H.R. REP. No. 1463, 90th Cong., 2d Sess. 4 (1968) ("[T]he committee expects manufacturers, air carriers, [and] all other segments of the aviation community . . . to continue and increase their contributions toward the common goal of quiet.").

3. See S. REP. No. 1353, 90th Cong., 2d Sess. 2-3 (1968) ("A completely quiet airplane will not be developed in the near future. . . . [But] the Federal Government must assure that the potential reductions are in fact realized."). See also EPA, AIRCRAFT/AIRPORT NOISE STUDY REPORT, NOISE SOURCE ABATEMENT TECHNOLOGY AND COST ANALYSIS INCLUDING RETROFITTING 5.2 (1973) ("Further reductions in engine-generated noise may have limited effectiveness, since it appears that a noise floor, due to external aerodynamic flow, is present during the approach and landing pattern. This . . . has been estimated to generate a noise level of approximately . . . [currently required] levels minus 5 to 10 EPNdB.").

4. DEPT OF TRANSP. & NAT'L AERONAUTICS & SPACE ADMIN., CIVIL AVIATION RESEARCH AND DEVELOPMENT POLICY STUDY—SUPPORTING PAPERS 3.32 (1971)
Due to political pressure placed upon officials by persons living in the airport vicinity, local governments have adopted various regulations aimed at reducing aircraft noise. The Supreme Court struck down certain regulations in City of Burbank v. Lockheed Air Terminal, Inc. Nevertheless, municipalities are again moving toward regulation of aircraft because of the substantial questions left unanswered by the Burbank decision.

This comment will deal with current attempts to reduce airport noise at the local level through the regulation of aircraft, particularly the ordinances adopted by the city of Santa Monica, California. Perhaps the most significant and practical alternatives in dealing with airport noise involve the regulation of land use surrounding the airport and in approach and departure zones. However, for many existing airports, the surrounding land uses have long been established, and the only feasible alternative perceived by local authorities is regulating the actual operation of aircraft.

[hereinafter cited as CIVIL AVIATION POLICY STUDY]. The study noted: “General aviation aircraft range from small, single-place piston aircraft to very large jet transports and rotorcraft. . . . [A]lthough general aviation generates less than 10% of the total domestic air passenger-miles, it utilizes 20 times as many airports as domestic air carriers. . . .” Id. The total number of aircraft in the general aviation fleet on December 31, 1969, was 130,806. Id. “Based on an expected average growth rate of 5.3% per year, by 1985 approximately 287,000 general aviation aircraft . . . must be anticipated . . . .” Id. (citations omitted). That rate has proved slightly optimistic because the expected number of 187,770 at the end of 1976 was reported by the the Federal Aviation Administration (FAA) to be actually 178,304. FAA GENERAL AVIATION NEWS, Jan. 1978, at 14.

7. Id. at 653-56 n.14. See note 104 & accompanying text infra. This movement will probably increase as air traffic continues to grow as a result of airline deregulation.
8. SANTA MONICA, CAL., CODE §§ 10100-10144 (1978). The validity of various sections of the code has been challenged in Santa Monica Airport Ass'n v. City of Santa Monica, Civ. No. 77-2852-IH (C.D. Cal., filed July 29, 1977).
9. See EPA REPORT, supra note 1, at 101-04, which suggests use of various techniques including requirements for open space, higher noise insulation in building codes, and other traditional land use tools.
10. Economic studies have been used in attempts to compare the costs of aircraft noise with the costs of aircraft noise abatement, and the economic measure of the benefits of aircraft noise abatement. See, e.g., EPA, THE ECONOMIC IMPACT OF NOISE 12-36 (1971), which attempts to measure the cost of aircraft noise by looking to court awards in litigation for compensation for loss of property value, noise easements, and noise damage. Id. at 12. The limited information available indicated a 15-20 percent drop in fair market value of improved real estate and a 40 percent decline in the value of vacant lands. Id. at 18. See also CIVIL AVIATION POLICY STUDY, supra note 4, at 5.6-5.7.
11. EPA REPORT, supra note 1, at 103-05.
II. THE SANTA MONICA REGULATORY SCHEME

The city of Santa Monica, California, has long been concerned with airport noise, and has been active in litigation over noise regulation. The Santa Monica Municipal Airport is owned and operated by the City of Santa Monica. The city's concern regarding noise is prompted, at least in part, by the number of flight operations occurring at that airport. Indeed, in 1976 Santa Monica Municipal Airport was the forty-fifth busiest airport in the United States, with nearly all of its traffic consisting of general aviation


13. 58 Op. Cal. Atty Gen. 345, 346 (1975). The first parcel of land was acquired in 1926 and consisted of about 128 acres including Clover Field, an existing airfield. The city has purchased additional lands over the years and the airport now consists of about 215 acres. Id.

14. Another important factor is that "[t]he airport is surrounded on all sides by single family residential property. . . . The areas surrounding the airport are desirable; the value of an average home being in excess of one hundred thousand dollars ($100,000)." Brief for Defendant at 9, Santa Monica Airport Ass'n v. City of Santa Monica, Civ. No. 77-2852-IH (C.D. Cal., filed July 29, 1977). Still another factor is that "[t]he land north of the runway is not leased for airport related uses. . . . [O]ne million (1,000,000) square feet . . . has been leased to tenants who are in the process of construction of an industrial-professional complex unrelated to aircraft sale, service or training." Id. at 5. In fact, the entire airport "is zoned for industrial use (M-2)." Id. This pressure for financial return greater than that available from airport related operations is similar to the pressures which have resulted in the recent closings of some 112 "privately-owned but open-to-the-public airports." FAA General Aviation News, Mar. 1978, at 14. Some 120 others may close within the next 10 years unless solutions are found to the problems which are mainly "financial, particularly high property taxes and the high cost of capital improvements and maintenance." Id.

15. Brief for Aircraft Owners and Pilots Ass'n, Amicus Curiae at 5, Santa Monica Airport Ass'n v. City of Santa Monica, Civ. No. 77-2852-IH (C.D. Cal., filed July 29, 1977):

The annual report submitted by the Federal Aviation Administration for air traffic activity within the United States discloses that the Santa Monica Municipal Airport had 266,474 aircraft operations during Fiscal Year 1976 . . . . To provide a more complete picture, the same report shows Los Angeles International Airport had 467,479 aircraft operations during the same period, a volume which gave it sixth ranking; Santa Ana had 627,441 operations and ranked second; Van Nuys was third with 614,355; Long Beach fourth with 553,113; and Torrance eighth with 448,233. Id. The Santa Monica operations number is equivalent to 730 takeoffs or landings each day, or, using a 6:00 a.m. to 11:00 p.m. period only, one takeoff or landing every 84 seconds.

Of the annual number of operations, about half are classified as "itinerant" operations, which are defined "as takeoffs and landings excluding touch and go operations." Brief for Defendant at 6, Santa Monica Airport Ass'n v. City of Santa Monica, Civ. No. 77-2852-IH (C.D. Cal., filed July 29, 1977). It is
AIRCRAFT NOISE REGULATION

1979

aircraft. At one point, the city considered closing the airport completely. Instead of closing the airport, the city modified its extensive regulatory scheme with the goal of reducing resultant noise.

Section 10100 of the Santa Monica Municipal Code, the "regulatory purposes" section, originally provided for the operation of the airport "as a public air terminal facility for the promotion and accommodation of air transportation, general aviation and recreational flying." That section now indicates the intention of the city to govern the use of the airport "to the full limit of the authority which the City... possesses as the owner, operator, and proprietor of said airport... and... to the full extent otherwise provided by law...." The following reasons are given for the adoption of the subsequent provisions:

[T]o provide for a utilization of the airport facility which is compatible with adjacent residential, industrial, and commercial uses, to provide a minimum of interference with the peace and enjoyment of the citizens surrounding the airport, a minimum of environmental damage, and a minimum of noise and air pollution commensurate with compatible airport use.

Section 10101, the "night departure ban" provision, also was amended in 1977. While the section still provides that "[t]he airport shall be open for public use at all reasonable hours of the day not clear how many of these "itinerant" operations are of an interstate nature, and how many are commenced and completed within California.

16. 58 Op. CAL ATT’Y GEN. 345, 346 (1975). "[I]t is apparent that the City has entered into numerous contracts and leases wherein it has contracted away its rights to deal freely with the Airport property... These contractual agreements... leads [sic] to the conclusion that the City may not at... present... cease using the Airport for airport purposes." Id. at 351-52 (footnote omitted).

17. See note 16 & accompanying text supra.

18. SANTA MONICA, CAL, CODE §§ 10100-10144 (1978). The original section 10105A (ban on night jet departures) was adopted in 1967. Santa Monica, Cal., Ordinance 75CCS (Mar. 14, 1967). Section 10105B (SENEL limit) was added in 1973. Ordinance 909CCS (Feb. 27, 1973); see note 35 infra. Sections 10105A (total jet ban) and 10105A1 (assisting violation of jet ban) were amended to the current version in 1975. Ordinance 991CCS (Mar. 18, 1975). Section 10105A2 (helicopter training prohibition) was added in September of 1977. Ordinance 1068CCS (Sept. 13, 1977). Sections 10100 (regulatory purposes) and 10134 (Airport Director discretion) were changed in 1977 also. Ordinance 1070CCS (Oct. 25, 1977). Section 10101 (night departure and night engine start-ups ban) was amended to its current version later that same year. Ordinance 1075CCS (Dec. 13, 1977). Section 10111C (weekend touch & go ban) was added in early 1978. Ordinance 1076CCS (Jan. 24, 1978).

19. SANTA MONICA, CAL, CODE § 10100 (1975) (prior to amendment by Santa Monica, Cal., Ordinance 1070CCS (Oct. 25, 1977)).


21. Id. § 10100(C).

22. See note 18 supra.
and night," the additional language provides that “night takeoffs or engine start-ups are prohibited between the hours of 11:00 o’clock P.M. and 6:00 o’clock A.M., Monday through Friday and 11:00 o’clock P.M. and 7:00 o’clock A.M. on Saturday and Sunday.”

The “night departure ban” section provides a specific exception for “an emergency involving life, or death . . . [as long as] approval [for takeoff] is obtained before take-off.” This approval may be given by the Airport Director, or, in his absence, the Watch Commander of the Santa Monica Police Department.

Section 10104, the “minimum altitudes” section, concerns the operation of aircraft over the city. It provides:

No aircraft shall be flown or operated below the minimum air traffic pattern altitude of one thousand feet above mean sea level, except when approaching a runway for landing or while climbing to pattern altitude after a take-off. No aircraft shall be flown or operated in the traffic pattern when the cloud base is reported to be less than one thousand feet measured from mean sea level.

This regulation appears very similar to the general federal regulation regarding minimum altitudes. However, the regulation of operations when the applicable cloud bases are reported differs from the federal regulatory scheme.

Section 10105, the “general prohibition” section, provides in relevant part: “No aircraft shall be operated while on the ground or in flight in such a manner as to cause unnecessary noise.” But the regulation of noise does not end with the altitude restrictions, hours of operation limitation, and general prohibitions. Section 10105A, the “total jet ban” section, prohibits the takeoff or landing of “any fixed wing aircraft utilizing any turbo jet or turbo fan engine, in, at or upon the Santa Monica Municipal Airport at anytime.” Further, the section forbids providing facilities for “the maintenance or operation of any aircraft specified in [that] section.” The “total jet ban” section also provides for a misdemeanor criminal sanction upon its violation. Assisting, counseling, or aiding another in violating the “total jet ban” section

24. Id.
25. Id.
26. Id.
27. Id. § 10104.
31. Id. § 10105A.
32. Id.
33. Id.
is made a misdemeanor criminal offense under section 10105A1, the "assisting violation of jet ban" section.

Section 10105B, the "SENEL limit" section, provides for explicit noise regulations designed to "limit the noise in residential areas in the vicinity of Santa Monica Municipal Airport, generated by takeoff and landing operations at said Airport." Regarding implementation of noise restrictions, the regulation states:

The noise levels generated by aircraft takeoffs or aircraft landings at the Airport are to be measured at one or more positions in the vicinity of the Airport. The measurements shall be in terms of the single event noise exposure level (SENEL). The measured SENEL values are to be compared with noise level limits established by this ordinance. An aircraft operator whose aircraft produces noise levels which exceed the SENEL limits shall be deemed to be in violation of this ordinance.

The initial SENEL limit established by the ordinance was "100 dB" (decibels). Although it is unclear from the language of the ordinance at what altitude aircraft typically pass over the initial measuring point established, typical general aviation aircraft approach the 100 dB limit as measured in level flight at 500 feet. Additionally, the "SENEL limit" section creates a presumption of violation with regard to turbojet or turboshaft aircraft. Thus, "unless the aircraft operator can furnish to the City suitable technical evidence that the aircraft . . . can meet the noise level limits," operation of jet aircraft is "assumed . . . [to] result in violation of the

---

34. Id. § 10105A1.
35. "Single event noise exposure level (SENEL) . . . in decibels, is the noise exposure level of a single event, such as an aircraft flyby, measured over the time interval between the initial and final times for which the noise levels of a single event exceed the threshold noise level." Id. § 10105B (2)(d).
36. Id. § 10105B(1).
37. Id. § 10105B(3). For a concise summary of the general noise measurement schemes, see EPA, EFFECTS OF NOISE ON PEOPLE 99-100 (1971). For a more technical analysis, see C. BRAGDON, NOISE POLLUTION 51-62 (1970).
39. SANTA MONICA, CAL., CODE § 10105B(4) (1978) provides:

Measurements shall be made at ground positions on or near the center line of nominal takeoff and landing flight tracks for aircraft operating from the Airport . . .

The initial measurement position shall be established within 300 feet of the intersection of Dewey Avenue and 18th Street. Additional measurement positions may be established as needed to carry out the purpose of this ordinance.

40. FAA ADVISORY CIRCULAR No. 36-2A, Measured or Estimated (Uncertificated) Airplane Noise Levels 7 (Feb. 6, 1978).
noise level limits."\textsuperscript{42}  
Section 10105F, the "jet ban waiver" section, allows the airport director to authorize jet aircraft takeoffs or landings if he or she determines that "a bona fide emergency exists, and it is absolutely necessary that such aircraft land . . . for the preservation of life or property."\textsuperscript{43}

Section 10105A2, the "helicopter training prohibition" provision, strictly forbids helicopter pattern flight training,\textsuperscript{44} and declares it unlawful to "conduct or participate in, or aid or assist any other person in"\textsuperscript{45} helicopter pattern training.

Section 10111, the "nighttime touch-and-go ban" section, provides that "[n]o touch and go landings shall be made during the hours of darkness."\textsuperscript{46} Section 10111C, the "weekend touch-and-go ban" section, imposes a weekend ban on pattern flying by fixed wing aircraft, low approach operations, stop and go landings, and touch and go landings.\textsuperscript{47} The only exceptions are actions taken in an emergency, where safety requires, or when required by the FAA.\textsuperscript{48} These regulations attempt to restrict use of the airport to non-training purposes at times that would ordinarily be busiest for training purposes and at times when the greatest number of persons are in their homes in the surrounding residential areas.

Section 10112A, the "departure pattern" section, prescribes a straight out departure path to a minimum altitude of 600 feet for all aircraft, except that "small aircraft"\textsuperscript{49} departing from Runway 21\textsuperscript{50} are advised that "it is recommended that where practicable said aircraft should veer approximately ten degrees . . . to the left as soon as possible after takeoff."\textsuperscript{51}

Section 10116, the "nighttime warmup" provision, states that

\textsuperscript{42} \textit{Id.}  
\textsuperscript{43} \textit{SANTA MONICA, CAL., CODE} § 10105F (1975). \textit{See} note 128 infra.  
\textsuperscript{44} \textit{SANTA MONICA, CAL., CODE} § 10105A2 (1978).  
\textsuperscript{45} \textit{Id.}  
\textsuperscript{46} \textit{Id.} § 10111.  
\textsuperscript{47} \textit{Id.} § 10111C. This section defines a "touch-and-go" landing as "an action by an aircraft consisting of a landing and departure on a runway without stopping or exiting the runway." \textit{Id.} § 10111C(1). A "stop-and-go" is defined as "an action by an aircraft consisting of a landing followed by a complete stop on the runway and a takeoff from that point." \textit{Id.} § 10111C(2). A "low approach" consists of "an approach over the Airport for a landing where the pilot intentionally does not make contact with the runway thereon." \textit{Id.} § 10111C(3).  
\textsuperscript{48} \textit{Id.} § 10111C.  
\textsuperscript{49} \textit{Id.} § 10112A.  
\textsuperscript{50} \textit{Id.} "Runway 21" is a term used to refer to a particular strip of runway in a particular direction of flight, \textit{e.g.}, aircraft using the strip of runway on a magnetic heading of about 210 degrees are using "Runway 21."  
\textsuperscript{51} \textit{Id.}
"[d]uring hours of darkness the preflight warm up of engines shall be conducted only at midfield at a point designated by the Airport Director."52 The airport director receives authority under section 10134, the "Airport Director discretion" section, to "delay or restrict any flight or other operations at the airport and [to] refuse take-off clearance to any aircraft,"53 subject to prescribed standards.54

Violation of any of these provisions is declared a misdemeanor criminal offense under section 10143.55 In addition to criminal proceedings, the "total jet ban" section is enforced by the imposition of a five thousand dollar landing fee and a ten thousand dollar takeoff fee and by subjecting the aircraft to impoundment; however, the city returns impounded aircraft to their pilots and no successful collection of these fees has yet been made.56 The "SENEL limit" provision is enforced by a warning on the first offense and prosecution for the second offense.57 The "night departure ban" section has been invoked on isolated occasions against aircraft performing medical functions.58 The "nighttime touch-and-go ban" and "weekend touch-and-go ban" sections are frequently violated and are enforced by criminal prosecution.59 There is no enforcement of the "helicopter training prohibition" section since all helicopter training operations have ceased.60

52. Id. § 10116.
53. Id. § 10134.
54. The standards are as follows:
   1. Discretion shall not be exercised in any manner which conflicts with state or federal law.
   2. Discretion may only be exercised where:
      a) There is reason to believe that its exercise is necessary for the protection of public health, safety, or welfare, or
      b) There is reason to believe that an aircraft violates in some manner the proprietary rights of the City . . . as the owner/proprietor of the . . . Airport, or
      c) Where there is reason to believe that a violation of any of the provisions of this Article is imminent.
   3. Nothing in this section shall authorize the Airport Director . . . to deny access to the . . . Airport to employees of the federal government, or to other persons in the case of any emergency, or to those users . . . authorized . . . by law on any basis where pre-emptive rights validly exist.

Id.
55. Id. § 10143.
56. Brief for Defendant at 17-18, Santa Monica Airport Ass'n v. City of Santa Monica, Civ. No. 77-2852-IEI (C.D. Cal, filed July 29, 1977).
57. Id. at 19.
58. Id.
59. Id.
60. Id. The Santa Monica Municipal Code contains numerous provisions of other types involving the storage, use or maintenance of aircraft at that airport.
III. CONSTITUTIONAL LIMITATIONS ON LOCAL REGULATION

A. Commerce Clause

The Congress of the United States received the authority to regulate interstate and foreign commerce under the commerce clause of the United States Constitution.\(^{61}\) Even where Congress has not attempted regulation, states or local governments may not enact legislation which unduly burdens interstate commerce.\(^{62}\)

The Supreme Court, in *Southern Pacific Co. v. Arizona*,\(^{63}\) summarized the test used to discover an undue burden as one which would "impede substantially the free flow of commerce from state to state, or [would] regulate . . . commerce which, because of the need for national uniformity, demand[s] that . . . regulation . . . be prescribed by a single authority."\(^{64}\) The *Southern Pacific* decision struck down a state statute placing a limit on the number of railroad cars which could be operated on a particular train in that state. The Court decided that there was "no doubt that the Arizona Train Limit Law imposes a serious burden on the interstate commerce."\(^{65}\) The Court balanced the "total effect of the law as a safety measure"\(^{66}\) against the "national interest in keeping interstate commerce free from interferences which seriously impede it."\(^{67}\) The balance favored the uninterrupted flow of commerce.

The commerce clause analysis has been applied in the aircraft noise regulation area as well. In *American Airlines, Inc. v. City of Audubon Park*,\(^{68}\) the court invalidated an ordinance which prohibited aircraft from flying over Audubon Park below 750 feet above the ground.\(^{69}\) The city adjoined the principal Louisville, Kentucky airport\(^{70}\) and the typical approach path for landing on the Instrumentation...
AIRCRAFT NOISE REGULATION

The glidepath 71 crossed the most distant city limit at 442 feet above the ground and the closest city limit to the airport at 282 feet. 72 The court, in a per curiam opinion, correctly described the ordinance as an "intolerable and undue burden on interstate and foreign commerce," 73 for enforcement of the ordinance would have effectively rendered the airport unusable since no aircraft could have taken off or landed in compliance with the ordinance.

The district court in \textit{Lockheed Air Terminal, Inc. v. City of Burbank} 74 found that an ordinance prohibiting jet aircraft takeoffs between 11 p.m. and 7 a.m. was invalid under the commerce clause because "air commerce, by reason of its speed and volume, requires a single authority in control if it is to be conducted at maximum safety and efficient use of the navigable air space." 75 The court conceded that viewed by itself the ordinance was probably valid, but, assuming enactment on a nationwide scale by other localities, it violated the commerce clause. 76 The court of appeals affirmed on supremacy clause grounds, 77 with the Supreme Court affirming for similar reasons. 78 In a dissent joined by three other justices, Justice Rehnquist doubted the validity of the district court's analysis because "the proper determination of the question turns on an evaluation of the facts of each case . . . and not on a predicted proliferation of possibilities." 79 In light of the foregoing, the potential success of a commerce clause attack on local aircraft regulations remains uncertain.

\textbf{B. Supremacy Clause—Federal Preemption}

The early attempts to regulate aircraft on the local level in order to reduce resultant noise were ineffectual. The ordinances were successfully attacked under the supremacy clause. 80 More

71. The glidepath is a sloping electronic guidance beam which allows an aircraft to descend at a uniform rate while providing obstacle avoidance. See EPA REPORT, supra note 1, at 20-21.

72. 407 F.2d at 1307. The altitude at which a standard Instrument Landing System (ILS) approach procedure terminates over the runway threshold is 200 feet. Assuming the standard descent angle of 3.0 degrees, the nearest city limit would have been less than one hundred feet from the runway threshold.

73. Id.


75. Id. at 928.

76. Id. at 927.

77. 457 F.2d at 670.

78. 411 U.S. at 633.

79. Id. at 654 (Rehnquist, J., dissenting).

specifically, the challenges brought about a determination that local ordinances conflicted with particular federal law\textsuperscript{81} or were preempted by the pervasive scheme of federal regulation of aviation.\textsuperscript{82}

The first case involving such a local ordinance, \textit{Allegheny Airlines, Inc. v. Village of Cedarhurst},\textsuperscript{83} struck down an ordinance prohibiting flights over that town at less than one thousand feet above the ground. Aircraft approaching to land at Idlewild Airport,\textsuperscript{84} located about four thousand feet from the village at the nearest point, passed over the village at altitudes as low as 450 feet. The court held the ordinance invalid because, under the predecessor of the Federal Aviation Act of 1958,\textsuperscript{85} "the federal regulatory system . . . has preempted the field below as well as above 1,000 feet from the ground."\textsuperscript{86}

The Second Circuit also invalidated an ordinance, in \textit{American Airlines, Inc. v. Town of Hempstead},\textsuperscript{87} which prohibited aircraft from operating over the town if they exceeded noise limits measured on the ground. The town lies just to the east of John F. Kennedy International Airport in New York, and thus the aircraft were forced to fly around the town to avoid violating the ordinance.\textsuperscript{88}

The district court in \textit{Hempstead} held the ordinance invalid for three reasons: (1) the ordinance unconstitutionally burdened interstate commerce; (2) federal regulation preempted the area; and (3) the ordinance directly conflicted with specific federal regulations.\textsuperscript{89} The Second Circuit backed away from the broader ground of preemption used in \textit{Cedarhurst},\textsuperscript{90} and specifically concluded in \textit{Hempstead} that "there is square conflict between the local ordinance and federal regulation."\textsuperscript{91}

On the other hand, the California Supreme Court, in \textit{Loma Portal Civic Club v. American Airlines, Inc.},\textsuperscript{92} remained unpersuaded by an argument "that state action affecting any aspect of flight operations is precluded by the extensive pattern of federal regulation

\textsuperscript{81. E.g., American Airlines, Inc. v. Town of Hempstead, 398 F.2d 369 (2d Cir. 1968), cert. denied, 393 U.S. 1017 (1969).}
\textsuperscript{82. E.g., Allegheny Airlines, Inc. v. Village of Cedarhurst, 238 F.2d 812 (2d Cir. 1956).}
\textsuperscript{83. Id. at 812.}
\textsuperscript{84. Idlewild is now known as John F. Kennedy International Airport.}
\textsuperscript{85. Civil Aeronautics Act of 1938, ch. 601, § 1, 52 Stat. 977 (repealed Pub. L. 85-726, Title XIV, § 1401(b), 72 Stat. 806 (1958)).}
\textsuperscript{86. 238 F.2d at 815.}
\textsuperscript{87. 398 F.2d 369 (2d Cir. 1968), cert. denied, 393 U.S. 1017 (1969).}
\textsuperscript{88. Id. at 376.}
\textsuperscript{89. Id. at 372.}
\textsuperscript{90. Id. at 376 n4. See notes 83-86 & accompanying text supra.}
\textsuperscript{91. 398 F.2d at 375-76.}
\textsuperscript{92. 61 Cal. 2d 582, 394 P.2d 548, 39 Cal. Rptr. 708 (1964).}
Nevertheless, the court refused to enjoin noisy aircraft from flying over a populated area near San Diego’s Lindbergh Field on state statutory grounds. The California court determined that “[i]t is clear that the federal legislation was not intended to be exclusive.” The court founded this conclusion on the portion of the Federal Aviation Act of 1958 which provides that “[n]othing contained in this chapter shall in any way abridge or alter the remedies now existing . . . but the provisions of this chapter are in addition to such remedies.”

The court explained that the Cedarhurst decision was not contrary to its decision because “[d]espite the preemption language . . . the court was there dealing with an ordinance which ‘plainly conflicts with the federal . . . regulations.’” The court in Loma Portal was certainly willing to concede that a state law conflicting with a federal law could not be enforced under the supremacy clause. However, the court would not accept the broader argument that federal regulations had occupied the entire field of aircraft noise regulation.

In City of Burbank v. Lockheed Air Terminal, Inc., the Supreme Court struck down an ordinance placing an 11 p.m. to 7 a.m. curfew on jet aircraft flights from the Hollywood-Burbank Airport in California. The Court found that “the pervasive nature of the scheme of federal regulation of aircraft noise . . . leads us to conclude that there is pre-emption.” The Solicitor General had “concede[d] that as respects ‘airspace management’ there is pre-emption.”

The majority opinion accepted the finding of the district court:

“The imposition of curfew ordinances on a nationwide basis would result in a bunching of flights in those hours immediately preceding the curfew. This bunching of flights during these hours would have the twofold effect of increasing an already serious congestion problem and actually increasing, rather than relieving the noise problem by increasing flights in the period of greatest annoyance to surrounding communities. Such a result is totally inconsistent with the objectives of the federal statutory and regulatory scheme. . . . The imposition of curfew ordinances on a nationwide basis would cause a serious loss of efficiency in the use of the navigable airspace.”

93. Id. at 591, 394 P.2d at 554, 39 Cal. Rptr. at 714.
94. Id. at 589-90, 394 P.2d at 553, 39 Cal. Rptr. at 713.
95. Id. at 593, 394 P.2d at 555, 39 Cal. Rptr. at 715.
97. 61 Cal. 2d at 593, 394 P.2d at 555, 39 Cal. Rptr. at 715.
99. Id. at 633.
100. Id. at 627.
101. Id. at 627-28 (quoting Lockheed Air Terminal, Inc. v. City of Burbank, 318 F. Supp. 914, 927 (1970)).
The dissenting opinion was not inclined to look at the problem on a
nationwide basis, preferring instead to constrain itself to the facts
of the particular case.\textsuperscript{102}

The Court in \textit{Burbank} found pervasive the regulatory scheme
embodied in the Federal Aviation Act of 1958 and the Noise Con-
trol Act of 1972, which amended the Federal Aviation Act.\textsuperscript{103} But
the \textit{Burbank} decision was narrowed to its facts by the now famous
footnote which cites a letter to the Aviation Subcommittee of the
Senate Committee on Commerce from the Secretary of Transpor-
tation. The footnote provides:

\begin{quote}
"[T]he 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. Airport owners \textit{acting as}
proprietors can presently deny the use of their airports to aircraft on the
basis of noise considerations so long as such exclusion is non-discrimina-
tory."\textsuperscript{104}
\end{quote}

Thus, it would seem that the preemption holding applies only to
municipalities which seek to regulate noise at airports which they
do not operate. The Court, in the same footnote, indicated that the
"authority that a municipality may have as a landlord is not neces-
sarily congruent with its police power."\textsuperscript{105} It accordingly declined
to consider "what limits, if any, apply to a municipality as a propri-
eter."\textsuperscript{106}

In \textit{Burbank}, the Court reviewed the federal statutory scheme in
great detail, concluding that the "FAA, now in conjunction with
EPA, has full control over aircraft noise, pre-empting state and local
control."\textsuperscript{107} The statutes provide, in part, 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 . . . ."\textsuperscript{108} The Administrator of the FAA is delegated au-
thority over the use of the airspace "in order to insure . . . the effi-
cient utilization of such airspace."\textsuperscript{109}

Specifically, the Court reviewed the Noise Control Act of 1972
which amended the Federal Aviation Act of 1958. The latter act, as
amended, provides in relevant part:

\begin{quote}
(b) Consultations; standards; rules and regulations; aircraft certificates.
(1) In order to afford present and future relief and protection to the
public health and welfare from aircraft noise and sonic boom, the FAA,
\end{quote}

\begin{thebibliography}{9}
\bibitem{102} Id. at 654 (Rehnquist, J., dissenting). \textit{See} note 79 \& accompanying text \textit{supra}.
\bibitem{103} 411 U.S. at 628-33.
\bibitem{104} Id. at 635-36 n.14 (emphasis in original).
\bibitem{105} Id.
\bibitem{106} Id.
\bibitem{107} Id. at 633.
\bibitem{109} Id. § 1348(a).
\end{thebibliography}
after consultation with the Secretary of Transportation and with EPA, shall prescribe and amend standards for the measurement... such regulations as the FAA may find necessary to provide for the control and abatement of aircraft noise and sonic boom...

(d) Considerations determinative of standards, rules, and regulations. In prescribing... standards and regulations under this section, the FAA shall—

(1) consider relevant available data relating to aircraft noise...

(2) consult with such Federal, State, and interstate agencies as he deems appropriate...

(3) consider whether any proposed standard or regulation is consistent with the highest degree of safety in air commerce...

(4) consider whether any... regulation is economically reasonable, technologically practicable, and appropriate for the particular type of aircraft...

(5) consider the extent to which such... regulation will contribute to carrying out the purposes of this section.110

The Senate and House Committees both included, in their reports on amendments to 49 U.S.C. § 1431 under the Noise Control Act of 1972, statements that the relationships between the federal government and the local governments were not affected by the amendments.111 But the Senate Report contains the minority views of Senator Edmund Muskie of Maine, who advocated a provision rejected by the committee:

"This provision would have imposed a positive burden upon the operator of the airport to exercise responsibility to regulate the number, the frequency and the hours of flight or to impose land use controls so as to eliminate noise as an environmental problem in the area of that airport."112

Senator Muskie apparently believed that locally-originated controls were preempted because of the alternatives he consequently foresaw:

"The reported bill would force these people to wait for [new] emission control technology... or on the courts to impose sufficient... claims against... the airport operators for creating a public nuisance... To turn over to the courts the responsibility of making ad hoc decisions to solve environmental noise problems is equally unacceptable."113

110. Id. at § 1431(b)(1), (d) (Supp. V 1975).
111. The House Report provided: "No provision of the bill is intended 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 the enactment of the bill." H.R. Rep. No. 92-842, 92d Cong., 2d Sess. 10 (1972). The Senate Report similarly stated: "This does not address responsibilities or powers of airport operators, and no provision of the bill is intended to alter in any way the relationship between... the Federal... and... State and local governments that existed... prior to the enactment of the bill." S. Rep. No. 92-1160, 92d Cong., 2d Sess. 10-11 (1972).
113. Id.
However, the majority view in the legislative proceedings remains that no "change in the existing apportionment of powers between the Federal and State and local governments" was intended. The views of the Secretary of Transportation in his letter to the Aviation Subcommittee received the concurrence of the Committee Report:

[The legislation] 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. . . . Airport owners acting as proprietors can presently deny the use of their airports . . . on . . . noise considerations so long as such exclusion is non-discriminatory . . .

The legislation . . . will not prevent airport proprietors from excluding any aircraft on the basis of noise considerations.

Accordingly, since Burbank applies only to regulations under the municipality's police power, it will not control in an action involving an airport proprietor. Moreover, where the attempted local noise regulation directly conflicts with a federal regulation, the federal law prevails under the previous authority. However, where no federal regulation directly conflicts, the federal preemption doctrine may be applicable. As will be suggested later in this comment, perhaps the appropriate determination is whether the local ordinance affects the flight paths of aircraft while engaged in the performance of flight, or takeoff or landing runs in connection with actual flight. Under this rule, where flight of aircraft is adjusted in some way, preemption should apply; it would not apply where actual flight is unaffected.

C. Equal Protection Clause

Even in the post-Burbank environment, the courts have maintained the two-tiered regulatory scheme for control of airport noise. In British Airways Board v. Port Authority of New York, the operators of the supersonic jet Concorde obtained an injunction prohibiting enforcement of a Port Authority ban on Concorde operations at John F. Kennedy International Airport. The court looked to the same legislative materials as the Burbank court did in delineating the separate roles of the federal government and the local government airport operators. After remand to the district

115. See note 104 & accompanying text supra.
116. See notes 147-59 & accompanying text infra.
117. See notes 147-59 & accompanying text infra.
118. See notes 147-59 & accompanying text infra.
120. 564 F.2d at 1011 n.8.
court, the court of appeals summarized its view of the role of airport proprietors:

> Our initial opinion in this case delineated the extremely limited role Congress had reserved for *airport proprietors* in our system of aviation management. Common sense, of course, required that exclusive control of airspace allocation be concentrated at the national level, and *communities were therefore preempted from attempting to regulate planes in flight*. . . . The task of protecting the local population from airport noise, however, has fallen to the agency, usually of local government, that owns and operates the airfield. . . . 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 assure compatible land use. . . . would result in a rational weighing of the costs and benefits of proposed service. Congress has consistently reaffirmed its commitment to this two-tiered scheme, and both the Supreme Court and executive branch have recognized the important role of the airport proprietor in developing noise abatement programs consonant with local conditions.\(^{121}\)

The *British Airways* court held that, while the Port Authority of New York could “subject the Concorde to reasonable noise regulations,”\(^ {122}\) the Port Authority could not discriminate against that particular type of aircraft. The evidence disclosed that the Concorde’s “perceived noise ‘footprint’ was comparable to that of the [Boeing] B707-320B. . . . [and] the vibrations emitted. . . . were no greater than those induced by long range subsonic aircraft, such as the [Boeing] B-747 and [McDonnell-Douglas] DC-10.”\(^ {123}\)

The court found that the regulatory scheme “mandates that each airport operator be circumscribed to the issuance of reasonable, nonarbitrary and nondiscriminatory rules defining the permissible level of noise which can be created by aircraft using the airport.”\(^ {124}\) Because the ban of Concorde at Kennedy Airport went beyond this level of permissible regulation in singling out a particular aircraft, the court dissolved the ban on Concorde flights to the Kennedy Airport.

The court explicitly refused to preclude the Port Authority from adopting “a new, uniform and reasonable noise standard in the future, assuming the longstanding 112 PNdB rule. . . . is deemed inadequate.”\(^ {125}\) And, as noted by the concurring opinion, those future reasonable standards “might have the effect of authorizing, limiting or banning the use of JFK by SSTs.”\(^ {126}\) So, although the local government role in reducing airport noise by regulating the aircraft themselves appears limited, nondiscriminatory noise limit

---

121. *Id.* at 1010-11 (emphasis added; citations omitted; footnote omitted).
122. 558 F.2d at 82.
123. 564 F.2d at 1008-10 (footnote omitted).
124. *Id.* at 1011.
125. *Id.* at 1013 (footnotes omitted).
126. *Id.* at 1017-18 (Mansfield, J., concurring in part).
regulations may be employed to include or exclude aircraft from use of the airport by the airport proprietor.

IV. ANALYSIS OF THE SANTA MONICA REGULATIONS

Under the analysis used by the courts and adopted by Congress in the Noise Control Act of 1972, local regulations which directly conflict with explicit federal statutes or regulations are invalid. One of the Santa Monica regulations, the "jet ban waiver" section, provides for an exception to the ban on jet aircraft operations when the airport director determines that "a bona fide emergency" exists. However, the applicable federal regulation provides that "[t]he pilot in command of an aircraft is directly responsible for, and is the final authority as to, the operation of that aircraft." Further, "[i]n an emergency requiring immediate action, the pilot in command may deviate from any [FAA] rule . . . to the extent required to meet that emergency."

The pilot in command receives such authority, since only he or she is fully aware of the operating limitations and conditions to which the pilot is subject, whether they be mechanical, meteorological, or physiological. The pilot must have the freedom to approach these problems without worrying about such things as noise ordinances. The more reasoned view would look to the national aviation scheme and, clearly, the actions of the pilot directed to the preservation and protection of human lives and property should override the interest of the airport proprietor in limiting intermittent noise around its airport. Emergencies are rare occurrences, and sometimes what appears to be a desperate situation later turns out to be unharmed. Nevertheless, the interests of safety require excessive emergency status recognition in order that any aircraft which might have a perceived need for emergency status should not be denied that status.

Similarly, the "airport director discretion" section arguably attempts to place the power of air traffic control in the hands of the

127. See text accompanying notes 89-97 supra. See also notes 111-16 & accompanying text supra.
128. SANTA MONICA, CAL., CODE § 10105F (1975). In United States v. City of Santa Monica, Civ. No. 75-1332-MNL (C.D. Cal. Nov. 24, 1975), the parties stipulated to a permanent injunction against the city to enjoin enforcement of section 10105F which would enable the airport director to make an independent judgment as to whether an in-flight emergency exists, contrary to the decision of the pilot in command of any aircraft seeking clearance to land at Santa Monica Municipal Airport.
129. 14 C.F.R. § 91.3(a) (1978).
130. Id. § 91.3(b).
Federal employees receive authority to issue air traffic control clearances in order "to provide for the safe, orderly, and expeditious flow of air traffic." Moreover, the pilot of an airplane may not, "at an airport with an operating control tower, taxi an aircraft on a runway or taxiway, or takeoff or land an aircraft, unless he has received an appropriate clearance from [air traffic control]." To allow the airport director to countermand a federal air traffic control clearance would conflict with the federal air traffic control authority. The purposes of the federal clearance are to provide for "expeditious flow of air traffic" and to "[prevent] collision between known aircraft." The apparent purpose of the Santa Monica regulation is compliance with noise regulations. And Santa Monica, or any other municipality, must defer to federal authority, even under the rule of Loma Portal Civic Club v. American Airlines, Inc.

The standards for exercise of that discretion may be helpful in alleviating this conflict, since one standard is that the discretion may not be exercised to conflict with federal law. On the other hand, the authority to deny or delay takeoff clearance has no meaning so long as the control tower is in operation. While the control tower operates, it alone exercises control over aircraft from the time they enter a taxiway until they take off, and from the time of touch down at landing until the aircraft exit the taxiway to the parking area. At the same time, during nighttime hours in which the tower is not operating, the airport director may deny takeoff clearance without infringing on the federal authority. By proper application of this standard, the apparent conflict between the "airport director discretion" section and the federal air regulations can be resolved.

In addition, section 10104, the "minimum altitudes" section, prohibits flights below 1,000 feet above mean sea level except during takeoff or landing operations. Assuming that the Santa Monica area surrounding the airport is a "congested area of a city," the Santa Monica regulation differs from the federal regu-

---

133. Id. § 91.87(h).
134. Id. § 65.45(a).
135. Id. § 1.1 (definition of "air traffic clearance").
137. See note 54 supra.
139. Id. § 10104 (1978) (emphasis added). See also notes 27-28 & accompanying text supra.
140. 14 C.F.R. § 91.79(b) (1978).
lation which provides for a minimum "altitude of 1,000 feet above
the highest obstacle within a horizontal radius of 2,000 feet of the
aircraft." Obviously, the very lowest permissible altitude under
the federal regulation is one thousand feet above ground level.
Santa Monica's ordinance would permit flights at altitudes below
those authorized by the federal regulation; specifically, an amount
equal to the elevation above sea level of the ground at Santa
Monica. This difference may amount to a conflict between the lo-
cal interest and the federal standard, at least to the extent that
there is a federal interstate commerce interest in flights being con-
ducted at at least 1,000 feet.

The "minimum altitudes" section also prohibits flights when
the cloud bases are below 1,000 feet above sea level. This appar-
ently attempts to adopt a local version of a federal regulation
which provides: "Except as provided in § 91.107, no person may op-
erate an aircraft, under [visual flight rules], within a control zone
beneath the ceiling when the ceiling is less than 1,000 feet." But
even ignoring the conflict between measurements above the
ground and above sea level, the Santa Monica ordinance ex-
cludes the exception provided by the federal regulation for waiver
of that requirement "when a person has received an appropriate
[air traffic control] clearance." Again, direct conflicts with ap-
propriate federal regulations must result in the invalidation of the
local ordinance.

Beyond the situations in which federal regulations directly con-
flict with local regulations, federal preemption may apply to regu-
lations imposed by airport proprietors which affect the flight of
aircraft. Noise regulations which restrict aircraft by fixed loca-
tion ground measurements encourage attempts by operators to cir-
cumvent the measuring devices while still landing and departing
from the affected airport. Yet the Burbank footnote left open the
possible application of regulations based upon local govern-

141. Id. 142. SANTA MONICA, CAL., CODE § 10104 (1978).
143. 14 C.F.R. § 91.105(c) (1978).
144. See text accompanying note 141 supra. See also 14 C.F.R. § 1.1 (1978), which
provides: "'Ceiling' means the height above the earth's surface of the lowest
layer of clouds . . . reported [at least] as 'broken' . . . and not . . . as 'thin' or
'partial.' " Id.
146. See notes 90-97 & accompanying text supra.
148. See note 154 infra. See also Air Transp. Ass'n v. Crotti, 389 F. Supp. 58 (N.D. Cal. 1975), which involved regulations treated as though enacted by an airport
proprietor. The court stated: "[T]he SENEL provisions . . . are a per se un-
lawful exercise of police power into the exclusive federal domain of control
AIRCRAFT NOISE REGULATION

1979]

ment's status as proprietor of the airport. The proprietary interest logically would not extend beyond the airport premises to an area where nearly all flight paths are located.

As previously discussed, the Federal Aviation Act of 1958, as amended, actually deals with airspace management and local regulations covering aircraft flight unavoidably affect the proper utilization and management of the airspace. The local interest of the airport proprietor lies in determining the level of service desired and excluding aircraft which are noisier than those necessary to provide that level of service.

The "SENEL limit" section of the local ordinances attempts to exclude these noisier aircraft; but in its implementation with local ground measurements it has the effect of regulating or affecting flight paths. The presumption of section 10105B(9) that jet aircraft are incapable of meeting the 100 decibel limit attempts to remedy this tendency to change flight paths by reference to the general type of powerplant used by the aircraft. However, not all jet powered aircraft are noisier than all propeller driven aircraft. As a result, this presumption appears to violate the re-

over aircraft flights . . . and airspace management . . . . [They] collid[e] head-on with the federal regulatory scheme . . . ." Id. at 65.

149. See notes 104-06 & accompanying text supra.

The Port of New York Authority has for years imposed noise limitations on aircraft taking off from its airports and monitors the take-offs to assure compliance. The Authority exercises its right to prescribe noise limits in its capacity as an airport owner-operator and not as an exercise of local governmental police power to regulate in a legislative sense. . . . The Authority does not regulate landings inasmuch as approach procedures are executed off the premises in which it has a proprietary interest.

Id. at 32180 (emphasis added).

151. See notes 101, 108-09 & accompanying text supra.
154. See C. BRAGDON, supra note 37, at 25-26, which describes the "beat the box" scheme used to elude permanent noise monitoring stations by having agents alert pilots by radio when they are in the vicinity of the box after takeoff. The pilots reduce power and maintain altitude for about 10 seconds and upon another radio signal resume normal noisy flight operations.
156. FAA ADVISORY CIRCULAR No. 36-1B, CERTIFICATED AIRPLANE NOISE LEVELS 7-9 (Dec. 5, 1977), which includes noise measurements for various aircraft, shows the Lockheed model L-100-30 propeller driven airplane produces higher measured noise levels (takeoff—98.4 EPNdB; landing—99.1 EPNdB) than the Rockwell international model Sabre 60 Sabreliner jet powered air-


quirement that regulations be nondiscriminatory.\footnote{157}

The national interest lies primarily in efficient and readily available use of the navigable airspace in a national transportation system.\footnote{158} This system could not tolerate a great amount of locally originated and non-standardized rules governing the way in which flights are to be conducted.\footnote{159} Nevertheless, local airport proprietors should be able to determine the level of service offered, and to completely exclude aircraft on a noise basis. Thus, the local authority cannot simultaneously accept the benefits of the service and deny the burden of the increased noise.

An alternative would be regulations excluding aircraft on the basis of established measurements conducted by the federal government. An airport proprietor could choose a specified level of noise to be tolerated, and exclude all aircraft by type and model which exceed that level as determined by standard federal measurements. This would eliminate any possibility of affecting flight paths, other than total exclusion from landing or departing that particular airport, because the regulations could only be enforced with reference to the type of aircraft, and not to the particular noise measurement which might be circumnavigated by noisy aircraft. Circumnavigation may solve the local problem, but would create a great morass of varied procedures in aviation at the national level and seriously affect the safety of flight operations.

Section 10105A of the Santa Monica rules is directed toward the primary object of the noise regulations in that area. The airport proprietor determined that jet powered aircraft were creating most of the unwanted noise, and so enacted an ordinance prohibiting the use of that airport by aircraft powered in that fashion.\footnote{160} How-

craft (takeoff—95.0 EPNdB; landing—98.5 EPNdB). \textit{Id.} This is not an isolated example, as other propeller driven aircraft were noisier than other jet aircraft on one or both of the measurements. \textit{See also} note 161 \textit{infra}.

\footnote{157} British Airways Bd. v. Port Auth. of New York, 564 F.2d 1002, 1011 (2d Cir. 1977).


\footnote{159} City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 638-39 (1973), recognizes the need for uniformity:

[T]he [FAA] Administrator has imposed a variety of regulations relating to take-off and landing procedures and runway preferences. The Federal Aviation Act requires a delicate balance between safety and efficiency . . . and the protection of persons on the ground . . . Any regulations adopted . . . to control noise pollution must be consistent with the "highest degree of safety. . . ." The interdependence of these factors requires a \textit{uniform and exclusive system of federal regulation} if the congressional objectives underlying the Federal Aviation Act are to be fulfilled.

\textit{Id.} (emphasis added).

\footnote{160} Brief for Defendant at 12-13, Santa Monica Airport Ass'n v. City of Santa Monica, Civ. No. 77-2852-IH (C.D. Cal., filed July 29, 1977).
ever, this type of regulation ignores the fact that certain propeller driven aircraft create more noise than particular jet powered aircraft.\textsuperscript{161} The court in *British Airways Board v. Port Authority of New York*\textsuperscript{162} refused to endorse a ban on a particular type of aircraft for noise purposes when other types of aircraft were at least as noisy as the excluded type.\textsuperscript{163} It concluded discriminatory regulations were unavailable to local airport proprietors due to the following circumstances: (1) all other authority had been preempted by Congress; (2) the commerce clause prohibits excessive regulations; and (3) there was a prior agreement between the Port Authority and the Secretary of Transporation.\textsuperscript{164}

Whatever the theory applied, the generally accepted rule remains that the criteria used to distinguish between persons treated differently must be rationally related to the objective of the legislative enactment.\textsuperscript{165} Furthermore, the objective measurements available thus far indicate that the “total jet ban” section discriminates against quiet jet powered aircraft in favor of noisy propeller driven aircraft. This distinction is not rationally related to the clear objective of the Santa Monica noise restrictions, which is “to provide a minimum of interference with the peace and enjoyment of the citizens surrounding the airport, a minimum of environmental damage, and a minimum of noise and air pollution commensurate with compatible airport use.”\textsuperscript{166} The type of powerplant has no relevance except as to the amount of noise it produces. While it may have been true at one time that all jet powered aircraft were noisier than propeller driven airplanes,\textsuperscript{167} it apparently is no longer true and is an irrational distinction for noise reduction purposes.

The same analysis should be applied to the “weekend touch-and-go ban”, “nighttime touch-and-go ban,” and "helicopter train-
ing prohibition" sections. These sections appear to rationally distinguish between the types of persons treated differently. The "weekend touch-and-go ban" section\textsuperscript{168} bans all training flights during the time to which it applies, and distinguishes between flights on weekdays and on the weekend. On weekends, the volume of training flights and the number of persons present in surrounding residential areas are greater than on a weekday. More persons can be subjected to disturbing noise by a greater number of aircraft on the weekend. The prohibition results in a shift of these activities to weekdays, periods during which the annoyance of those flights will affect fewer people less frequently.

These same considerations support the rationality of the "nighttime touch-and-go ban" section.\textsuperscript{169} Again there appears to have been a rational determination of the desired level of service to be offered, and a prohibition of activities beyond that point. Particularly since there would be no objection under the various legal theories to a total prohibition on training activities, the decision represents a rational balancing of the benefits of the pilot competence achieved by the training flights with the costs of resultant noise to the surrounding area. Similarly, the "helicopter training prohibition" section\textsuperscript{170} represents a rational determination of the level of service to be offered. The difference between helicopters and other types of aircraft is the distinctive type of noise generated by the helicopter,\textsuperscript{171} and the more lengthy and frequent nature of training activities.

There remains the question of the validity of certain Santa Monica aircraft noise provisions under the commerce clause of the United States Constitution.\textsuperscript{172} Both the "night departure ban" section\textsuperscript{173} and the "total jet ban" section\textsuperscript{174} involve the same analysis and will be discussed together. Both provisions should be viewed in terms of the balancing of interests employed in \textit{Southern Pacific Co. v. Arizona.}\textsuperscript{175} The local interest in noise control is balanced against the national interest in interstate commerce free from interference. The threshold question is whether the Santa Monica provisions interfere with interstate commerce in any way. In \textit{Na-}

\textsuperscript{168} Santa Monica, Cal., Code § 10111C (1978).
\textsuperscript{169} Id. § 10111.
\textsuperscript{170} Id. § 10105A.
\textsuperscript{171} Brief for Defendant at 77, Santa Monica Airport Ass'n v. City of Santa Monica, Civ. No. 77-2852-IH (C.D. Cal., filed July 29, 1977). "Many helicopters emit a peculiarly annoying sound known as blade slap... [which] produces intense peak noises and is profoundly disturbing to residents." \textit{Id.}
\textsuperscript{172} See notes 61-79 & accompanying text \textit{supra.}
\textsuperscript{173} Santa Monica, Cal., Code § 10101 (1978).
\textsuperscript{174} Id. § 10105A.
\textsuperscript{175} 325 U.S. 761 (1945). See notes 63-67 & accompanying text \textit{supra.}
tional Aviation v. City of Hayward, the court considered the effect on interstate commerce "incidental at best and clearly not excessive when weighed against the legitimate and concededly laudable goal of controlling the noise levels . . . during the late evening and morning hours." There the court considered a SENEL regulation which applied only during the hours between 11:00 p.m. and 7:00 a.m. Moreover, in Hayward, other surrounding airports were available to accept the operations excluded because of the noise regulations. Santa Monica is one of ten reliever airports for the Los Angeles International Airport, and all of the flights prohibited by the "night departure ban" section and the "total jet ban" section can be completed to one of the other airports in that area. The effect of these regulations alone almost certainly does not adversely affect interstate commerce.

By assuming the imposition of similar noise restrictions by a much greater number of airports in the region or on a nationwide basis, one can envision a substantial effect upon interstate commerce. But the Supreme Court in City of Burbank v. Lockheed Air Terminal, Inc. based its decision solely upon the preemption doctrine, and a strong dissent indicated that the validity of such an assumption is questionable. Both the "total jet ban" provision and "nighttime departure ban" section should withstand attack under the commerce clause.

In addition to these previously discussed sections, the Santa Monica Municipal Code contains a provision aimed at noise control that has not been challenged, and seems to be precisely the type of regulation that ought to occur on the local level. Under section 10116, the "nighttime warmup" provision, the airport director designates a location for the warming up of aircraft engines during hours of darkness. Since most airfields are situated differently, this has the effect of moving the noise to the spot most distant from persons who might otherwise be disturbed. As the local authority has the greatest knowledge along these lines, so it ought to be responsible for determining the appropriate location for engine warmup.

178. Id.
179. Brief for Defendant at 7, Santa Monica Airport Ass'n v. City of Santa Monica, Civ. No. 77-2852-II (C.D. Cal., filed July 29, 1977).
181. Id. at 633.
182. Id. at 654 (Rehnquist, J., dissenting). See text accompanying note 79 supra.
Section 10112A, the "departure pattern" section, appears to be worded in such a manner as to represent no real requirement, but instead a mere suggestion. Similarly, the "general prohibition" section seems so vaguely worded as to define no standard capable of understanding or enforcement.

V. CONCLUSION

Although the greatest area of control available to the municipality as an airport proprietor appears to be land use planning techniques, municipalities continue to regulate aircraft operations instead. The better solution incorporates local noise regulations setting maximum noise levels to be allowed, and an exclusion of all aircraft by type and model that standard federal government measurements determine to produce noise which exceeds those levels. If the community later decides that noise is still a problem, it can further reduce the noise limit and exclude additional aircraft according to federal measurements.

Other regulations often conflict directly with the federal scheme of air regulation; but even where there is no direct conflict, local regulations affecting flight paths are preempted by the federal interest in airspace management. Discriminatory noise standards may also be held invalid, but no discrimination will result so long as federal standard measurements are uniformly used to exclude noisy aircraft.

The two-tiered federal-state system of aircraft noise control allows local authorities to truly limit noise but forces them to balance the loss of service of the aircraft consequently excluded. This allows the aviation system the necessary uniformity of flight procedures and makes avoidance of noise standards a simple matter for the aircraft operator. Both the local and national interests benefit from this type of system.

William B. Cassel '79

---

184. Id. § 10112A, which provides, in part, that for small aircraft "it is recommended that where practicable said aircraft should veer . . . to the left as soon as possible after takeoff." Id. (emphasis added).

185. Should this be enforced more strongly than the language would indicate, the previous analysis regarding preemption of local regulations over actual aircraft flight ought to be applied. See notes 147-59 & accompanying text supra.


187. See text accompanying note 30 supra.