

Environmental Law—Federal Regulation of Aircraft Noise Under Federal Aviation Act Precludes Local Police Power Noise Restrictions—*City of Burbank v. Lockheed Air Terminal, Inc.*¹—Responding to noise disturbances created by commercial air traffic, the City Council of Burbank, California, adopted a curfew ordinance prohibiting jet take-offs from the privately owned Hollywood-Burbank Airport between the hours of 11 p.m. and 7 a.m. Lockheed Air Terminal, Inc. (Lockheed), the airport owner, filed suit in the United States District Court for the Central District of California to invalidate the ordinance and enjoin its enforcement, contending that the ordinance was an unreasonable burden on interstate commerce, that it conflicted with regulations promulgated by the Federal Aviation Administration (FAA), and that federal regulation of air commerce was so pervasive as to preempt local legislation in the area. Despite Burbank's assertion that noise regulation has traditionally been a subject within the scope of state police power, the district court accepted Lockheed's contentions and found the Burbank ordinance unconstitutional.² The Court of Appeals for the Ninth Circuit affirmed³ on the grounds that extensive federal legislation preempted local regulation and that such local regulation conflicted with FAA regulations.

Affirming the injunction against enforcement of the Burbank ordinance,⁴ the Supreme Court of the United States found it necessary to reach only the preemption issue.⁵ Accordingly, the Court HELD: non-federal noise regulation enacted under the state police power was preempted by the pervasive scheme for federal regulation of aircraft noise embodied in the Federal Aviation Act.⁶

Because the Hollywood-Burbank Airport was not owned by the city, the facts of the case did not require the court to address the problem of cities attempting to regulate airports as proprietors. Furthermore, the Court expressly limited its holding to the preemption of noise regulation by municipalities which are not the owners of the airports they seek to regulate.⁷ The impact of the *Burbank* holding upon the power and scope of local regulation of aircraft noise is thus somewhat unclear, especially in light of the fact that

¹ 411 U.S. 624 (1973).

² 318 F. Supp. 914 (C.D. Cal. 1970).

³ 457 F.2d 667 (9th Cir. 1972).

⁴ 411 U.S. at 626.

⁵ Id. at 633.

⁶ Id. The doctrine of preemption, based on the supremacy clause of the United States Constitution (art. VI, cl. 2), is used by the courts to invalidate state laws which either conflict with federal laws—as when compliance with both the federal and non-federal standards is impossible—or which Congress explicitly or implicitly intended to forbid by enacting national legislation. See, e.g., Note, 13 B.C. Ind. & Com. L. Rev. 813, 814-15 (1972). Viewed somewhat differently, the contentions that state laws directly conflict with or are preempted by federal enactments may be considered as two distinct objections to state legislation. See Note, 15 B.C. Ind. & Com. L. Rev. 829 (1974).

⁷ 411 U.S. at 636 n.14.

nearly every major urban airport is subject to proprietary regulation.⁸ Furthermore, the Court does not seem to have resolved the immediate and substantial questions about airport regulation that public and private sectors had raised. On one hand, many municipal airport owners had been considering curfews and other operational restrictions on jet aircraft as possible means for alleviating the noise pollution in communities surrounding airports, and they had hoped for a go-ahead signal from the *Burbank* Court that such regulations would be permitted. On the other hand, airlines and aircraft companies feared that piecemeal local restrictions on air traffic might stunt the growth of air commerce, felt that uniform federal regulations would better protect their interests,⁹ and hoped that *Burbank* would resolve the issue of local versus federal control in favor of the latter. Because the Court's holding does not expressly preclude local proprietary regulations, it remains to be seen what impact the decision will have on the division of federal and local authority in the field of airport noise regulation. While it is arguable that *Burbank* does not preclude municipal proprietary regulation of airports, the policy implications of the Supreme Court's preemption reasoning suggest that such regulation may not be tolerated in subsequent decisions.

In order to analyze the implications of *Burbank* upon the role of municipal power in the field of aircraft noise regulation, this note will first discuss the reasoning behind the Court's finding of federal preemption of the Burbank ordinance. It will then examine some of the judicial presumptions upon which this finding was grounded. In particular, it will focus upon the Supreme Court's treatment of the broad congressional grant of authority to the FAA and its apparent willingness to weigh agency practices as a factor in determining whether or not Congress possessed preemptive intent. Finally, the note will explore the vital issue of preemption of municipal proprietary noise regulations in light of the *Burbank* holding and will suggest an alternate means by which federal law may create uniform regulation without disregarding the problems and needs of airport communities.

The principal piece of federal legislation dealing with air traffic is the Federal Aviation Act of 1958.¹⁰ This Act declares the sovereignty of the United States over its airspace,¹¹ establishes the Federal Aviation Administration (FAA), and broadly authorizes the FAA to enact regulations for the purpose of insuring the safe and efficient use of airspace and the protection of persons on the ground.¹² This Act was amended in 1968 to authorize the FAA

⁸ *Id.*

⁹ *Aviation Week & Space Technology*, Nov. 6, 1972, at 19.

¹⁰ 49 U.S.C. §§ 1301 et seq. (1970).

¹¹ 49 U.S.C. § 1508 (1970).

¹² 49 U.S.C. § 1348 (1970) provides in pertinent part:

(a) The Administrator is authorized and directed to develop plans for and

Administrator to prescribe regulations for the control and abatement of aircraft noise and sonic boom.¹³ It was further amended by the Noise Control Act of 1972 (1972 Act)¹⁴ to require the participation of the Environmental Protection Agency (EPA) in formulating aircraft noise regulations.

The Federal Aviation Act and its amendments contain no language expressly preempting local noise regulation. In order to determine whether or not Burbank's local regulations could exist under the imposing shadow of federal authority, the Court was obliged to look for evidence of congressional intent to preempt. It began its search by following the path of preemption analysis set forth in *Rice v. Santa Fe Elevator Corp.*¹⁵ In *Rice*, the Court began with the assumption that since the field in question was one which the states have traditionally occupied, state authority in the field would not be superseded by federal law unless such supersession was the clear and manifest purpose of Congress.¹⁶ Since it is often unclear from the face of a statute whether or not Congress intended to preempt local legislation,¹⁷ the Supreme Court, while ostensibly looking for evidence of congressional intent, has established several policy guidelines for determining which situations require a finding of federal preemption.¹⁸ In the absence of some overriding policy

formulate policy with respect to the use of the navigable airspace; and assign by rule, regulation, or order the use of the navigable airspace under such terms, conditions, and limitations as he may deem necessary in order to insure the safety of aircraft and the efficient utilization of such airspace. . . . (c) The Administrator is further authorized and directed to prescribe air traffic rules and regulations governing the flight of aircraft, for the navigation, protection, and identification of aircraft, for the protection of persons and property on the ground, and for the efficient utilization of the navigable airspace, including rules as to safe altitudes of flight and rules for the prevention of collision between aircraft, between aircraft and land or water vehicles, and between aircraft and airborne objects.

¹³ 49 U.S.C. § 1431 (1970). Prior to its further amendment in 1972, the Act provided in part that the Administrator, "[i]n order to afford present and future relief and protection to the public from unnecessary aircraft noise and sonic boom, . . . shall prescribe and amend such rules and regulations as he may find necessary to provide for the control and abatement of aircraft noise and sonic boom. . . ." *Id.*

¹⁴ 49 U.S.C. § 1431 (Supp. II 1972), amending 49 U.S.C. § 1431 (1970):

In order to afford present and future relief and protection to the public health and welfare from aircraft noise and sonic boom, the FAA, after consultation with the Secretary of Transportation and with EPA, shall prescribe and amend standards for the measurement of aircraft noise and sonic boom and shall prescribe and amend such regulations as the FAA may find necessary to provide for the control and abatement of aircraft noise and sonic boom, including the application of such standards and regulations in the issuance, amendment, modification, suspension, or revocation of any certificate authorized by this title. . . .

¹⁵ 331 U.S. 218 (1947).

¹⁶ *Id.* at 230.

¹⁷ This is especially true where Congress grants broad regulatory power to a federal agency, since Congress cannot anticipate the different ways that agency regulations will affect state laws. See generally Hirsch, *Toward a New View of Federal Preemption*, 1972 U. Ill. L.F. 515.

¹⁸ 411 U.S. at 633, citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

reason for respecting the state law, preemption will be presumed: where the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it;¹⁹ where the state policy may produce a result inconsistent with the objective of the federal legislation (interference);²⁰ where the federal act touches an area of exclusive federal power;²¹ or where the objective of the federal statute requires a uniform system of regulation.²²

Applying the principles enunciated in *Rice*, the *Burbank* Court found preemption of Burbank's regulations because of the pervasive scheme of federal regulation of aircraft noise.²³ In reaching its finding of preemption, the Court relied on a variety of legislative sources. It noted that the Noise Control Act of 1972, Congress' most recent expression on the subject of airport noise, gave the FAA, in conjunction with the EPA, broad authority to promulgate any regulations needed to protect the public from aircraft noise.²⁴ Since this 1972 Act granted broad, but not necessarily exclusive, regulatory authority to the FAA, the *Burbank* majority found it necessary to look into the legislative history of the Act in order to find more specific evidence of Congress' preemptive intent. Although both the House and Senate committee reports stated that the proposed act would not alter the then current preemptive status of federal noise regulation,²⁵ the Court probed deeper into the origin and development of the 1972 Act, because of its belief that Congress' most recent pronouncement on aircraft regulation contained the best evidence of Congress' preemption policy.²⁶ Prior to 1972, federal noise control was a matter within the general regulatory scope of the Federal

¹⁹ E.g., *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947).

²⁰ E.g., *Hill v. Florida ex rel. Watson*, 325 U.S. 538 (1945).

²¹ E.g., *Hines v. Davidowitz*, 312 U.S. 52 (1941).

²² E.g., *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 298 (1851).

²³ 411 U.S. at 633. State police power as a justification for interference with air commerce had been challenged in the courts as early as 1956. In *Allegheny Airlines, Inc. v. Village of Cedarhurst*, 132 F. Supp. 871 (E.D.N.Y. 1955), aff'd, 238 F.2d 812 (2d Cir. 1956), a village ordinance making it a crime to fly aircraft over the village at altitudes under 1000 feet was held to be preempted. The court ruled that air traffic control was a field of regulation which Congress had preempted to the complete exclusion of conflicting legislation of states and their agencies.

In *American Airlines, Inc. v. Town of Hempstead*, 272 F. Supp. 226 (E.D.N.Y. 1967), aff'd, 398 F.2d 369 (2d Cir. 1968), a town noise restriction which would have prevented aircraft from using five runways at nearby Kennedy International Airport was held to conflict with federal air traffic regulations and was therefore preempted.

In *American Airlines, Inc. v. City of Audubon Park*, 297 F. Supp. 207 (W.D. Ky. 1968), an ordinance prohibiting overflights at altitudes under 750 feet was found to be invalid as an undue burden on interstate commerce.

The *Burbank* decision, however, represented the first instance in which preemption of a local police power noise ordinance was affirmed on the basis of pervasive federal control rather than on the more narrow ground of actual conflict with federal regulations.

²⁴ 411 U.S. at 628-33.

²⁵ Id. at 634.

²⁶ See id. at 634-35.

Aviation Act, but Congress had not given the FAA specific responsibility for airport noise control.²⁷ However, the legislative history of the 1972 Noise Control Act appeared to the Court conclusively to authorize such specific responsibility.²⁸ Relying upon the statements of congressmen whose committees had reported on the bill,²⁹ the Court sought evidence of a congressional intent that responsibility for airport noise control be shouldered by the FAA.

The Court found the FAA empowered to utilize a pervasive body of noise restrictions such as curfews and restrictive flight scheduling as means of regulating noise levels. It was thus able to conclude that the granting of such pervasive federal control evidenced congressional intent to preempt local regulations. It appeared, however, that the Court's finding of preemption rested not only upon the existence of extensive federal noise control powers, but also upon the belief that locally administered noise control would defeat Congress' larger goal—that of having the FAA exercise nationwide regulatory control over air commerce to insure air safety and efficiency.³⁰ The Court could not really consider the question of preemption of local airport noise regulations without taking into account the impact of such local regulations upon the ability of the FAA to carry out its overriding responsibility to regulate air commerce.³¹ Emphasizing the possibilities for interference with air commerce inherent in local noise ordinances, the Court accepted the district court's finding that the imposition of curfews on a nationwide basis would result in a bunching of flights during those hours before and after the curfew, which in turn would bring about increased traffic congestion and a concomitant decrease in safety and

²⁷ Id. at 643 (dissenting opinion).

²⁸ Id. at 633.

²⁹ The Court quoted Congressman Staggers, Chairman of the House Committee on Interstate and Foreign Commerce, which submitted the 1972 Noise Control Act and Report. Congressman Staggers said:

I cannot say what industry's intention may be, but I can say to the gentleman what my intention is in trying to get this bill passed. We have evidence that across America some cities and States are trying to do [*sic*] pass noise regulations. Certainly we do not want that to happen. It would harass industry and progress in America. That is the reason why I want to get this bill passed during this session.

118 Cong. Rec. H10,294 (daily ed. Oct. 18, 1972), cited in 411 U.S. at 636-37. Of Sen. Tunney, a member of the Senate Committee on Public Works, which submitted the Act and Report, the Court said:

He made clear that the regulations to be considered by EPA for recommendation to FAA would include: . . . proposed means of reducing noise in airport environments through the application of emission controls on aircraft, the regulation of flight patterns and aircraft and airport operations, and *modifications in the number, frequency, or scheduling of flights . . . [as well as] . . . the imposition of curfews on noisy airports . . .*

411 U.S. at 637, citing 118 Cong. Rec. S18,644 (daily ed. Oct. 18, 1972) (emphasis in original).

³⁰ See 49 U.S.C. §§ 1348(c), 1431(d)(3) (1972).

³¹ See 411 U.S. at 627.

efficiency.³² Furthermore, the fractionalized control of the time of take-offs and landings would severely limit the flexibility of the FAA in controlling air traffic flow, a complex operation presently coordinated on a national basis.³³ The Supreme Court agreed that such results would be totally inconsistent with the objectives of the federal statutory and regulatory scheme.³⁴ By stressing its belief that a curfew would defeat the Federal Aviation Act objectives of air safety and efficiency, the Court demonstrated that its finding of preemption was grounded largely upon this functional consideration, rather than solely upon a finding of congressional preemptive intent in the limited area of noise regulation.³⁵ Although the legislative history of the Noise Control Act of 1972, by itself, might not have supported a finding of federal preemption, the Court's willingness to consider the additional factor of local interference with air commerce enabled it to reach the result that it did. The majority differed on this issue with the dissent, which, having failed to weigh the impact of noise regulation upon air commerce, argued that the Federal Aviation Act and its amendments were not intended to establish complete and preemptive federal noise controls.³⁶

³² Id. It appeared to the District Court that if the curfew ordinance were held to be valid, similar ordinances would be passed by all cities surrounding airports. See *Lockheed Air Terminal, Inc. v. City of Burbank*, 318 F. Supp. 914, 927 (C.D. Cal. 1970).

³³ 411 U.S. at 639.

³⁴ Id. at 627-28.

³⁵ In preemption cases involving regulation of commerce, the Court will often look to the effects of a local police power ordinance to determine whether it unreasonably burdens interstate commerce, while framing its opinion in the language of preemption. See Note, *Preemption as a Preferential Ground: A New Canon of Construction*, 12 *Stan. L. Rev.* 208 (1959). In the *Burbank* case, however, a proper evaluation of the ordinance's burden on interstate commerce—which dissenting Justice Rehnquist maintained was dependent on the facts of the case and not on the “predicted proliferation of possibilities,” 411 U.S. at 654 (dissenting opinion)—might have led to a different conclusion. The Burbank curfew had the effect of prohibiting only one scheduled commercial flight a week, plus a number of corporate jet takeoffs. Both commerce clause and preemption analyses use the “need for a uniform system of regulation” as a standard for invalidating state laws. But while substantial interference with interstate commerce must be shown in commerce clause cases—see, e.g., *California v. Zook*, 336 U.S. 725 (1949); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959)—invalidation by preemption is a more flexible standard. If a local ordinance of the category in question would interfere with the uniform system of regulations necessary for achieving Congress’ purposes, the Court may strike it down. Thus, although the Burbank curfew itself might not have offended the commerce clause, the Court thought the category of police power noise regulations had to be preempted. This approach has been criticized for resulting in overbroad preemption, excluding all state regulation from the field rather than just the offending legislation. See Freeman, *Dynamic Federalism and the Concept of Preemption*, 21 *De Paul L. Rev.* 630 (1972).

³⁶ The dissent had maintained that the 1958 Act did not so much as mention airport noise, that the 1968 Amendment was designed to regulate the mechanical design aspect of aircraft noise emissions rather than airport operating procedures, and furthermore that the Noise Control Act of 1972 merely included the EPA in the formulation of regulations authorized by the 1968 Amendment, but was not intended to alter the extent of federal preemption in the area of airport noise regulation. 411 U.S. at 641-42, 650-51 (dissenting opinion).

It is further arguable that the Court's broad construction of the FAA's power over air commerce, which transformed the 1968 and 1972 noise amendments' non-exclusive grants of power into preemptive law, was heavily influenced by FAA behavior of a preemptive nature. In order to understand fully the role of FAA behavior in the Court's determination, it is first necessary to consider the general theoretical position of agency activity in the judicially developed preemption matrix.

When Congress gives a federal agency broad regulatory power and does not expressly address itself to the question of preemption, the Supreme Court has felt free to presume congressional intent to preempt state regulation of matters subject to federal agency control, especially when the agency has expressed the desire and capacity to regulate such matters.³⁷ This presumption is based on the theory that Congress could not have intended state competition with federal authorities in a field regulated by a federal agency.³⁸ Such a presumption springs from the existence of a federal agency which not only has a grant of regulatory power broad enough to regulate the subject covered by the competing local ordinance, but also exercises a continuous regulatory function and can easily respond to the perceived needs of the field. In *Burbank*, the FAA was in a position to respond to the demands of local noise regulation by virtue of its Traffic Control Centers in every major commercial airport. Moreover, the Federal Aviation Act of 1958 had never been construed to prohibit federal regulation of noise, and the FAA had demonstrated its authority to pass airport noise regulations.³⁹ At the Hollywood-Burbank Airport itself, the FAA Chief of the Air Traffic Control Tower had issued a runway preference order prescribing procedures to be followed for abatement of noise at night.⁴⁰ Under such circumstances, the failure of the FAA to establish a curfew was looked upon by the Supreme Court as an agency judgment that noise control policy did not require such regulation.⁴¹

Thus, where regulatory authority has been broadly granted to a federal agency, the Court, while ostensibly searching for congres-

³⁷ See Note, *supra* note 35, at 216-17. Cf., e.g., *Campbell v. Hussey*, 368 U.S. 297 (1961); *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148 (1942); *Napier v. Atlantic Coast Line R.R.*, 272 U.S. 605 (1926).

³⁸ Whenever the Court bases a preemption decision on a "pervasive scheme of federal regulation," broad agency control is invariably the type of regulation to which it refers. *Hirsch*, *supra* note 17, at 549.

³⁹ 411 U.S. at 639-40. See, e.g., *Air Transp. Ass'n v. City of Inglewood*, 12 Av. L. Rep. 17,818, 17,821-23 (1972) (lists similar FAA regulations for noise control at Los Angeles International Airport).

⁴⁰ *Lockheed Air Terminal, Inc. v. City of Burbank*, 457 F.2d 667, 669 (9th Cir. 1972).

⁴¹ The FAA runway preference order was intended by the agency "to reduce community exposure to noise to the lowest practicable minimum." 411 U.S. at 626 n.2. Once it is established that Congress intended completely to occupy a field of regulation, a local ordinance which calls for a more pervasive scheme of regulation is nugatory. See *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947).

sional intent, has accepted an agency's preemptive behavior as evidence establishing a presumption of preemption.⁴² Viewing the FAA's activity in this manner, the Court felt that the 1968 and 1972 Noise Control Amendments ratified an FAA determination that noise control regulation was within the scope of its powers.⁴³ The presumption was thereby strengthened that the FAA should totally occupy the field of noise regulation in order to exercise its primary responsibility of air commerce regulation.

Despite its finding of preemption in the instant case, the Court limited its effect to a prohibition of airport noise regulations which constitute an exercise of local police power. This limitation was justified by the fact that the regulations challenged were those of a locality which was not the proprietor of the airport it sought to regulate. The question of whether or not a locality as lessor and proprietor of an airport may issue noise regulations was expressly left unanswered.⁴⁴ Yet this is the crucial question, since all the major commercial airports in the country except Hollywood-Burbank are owned and operated by the municipalities they serve.⁴⁵ These municipal proprietors are the primary targets of community protests about noise in neighborhoods adjacent to their airports, and they, rather than the federal government or individual airlines, are financially responsible for the detrimental effects of airport noise.⁴⁶ This note will now turn to a discussion of the question whether municipal proprietors are preempted from effectively responding to the problem.

Prior to the *Burbank* decision, the Senate Report on the 1968 Noise Abatement Amendment recognized a distinction between an outside community interfering with air commerce and a municipal airport proprietor trying to run its airport operation effectively:

[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. . . . Just as an airport owner is responsible for deciding how long the runways will be, so is the owner responsible for obtaining noise easements necessary to permit the landing and takeoff of [noisier] aircraft.⁴⁷

⁴² See Note, *supra* note 35, at 216-17.

⁴³ 411 U.S. at 633.

⁴⁴ *Id.* at 636 n.14. Since the owners of the Hollywood-Burbank Airport were in no position to argue the cause of a municipal proprietor, despite the possibly controlling similarities in their positions, the Court properly limited its holding to the factual situation.

⁴⁵ *Id.*

⁴⁶ *Griggs v. Allegheny County*, 369 U.S. 84 (1962).

⁴⁷ S. Rep. No. 1353, 90th Cong., 2d Sess. 7 (1968). However, the Supreme Court made it clear in *Burbank* that federal preemption of noise regulation was not based solely on the 1968 Amendment, but also upon the larger needs of air commerce regulation and the FAA's capacity to deal effectively with noise.

Assuming *arguendo* that Congress did not intend to preempt proprietary restrictions, the inquiry would then shift to whether the federal and local regulations would be likely to conflict in practice. Where compliance with both federal and state regulations is a physical impossibility for one engaged in interstate commerce, a holding of federal exclusion of state law is inescapable and requires no inquiry into congressional design.⁴⁸

The broad preemption language in the *Burbank* decision would seem to apply to proprietary interference with the scheme of federal noise regulation. The Court stated that the interdependent factors of safety, efficiency, and the protection of persons on the ground, which the FAA Administrator is required to balance in adopting noise control regulations, require a "uniform and exclusive system of federal regulation if the congressional objectives underlying the Federal Aviation Act are to be fulfilled."⁴⁹ The FAA, now in conjunction with the EPA, the Court concluded, "has full control over aircraft noise, preempting state and local control."⁵⁰ Municipal proprietary noise regulations would disrupt the required uniformity and exclusivity of the FAA's regulatory system no less than would the non-proprietary regulations declared unconstitutional in *Burbank*. Presumably, then, such proprietary regulations could be invalidated on preemptive principles emanating from the *Burbank* holding.

Airport operators, however, would argue that the proprietor's need to control noise must be respected, despite the federal need for uniform safety regulations. At issue, then, is the proprietary right of an airport-owning locality to regulate air service for purposes of noise control versus the need of Congress to regulate a safe, substantially unburdened flow of air commerce. The Senate Report maintains that the federal government is in no position to require an airport to expand to accommodate larger, noisier jets.⁵¹ Since the municipality is financially responsible for damage to the surrounding environment caused by noise, it should be able to protect itself from liability by regulating the use of its facility by certain types of aircraft.⁵² Furthermore, as the dissent in *Burbank* contended, a municipal airport proprietor could not be prevented from taking the more drastic step of permanently closing down the facility and should therefore be able to regulate the use of its airport on the basis of noise considerations.⁵³

However, municipal use of existing facilities is not beyond the influence of the federal government. In addition to its interest in

⁴⁸ *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963).

⁴⁹ 411 U.S. at 639.

⁵⁰ *Id.* at 633.

⁵¹ S. Rep. No. 1353, 90th Cong., 2d Sess. 6-7 (1968).

⁵² Brief for Port Authority of New York and New Jersey as Amicus Curiae, *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973).

⁵³ 411 U.S. at 653 (dissenting opinion).

preventing interference with federal air commerce regulations, Congress has emphasized that expansion of the public airport is essential if the national system of airways is to meet the demands of interstate commerce.⁵⁴ The municipality remains the owner and main beneficiary of its airport operation, just as the state is the owner of its roads which are used in interstate commerce. But state and local interests must be balanced against the need for the unburdened flow of interstate commerce. A state can go so far as to exclude heavy vehicles where necessary to protect its roads, since the regulation of highways has been held to be a local concern with little incentive to deal with the problem at the national level.⁵⁵ However, *Burbank* establishes that control over air commerce is a more vital national concern requiring uniform national regulation. Closing down the facilities of a high density commercial airport or substantially limiting the use of its existing facilities without FAA approval, despite the proprietor's vulnerable financial position,⁵⁶ would probably be found to be an unreasonable burden on interstate commerce for at least two reasons. First, as the Court noted in *Burbank*, the FAA's flexibility in controlling air traffic flow would be severely limited.⁵⁷ Second, such an action by a municipality would be likely to deprive a region of the means necessary to engage in increasingly necessary air commerce.⁵⁸

If the Supreme Court majority had been content to invalidate police power curfews by non-proprietor communities on the basis of the curfew's interference with federal safety regulations, its

⁵⁴ Airport & Airways Development Act of 1970, 49 U.S.C. §§ 1701 et seq. (1970), as amended, Pub. L. No. 93-44, 87 Stat. 88 (1973). Federal funds have contributed to the development of most major commercial airports since 1946. Act of May 13, 1946, ch. 251, § 2, 60 Stat. 170, repealed, Act of May 21, 1970, Pub. L. No. 91-258, 84 Stat. 235.

⁵⁵ *South Carolina v. Barnwell Bros.*, 303 U.S. 177 (1938). But see *Castle v. Hayes Freight Lines*, 348 U.S. 61 (1954), where a carrier was engaged in interstate trucking operations under authority of a certificate granted by the Interstate Commerce Commission, and the action of a state in barring the carrier from the state's highways for violation of the state's weight limit requirement constituted an unauthorized revocation of a federally granted right.

Just as interstate truckers are licensed by federal agencies, so must all commercial air carriers in the United States be certified by the Civil Aeronautics Board. 49 U.S.C. § 1371 (1970).

⁵⁶ It has been suggested that a finding of federal preemption of proprietary noise regulations would require an overruling of the *Griggs* decision in order to make the federal government liable for noise damages. See note 33 supra. The FAA apparently anticipated and sought to avoid such a sequence of events in its refusal to prescribe noise levels for specific airports. See 34 Fed. Reg. 18,355-56 (1969). The theory that federal preemption of the airport proprietor's right to regulate noise will lead inevitably to undeserved monetary liability is questionable in practice, since the FAA would be required to pass and enforce demonstrably necessary noise regulations, or be liable to those affected. Furthermore, the cost to a local airport of taking noise easements is largely compensable by the federal government, which recognizes such expenses as legitimate costs of airport development. 49 U.S.C. § 1720 (1970). Recovery, nationally, for noise related damages has amounted to approximately one tenth of one percent of the claims. EPA, Report on Airport-Aircraft Noise § 3, at 70 (1973).

⁵⁷ 411 U.S. at 639.

⁵⁸ See Airport & Airways Development Act, 49 U.S.C. § 1701 (1970).

reasoning would have left room for municipal proprietors to issue noise regulations, providing such regulations did not interfere with the requirements of safety in air commerce.⁵⁹ Undoubtedly, proprietary noise regulations have greater local justification than do non-proprietary police power ordinances, vis-à-vis interstate commerce, since airport operators are more likely to balance the need for efficient use of airport facilities with noise considerations than are self-interested neighboring communities.⁶⁰ In addition, municipal proprietors are more prone to enforce noise regulations than is the FAA,⁶¹ because they are more directly answerable to citizens and because they presently run the risk of financial liability if the noise is not controlled. Considering the importance of the local interest involved, proprietary restrictions should be examined individually by courts to determine the extent of their interference with federal regulations rather than collectively preempted, as was the general category of police power ordinances in *Burbank*. However, by formulating a presumption, based upon the breadth of the FAA's agency powers, that the field of noise regulation was preempted by the FAA, the Supreme Court appears to have ruled out the possibility of such individual treatment in proprietary cases. In a field where federal regulation is pervasive, local regulations on the same subject are preempted regardless of whether or not they interfere with the federal scheme. While the Supreme Court indicated that it was not addressing the municipal proprietor, the reasoning of *Burbank* may nevertheless be extended to preempt proprietary regulations as well.

The Supreme Court's decision in *Burbank* thus implies a serious threat to federal-state cooperation in controlling airport noise pollution. Although the Court majority found that the FAA had pervasive control of the field, thus theoretically excluding all local regulation, the FAA has often been willing to allow municipal proprietary noise restrictions which are not inconsistent with FAA regulations.⁶² The Port Authority of New York, for example, has enforced a system of decibel restrictions on jet operations for over twenty years.⁶³ Furthermore, the EPA's proposed regulations for abating airport noise, authorized by the Noise Control Act of 1972, will be submitted in 1974 for FAA approval and adoption. The EPA had expected to conclude that airport operators should be permitted

⁵⁹ Cf. *Aircraft Owners & Pilots' Ass'n v. Port Authority*, 305 F. Supp. 93 (E.D.N.Y. 1969); *Port Authority v. Eastern Airlines, Inc.*, 259 F. Supp. 745 (E.D.N.Y. 1966).

⁶⁰ See *American Airlines, Inc. v. Town of Hempstead*, 272 F. Supp. 226, 233 (E.D.N.Y. 1967), *aff'd*, 398 F.2d 369 (2d Cir. 1968).

⁶¹ Cf. *Citizens for Dulles v. Volpe*, 344 F. Supp. 573, 577 (E.D. Va. 1972) (indicates the FAA's enforcement record).

⁶² See *American Airlines, Inc. v. Town of Hempstead*, 272 F. Supp. 226, 232 (E.D.N.Y. 1967), *aff'd*, 398 F.2d 369 (2d Cir. 1968); *Port Authority v. Eastern Airlines, Inc.*, 259 F. Supp. 745 (E.D.N.Y. 1966).

⁶³ See Lesser, *The Aircraft Noise Problem: Federal Power But Local Liability*, 3 *Urban Law* 175, 198 (1971).

to restrict airport runway use, employ curfews, and establish economic incentives to encourage noise reduction, where such programs are consistent with air safety.⁶⁴ These tentative conclusions represented a policy determination that local cooperation with federal authorities is a necessary concomitant to the framing of responsive solutions to the noise pollution problem. It was assumed that the FAA would continue to regulate the field of air commerce, but would "share" regulatory responsibility with localities and thereby defer as much as possible to important local interests, such as the particular needs of an airport's surrounding environment and the extent of airport service desired.

In light of the Supreme Court's *Burbank* rationale, however, the EPA felt that federal promulgation of national noise regulations would be required and would apply even to municipal airport proprietors.⁶⁵ The EPA now intends to make noise controls part of the existing FAA airport certification program. Airports not initially in compliance with the regulations would be required to submit implementation plans for meeting the standards. When approved, the implementation plan would be adopted as a federal regulation for the airport and would be enforceable by the FAA.⁶⁶

The EPA's suggestions fit into the existing scheme of federal law in which federal agencies are encouraged to solicit local input prior to issuing regulations.⁶⁷ Yet the alternative of federal-local cooperative regulation should not be sacrificed so readily. On the basis of *Burbank* and prior case law, the EPA may be able to apply and the Court may be able to construe *Burbank* as permitting municipal proprietary regulations approved by the FAA.

When Congress gives a federal agency broad regulatory powers, courts tend to infer that the subject matter should have one regulatory master and thus presumptively invalidate state laws imposing requirements which could be imposed by the federal agency.⁶⁸ The corollary to this judicial inference and presumption should be that Congress has in fact delegated to the agency the authority to make preemption decisions in regard to the exercise of that power.⁶⁹ Prior to an agency investigation, Congress is not likely to know what division of federal-state authority will best serve its objectives.⁷⁰ Therefore, if the agency determines that cooperation with local authority would further the particular national policy involved, its determination should be weighed heavily by the courts.

⁶⁴ Aviation Week & Space Technology, May 14, 1973, at 23.

⁶⁵ EPA, Report on Airport-Aircraft Noise § 3, at 62 (1973).

⁶⁶ Id. at 64-66.

⁶⁷ 49 U.S.C. § 1343(i) (1970).

⁶⁸ See text at notes 36-43 *supra*.

⁶⁹ Cf. Hirsch, Toward a New View of Federal Preemption, 1972 U. Ill. L.F. 515, 552.

⁷⁰ This accounts for Congress' typical silence on the question of preemption, since it cannot fully anticipate what administrative regulations the agency will need to formulate and what role state and local government will seek to play in the overall regulatory scheme.

However, the Supreme Court has apparently failed to recognize that when Congress delegates broad regulatory powers to an agency, Congress' primary intent is to allow the agency to regulate the field effectively.⁷¹ While the Court is often willing to use agency activity as evidence of preemption,⁷² it is less eager to use evidence of agency cooperation with state authorities to conclude that state regulation is permitted. In *Cloverleaf Butter Co. v. Patterson*,⁷³ a federal statute providing for inspection of renovated butter was held to preempt a state statute requiring inspection of the ingredients used in the manufacture of renovated butter, on the ground that federal superintendence of the field precluded state regulation of the same subject. The Court reached this result even though federal officials welcomed the state agency's cooperation as a means of supplementing the shortage of federal inspectors needed to police the industry effectively. The Court's approach further discounted the fact that certain contaminated ingredients which were easily recognizable only before manufacturing, which frequently made state inspection the only effective safeguard.⁷⁴ Once federal power was deemed to be exclusive, agency intent to cooperate with state officials was ignored.

Where cooperation with a state agency appears to be envisioned by Congress, the Court will look more favorably on a federal agency's deferral to state power. Thus, in *Mintz v. Baldwin*,⁷⁵ a state regulation concerning the transportation of cattle with Bang's disease was upheld, even though the Secretary of Agriculture was empowered to establish regulations regarding interstate transportation of cattle from any place where he believed the disease existed. The Court believed that Congress recognized the local character of the problem and intended to allow state regulation where the Secretary of Agriculture chose not to exercise his power.⁷⁶ Likewise, in *Parker v. Brown*,⁷⁷ the Secretary of Agriculture was authorized to regulate raisin marketing in order to promote uniformity and stability in federal and state programs. Since ninety percent of the raisins grown in the United States were produced in California, the Secretary chose not to regulate the California market, but instead to assist California's state marketing regulation program. The state laws were held to be valid against a claim of federal preemption. Where a federal law contemplates the existence of state programs, there is no occupation of the field until the federal agency acts.⁷⁸

⁷¹ See Comment, *The Impact of Preemption on Federal-State Cooperation*, 1967 U. Ill. L.F. 656, 662; *California v. Zook*, 336 U.S. 725, 737 (1949).

⁷² See note 31 *supra*.

⁷³ 315 U.S. 148 (1942).

⁷⁴ *Id.* at 172-75 (Stone, C.J., dissenting).

⁷⁵ 289 U.S. 346 (1933).

⁷⁶ *Id.* at 351.

⁷⁷ 317 U.S. 341 (1943).

⁷⁸ *Id.* at 354.

Although the Court sanctioned federal-state cooperation in *Mintz* and *Parker*, the decisions were based on the Court's characterization of the federal legislation as not excluding local legislation.⁷⁹ The grant of power from Congress to the FAA, on the other hand, is likely to be considered so pervasive as to give the FAA exclusive control over noise regulation. But such a finding would not necessarily prevent the Court from validating FAA decisions which cede authority to municipal airport proprietors. A finding of pervasiveness by the Court has traditionally meant that even local regulations which purport not to interfere with the federal scheme are precluded. It is submitted, however, that such regulations, when sanctioned by the FAA as a necessary part of its overall regulatory scheme, should be permitted.⁸⁰ Congress' creation of the National Labor Relations Board (NLRB) indicates by analogy that such an approach by the FAA would not exceed the scope of administrative authority. Congress has preempted the field of labor disputes which affect interstate commerce, but the NLRB has been permitted to cede jurisdiction to state agencies so long as the state agencies avoid actions inconsistent with the NLRB regulations and national uniformity is thereby maintained.⁸¹

The Court, with good reason, is committed to act consistently with the congressional objectives of the Federal Aviation Act—namely, to provide a uniform system of air commerce regulation in order to promote safety and efficiency. Allowing local proprietary noise regulation without federal superintendence until the FAA issues regulations at a specific airport directly superseding the local regulations would put the required uniformity in danger. Under such circumstances a local regulation could not be preempted unless it directly interfered with FAA regulations, and determining the status of such regulations would require frequent litigation. Yet a decision to preempt such local regulation without more would eliminate the FAA's option of dealing with airport noise by allowing effective local enforcement, in contradiction to what appear to be the policy objectives of the regulatory scheme. In preemption decision-making, Congress, rather than the Supreme Court, has the last word. But it would obviously be an undue burden on Congress to require it to negate the holding of preemption as to each individual airport where the FAA from time to time deems it desirable to allow local regulation. In order to permit local regulation at a

⁷⁹ See *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146-52 (1963).

⁸⁰ An agency would still be restricted in the exercise of its preemption decision-making power. It would be responsible to Congress, which can choose expressly to preempt state authority at any time, and to the courts, which can prevent cession of authority not granted to an agency by Congress.

⁸¹ See, e.g., *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). Congress amended this procedure in 1959, allowing the states to assert jurisdiction over cases declined by the NLRB without requiring a formal cession by the Board. 29 U.S.C. § 164(c)(1) (1970).

designated individual airport, the better course would be to allow the FAA to make the tentative decision to "un-preempt" the field. This FAA decision would be "reviewable" by Congress, which can at any time act to expressly preempt local authority.⁸² Furthermore, airlines would be quick to contest any overly restrictive local law on the ground that it would conflict with existing federal policy.

Recognition of the agency role in preemption policy-making would bring the Court a long way toward the development of a realistic approach to the nature of administrative authority.⁸³ In a time of increasing demands on local airport proprietors to reduce environmental noise pollution, the Supreme Court would do well to defer to the FAA determination of the division between federal and state authority where Congress has not expressly spoken on preemption. Such an approach would give the Court a means of preventing needless preemption of local regulations consistent with congressional purposes, without eroding the principles enunciated in *Burbank*.

DAVID STRAUSS

Labor Law—Pre-Hire Contracts in the Construction Industry—*Operating Engineers Local 150 v. NLRB (R.J. Smith Construction Co.)*.¹—Local 150 brought an unfair labor practice action against R.J. Smith (the employer) alleging a refusal to bargain in violation of section 8(a)(5) of the National Labor Relations Act (the Act).² The employer had unilaterally increased selected employees' wage rates during the term of its contract with Local 150 and had failed to bring wage rates up to the level agreed upon in the contract.³ The relevant details of the bargaining relationship be-

⁸² One alternative to "un-preemption" would be to permit municipal proprietors to establish the same regulations as those promulgated for each airport by the FAA. Cf. *California v. Zook*, 336 U.S. 725 (1949). This approach would also allow enforcement by the proprietor, although not on the selective basis the FAA has previously employed. An added advantage of giving all municipal airport proprietors the power to enforce concurrent regulations is that liability would be less likely to shift from the proprietor to the federal government, thus maintaining the local incentive to control noise. Such an approach, however, also depends on the assertion that a finding of pervasiveness does not prevent the FAA from sanctioning complementary regulation.

⁸³ The FAA has been making such de facto preemption decisions throughout its history. It has chosen to permit the New York Port Authority, for example, to enforce the same types of regulations recommended by the EPA. See note 52 *supra*.

¹ 480 F.2d 1186, 83 L.R.R.M. 2706 (D.C. Cir. 1973). The statement of facts set forth below is taken from *id.* at 1187-88, 83 L.R.R.M. at 2707-08.

² 29 U.S.C. § 158(a)(5) (1970) provides: "It shall be an unfair labor practice for an employer— . . . (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title."

³ Local 150 also alleged a violation of §§ 8(a)(1) and (3), 29 U.S.C. §§ 158(a)(1), (3) (1970), in the company's discharge of the only two union workers in the employer's fairly stable