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## Gonna Fly Now: All the Noise about the Airport Access Problem

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# GONNA FLY NOW: ALL THE NOISE ABOUT THE AIRPORT ACCESS PROBLEM

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*The quietest jet in the world is infinitely louder than no jet at all.*<sup>1</sup>

James T. Murphy  
 Vice President, Airspace & Airports  
 Air Transport Association

*Noise is the sound of commerce. If you want commerce you will have to put up with some noise.*<sup>2</sup>

Donald D. Engen  
 Administrator  
 Federal Aviation Administration

### PROLOGUE

On January 31, 1988, the Washington Redskins defeated the Denver Broncos in that annual American spectacle, the Super Bowl.<sup>3</sup> The team from the nation's capital won, in large part, because of the successful aerial attack launched by MVP Quarterback Doug Williams.<sup>4</sup> Later that night, residents around San Diego's Lindbergh Field, like the Denver secondary, were subject to an aerial bombardment, but one of a different kind.<sup>5</sup> This assault consisted of the noise from thirty to thirty-five aircraft departures an hour due to the temporary suspension of a night curfew at the airport.<sup>6</sup> Interestingly, other similar noise and access regulations<sup>7</sup> at airports throughout the

1. Interview with James T. Murphy, Vice President, Airspace & Airports, Air Transport Association, in Washington, D.C. (June 16, 1987) [hereinafter J. Murphy interview].

2. Ott, *FAA Noise Policy to Stress National System, Fleet Replacement*, AVIATION WK. & SPACE TECH., Nov. 17, 1986, at 28 (quoting then FAA Administrator Engen). *But see* ENVIRONMENTAL PROTECTION AGENCY, OFFICE OF PUBLIC AFFAIRS, POLLUTION AND YOUR HEALTH (May 1976), reprinted in SOCIAL ISSUES RESOURCES SERIES, 2 POLLUTION ARTICLE 23, at 12 (1979) ("Noise is perhaps the most overlooked and underestimated form of environmental pollution. This is partly true because noise has long been regarded as an inevitable accompaniment to modern life.") These two quotes succinctly point to the dramatic differences between the FAA and EPA approaches to the problem of aircraft generated noise, discussed *infra* notes 131-38, 141-48 and accompanying text.

3. *Super Bowl XXII* (ABC television broadcast Jan. 31, 1988).

4. *See, e.g.,* Eskenazi, *Redskins Roll Up Records in Second Quarter*, N.Y. Times, Feb. 1, 1988, at C1, col. 1.

5. *Runway Gridlock*, Newsday, Jan. 21, 1988, at 144; *see also* Reinhold, *Tiny Airport Is a Giant Issue, Again*, N.Y. Times, Mar. 29, 1988, at A16, col. 1 (discussing the ongoing debate over aircraft noise and airport growth at Lindbergh Field, including the controversy related to the Super Bowl).

6. *Runway Gridlock*, *supra* note 5. The curfew was lifted to ease congestion and delays at the airport due to the large number of post-game flights. Sid McSwain, a member of the Noise Advisory Committee, stated: "That's just not fair, to expect people to endure that to accommodate just a small number of corporate fat cats." *Id.*

7. These are defined and discussed more fully *infra* notes 21, 36-44 and accompanying

land have given rise to a more meaningful contest involving the biggest team in Washington, D.C.<sup>8</sup> and scores of airport proprietors claiming home field advantage entitles them to defend against aircraft noise.<sup>9</sup> This Note explores the aircraft noise/airport access problem and attempts to focus the kind of attention on it that is usually reserved for a Super Bowl.<sup>10</sup>

## I. INTRODUCTION

Airports 1988.<sup>11</sup> Unlike the motion pictures of similar titles that preceded it,<sup>12</sup> this airport drama is real and the consequences and implications of its resolution are significant. Simply put, the national air transportation system is facing a shortage of airport capacity<sup>13</sup> that has been called "the single greatest challenge facing the nation's aviation system."<sup>14</sup> Capacity has become inadequate as air

text.

8. The federal government that is, specifically the Federal Aviation Administration (FAA), which, like the Miami Dolphin's offense, prefers to win through the air. *See, e.g., SPORT*, Aug. 1987, at 41, col. 1 (discussing the Dolphin's tendency to move the ball in the air rather than on the ground).

9. As is often the case in the sporting world, the home team proprietors have the support of their noise conscious partisans while the federal government generally have the cooperation of the visiting airlines. For a fuller analysis see *infra* notes 32-69 and accompanying text.

10. *See* Eskenazi, *supra* note 4 (reporting that over 125 million people watched the telecast of Super Bowl XXII).

11. A concise report of the air transportation system related issues facing the Congress, dubbed Airport '87, can be found in Starobin, *Air Travel: Trying to Smooth Out the Bumps*, CONG. Q., Apr. 18, 1987, at 707.

12. *See* M. MARTIN & M. PORTER, VIDEO MOVIE GUIDE 1986 3 (reviewing the original *Airport* motion picture).

13. *See, e.g.,* INDUSTRY TASK FORCE ON AIRPORT CAPACITY IMPROVEMENT AND DELAY REDUCTION, THE REPORT OF THE INDUSTRY TASK FORCE ON AIRPORT CAPACITY IMPROVEMENT AND DELAY REDUCTION 1 (1982) [hereinafter INDUSTRY TASK FORCE REPORT]; Ellett, *The National Air Transportation System: Design By City Hall?*, 53 J. AIR L. & COM. 1, 1 (1987) (article by FAA's Chief Counsel); Payne, *Only New Airports Can Break The Airborne Gridlock*, BUS. WK., May 25, 1987, at 174 (commentary); *Wanted: A dozen new airports*, U.S. NEWS & WORLD REP., Jan. 25, 1988, at 32-33; *The Late, Late Show*, U.S. NEWS & WORLD REP., Dec. 22, 1986, at 14; *48 Hours* (CBS News television broadcast, Feb. 2, 1988) (transcript on file at Hofstra Law Review) (interviewing FAA Administrator T. Allan McArtor).

14. *How Can We Get More Airport Capacity?*, *Newsday*, May 14, 1987, at 94 (editorial quoting Donald D. Engen, then FAA Administrator). *See also* INDUSTRY TASK FORCE REPORT, *supra* note 13, at 1:

The growing lack of needed airport capacity is one of the most important problems facing the U.S. aviation industry today. This problem will grow dramatically during the 1980s, becoming more severe at presently impacted airports, spreading to include additional airports and, consequently, adversely affecting even the smallest airports because of inadequate access to the growing number of larger capacity-constrained airports.

traffic has grown steadily<sup>15</sup> without a concomitant increase in the ability of existing airports to accommodate this growth.<sup>16</sup> Moreover, there have not been any new commercial airports built since 1974,<sup>17</sup> and only one such facility is currently being planned.<sup>18</sup>

Though certainly not the only factor involved,<sup>19</sup> the primary constraint on airport capacity is noise.<sup>20</sup> In fact, noise and noise-re-

15. See INDUSTRY TASK FORCE ON AIRPORT CAPACITY IMPROVEMENT AND DELAY REDUCTION, REPORT OF THE WORKING GROUP ON AIRCRAFT NOISE/AIRPORT CAPACITY (Draft) 3-4 (Sept. 18, 1987) [hereinafter WORKING GROUP REPORT]; Hardaway, *The FAA "Buy-Sell" Slot Rule: Airline Deregulation At The Crossroads*, 52 J. AIR L. & COM. 1, 2 (1986).

This growth is expected to continue, and the annual number of airline passengers is projected to increase substantially by 2000. Compare WORKING GROUP REPORT, *supra*, at 4 (projecting increase from 450 million passengers in 1987 to 780 million by 2000) with Ellett, *supra* note 13, at 1 n.1 (citing FEDERAL AVIATION ADMINISTRATION, LONG RANGE AVIATION PROJECTIONS, FISCAL YEARS 1998-2010, END YEAR ERROR ANALYSIS (1986) projecting increase from 372.6 million passengers in 1985 to 740 million in the year 2000). The increase in passengers and aircraft operations is generally attributed to airline deregulation. See Ellett, *supra* note 13, at 1.

16. See Ellett, *supra* note 13, at 1.

17. *Wanted: A dozen new airports*, U.S. NEWS & WORLD REP., Jan. 25, 1988, at 32-33; Dallas/Fort Worth, the last major airport built, was opened in 1974. *Id.*

18. *Id.* The only new airport currently being planned is a replacement field for Stapleton International in Denver, Colorado, the nation's fifth busiest airport. This much needed facility is the result of an ambitious cooperative undertaking by the city of Denver and surrounding communities. The plans for the transitional improvements to Stapleton (eventually to be phased out completely), construction of the new airport and the mitigation of noise impacts, providing a model worthy of further attention, is set forth in detail in, *Government Policies On Aircraft Noise: Hearings Before the Subcomm. on Aviation of the House Comm. on Public Works and Transportation*, 99th Cong., 2d Sess. 61-165 (1986) [hereinafter *House Hearings*] (including testimony, statements and various documents presented by local officials).

19. There are a host of factors at least partially responsible for the airport capacity shortage, including the following: outdated and inefficient airspace management technology, INDUSTRY TASK FORCE REPORT, *supra* note 13; inadequate numbers of professional air traffic controllers and underutilization of aircraft capacity, Blackman & Freeman, *The Environmental Consequences of Municipal Airports: A Subject of Federal Mandate?*, 53 J. AIR L. & COM. 375, 398 n.68 (1987); air carrier scheduling practices of clumping more flights at peak hours, Blackman & Freeman, *supra*, at 398 n.68; *One Chance in Four Your Plane Will Be Late*, *Newsday*, Nov. 14, 1987, at 16 (editorial calling for economic incentives for air carriers to modify schedules); fiscal constraints and inadequate funding, *Hard Facts Behind the Aviation Fog*, N.Y. Times, Sept. 18, 1987, at A38, col. 1 (editorial proposing that "an enlarged trust fund be devoted solely to aviation"); budgetary politics, Payne, *supra* note 13, at 174 (noting "[t]he Administration has been parsimonious in releasing" the Trust Fund of nearly \$6 billion, raised from user fees, to make the federal budget deficit look smaller); airline disputes over funding the construction of new airports, *What's Keeping New Airports From Getting Off The Ground*, *Bus. Wk.*, Jul. 27, 1987, at 32.

20. WORKING GROUP REPORT, *supra* note 15, at 3; AIRPORT ACCESS TASK FORCE, REPORT AND RECOMMENDATIONS OF THE AIRPORT ACCESS TASK FORCE 17 (1983) [hereinafter AIRPORT ACCESS TASK FORCE REPORT]; INDUSTRY TASK FORCE REPORT, *supra* note 13, at 18; *McArtor Calls for Blueprint To Increase Airport Capacity*, *AVIATION WK. & SPACE*

lated access regulations<sup>21</sup> at airports may even serve to reduce existing capacity.<sup>22</sup> At the same time these regulations have main-

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TECH., Jan. 18, 1988, at 61 (noting FAA Administrator's concern that noise instead of technological advances is controlling growth).

21. Airport access is "the process by which airports are made available to all potential users" and the regulation of access involves restricting use of the airport. Note, *Airport Use and Access*, 4 NORTHROP U.L.J. AEROSPACE ENERGY & ENV'T 159 (1983) (authored by Darrel DePue) [hereinafter Note, *Airport Access*]. The regulation of airport access therefore involves, to borrow from Harold Laswell's classic definition of politics, "who gets what, when and how." H. LASWELL, *POLITICS: WHO GETS WHAT, WHEN & HOW* (1936). See also 51 Fed. Reg. 2985 (1986) (Federal Aviation Administration, Proposed Policy Regarding Airport Access and Capacity, Notice of Proposed Policy, Jan. 22, 1986) [hereinafter FAA Proposal]; 49 Fed. Reg. 43020 (1984) (Air Transport Association Petition for Rulemaking, Oct. 25, 1984) [hereinafter ATA Proposal] (discussing local airport access and noise restrictions and proposed national policy responses to such restriction).

Congress has recognized the importance of "allocating the use of scarce airport facilities and airspace" and in 1982 it mandated the appointment of an Airport Access Task Force to study the problem. 49 U.S.C. § 2223 (1982). The Task Force identified, studied and reported on three major constraints on airport access which also serve to reduce the overall capacity of the national air transportation system. These limitations include: noise, environmental and airspace constraints; terminal space and gates; and groundside congestion. See AIRPORT ACCESS TASK FORCE REPORT, *supra* note 20, at 11. A more detailed analysis of the Task Force's findings and recommendations is provided *infra* notes 376-96 and accompanying text.

Access can be divided into two separate but related concepts: airside and landside or groundside access. See, e.g., FAA Proposal, *supra*, at 2986-87; AIRPORT ACCESS TASK FORCE REPORT, *supra* note 20, at 11. Airside access involves the ability of an airline to fly into or out of a given airport and relates to runway capacity, ramp and gate positions, departure and arrival schedules, as well as other flight regulations or delays. See, e.g., ATA Proposal, *supra*, at 43,021 (noting that airside access restrictions include noise and flight allocation plans, bans on the use of certain aircraft and nighttime curfews on aircraft operations). Landside access refers to the ability of airlines to accommodate their operations, given existing terminal space for baggage, ticket sales and incidental services and road access and parking. See Note, *Airport Access*, *supra*, at 170-71; see also Note, *Airline Deregulation and Airport Regulation*, 93 YALE L.J. 319, 332-37 (1983) [hereinafter Note, *Airport Regulation*] (authored by Stephen E. Creager); Schmitt, *Vast Growth Set for New York Airports*, N.Y. Times, Feb. 2, 1987, at A1, col. 3 (analyzing the landside access problems at the New York Metropolitan area's three major airports: Kennedy, LaGuardia and Newark). For detailed technical presentations regarding airport capacity and landside access problems, see AIRPORT ACCESS TASK FORCE REPORT, *supra* note 20, at 112-21; N. ASHFORD & P. WRIGHT, *AIRPORT ENGINEERING* 148-54, 344-64 (1979). Landside capacity may be used to limit airside access when potential airside capacity is greater than actual existing landside capacity. It is for this reason that many noise-impacted communities have vigorously objected to expansions in landside capacity at nearby airports. See, e.g., Knack & Schwab, *Learning To Live With Airports*, 12 PLAN. 11, 12-13 (Oct. 1986) (discussing the opposition of residents around John Wayne Airport to terminal improvements at the airport prior to assurances that growth would be limited).

Access regulations and restrictions are discussed in greater detail, *infra* notes 38-44 and accompanying text.

22. See WORKING GROUP REPORT, *supra* note 15, at 6; Ellett, *supra* note 13, at 1-5; Telephone interview with Alfred E. Kahn, Robert Julius Thorne Chair of Political Economy, Cornell University, Ithaca, New York, & Chairman, Civil Aeronautics Board, 1977-78 (Feb. 29, 1988) [hereinafter Kahn interview]. Professor Kahn notes that noise limits airport capacity

tained or enhanced the quality of life in noise impacted areas,<sup>23</sup> they have also raised concerns on the part of other interests including the airline and aviation industries and the federal government.<sup>24</sup> This has fostered considerable debate over the proper role of these local regulations.<sup>25</sup> Consequently, America is confronted with an airport access problem of monumental importance that involves a myriad of economic, environmental, legal and political issues.

Given the timeliness and significance of the controversy, this Note examines the nature and scope of the airport access problem.<sup>26</sup> The Note reviews the history of the federal government's role in legislating and regulating on aviation and noise control issues,<sup>27</sup> analyzes the leading and most recent cases on local access and noise regulations,<sup>28</sup> and evaluates each approach. These issues are further analyzed within a case study of Long Island MacArthur Airport.<sup>29</sup> This Note also comprehensively evaluates a number of proposals, particularly those of the past five years, which are aimed at resolving the airport access regulation controversy.<sup>30</sup> Finally, this Note concludes with some insights into the future direction of all the "noise"

and that noise-based access regulations are "another factor that tends to restrict, in many ways, the most readily expandable capacity," that is, capacity at airports capable of handling more air traffic. *Id.*

23. See Blackman & Freeman, *supra* note 19, at 382; Kahn interview, *supra* note 22 (noting that the aim of reducing noise impacts is "not socially illegitimate, [as] these are external costs" of aircraft operations that should be internalized in a rational manner); *infra* notes 343-44 and accompanying text (discussing the effectiveness of such regulations at Long Island MacArthur Airport).

24. See ATA Proposal, *supra* note 21; Ellett, *supra* note 13. These concerns are presented in notes 48-69 and accompanying text.

25. Compare Blackman & Freeman, *supra* note 19, at 396-400 (asserting that local regulations are not a threat to the air transport system, but are both effective and a proper exercise of airport proprietors' powers) with Ellett, *supra* note 13 (arguing that local access regulations are posing a serious threat to the national air transportation system). For the full panoply of views on these issues, see *House Hearings*, *supra* note 18.

26. See *infra* notes 32-69 and accompanying text. The problem is not uniquely American. See, e.g., Mordoff, *Munich's New International Airport Expected to Begin Operation in 1991*, AVIATION WK. & SPACE TECH., Feb. 22, 1988, at 92-93 (noting worldwide airport capacity shortage); Mordoff, *Forum Urges Initiation Of Joint Efforts To Expand Airport, Airway Capacity*, AVIATION WK. & SPACE TECH., Oct. 12, 1987, at 49 (reporting on aircraft noise and airport access as a problem at some foreign airports); Proctor, *Industry Preparing for Tougher Standards on Aircraft Noise*, AVIATION WK. & SPACE TECH., Feb. 15, 1988, at 108 (discussing impending U.S. and European action on aircraft noise problem); Sexton, *Living With Airport Noise In Islip Is No Tea Party*, *Newsday*, Apr. 22, 1984, Ideas at 8 (reporting violent airport protests in West Germany and Japan).

27. See *infra* notes 70-177 and accompanying text.

28. See *infra* notes 178-304 and accompanying text.

29. See *infra* notes 305-66 and accompanying text.

30. See *infra* notes 367-452 and accompanying text.

about the airport access problem.<sup>31</sup>

## II. THE NATURE AND SCOPE OF THE AIRPORT ACCESS PROBLEM

Aircraft operations generate noise.<sup>32</sup> Because this noise is concentrated at and around airports,<sup>33</sup> a significant problem is created for those living near airports and their flight paths,<sup>34</sup> especially when airports are found in or near residential areas.<sup>35</sup>

31. See *infra* notes 453-76 and accompanying text.

32. See FEDERAL AVIATION ADMINISTRATION, OFFICE OF ENVIRONMENT AND ENERGY, AVIATION NOISE EFFECTS (1985) [hereinafter FAA, AVIATION NOISE EFFECTS] (providing a comprehensive overview of the literature on aviation noise and its measurement). Therein, noise is defined as "unwanted sound." *Id.* at 1; see also Rockenstein, *Aircraft Noise: The Untamed Beast Part 1: Reducing Noise at the Source—The Aircraft*, 2 AIR & SPACE LAW. 4 (1984) (discussing the two types of noise generated by jet engines: the "whine" of internal operation of the engine and the "roar" of the hot gases exiting the engine); IA F. GRAD, TREATISE ON ENVIRONMENTAL LAW ch. 5 (1987) (providing background on noise pollution generally and aircraft noise in particular).

33. FAA, AVIATION NOISE EFFECTS, *supra* note 32, at 1. Several million Americans are affected by aircraft noise each day. *Id.* While there are differing estimates as to the actual number of people severely impacted by aircraft noise, the figure most recently cited is more than five million people. FEDERAL AVIATION ADMINISTRATION, ALTERNATIVES AVAILABLE TO ACCELERATE COMMERCIAL AIRCRAFT FLEET MODERNIZATION 10 (1986) [hereinafter FAA, FLEET MODERNIZATION]. This figure represents the number of persons ". . . exposed to an average day-night sound level of 65 decibels (Ldn 65) or greater. The Ldn 65 level of noise has been identified by the FAA as the maximum normally compatible with residential development." *Id.* As many more people are exposed to lesser amounts of aircraft noise, the aforementioned figure probably understates the dimensions of the aircraft noise problem.

34. See FAA, AVIATION NOISE EFFECTS, *supra* note 32, at 3-4 (surveying the problems associated with the impact of aviation-generated noise, including nuisances such as interference with the enjoyment and use of property, the disturbance of sleep and lower property values). For a discussion of more severe health effects of aviation noise than the FAA study addressed, including hearing loss and possible ties to birth defects, death rates and mental health, see S. REP. NO. 92-1160, 92nd Cong., 2d Sess., reprinted in 1972 U.S. CODE CONG. & ADMIN. NEWS 4655, 4655-57; F. GRAD, *supra* note 32, at § 5.01(1); Bell & Bell, *Airport Noise: Legal Developments and Economic Alternatives*, 8 ECOLOGY L.Q. 607, 608-11 (1980); Terry, *Health and Noise*, EPA J., Oct. 1979, at 10; Ingrassia, *Study Links Death Rate, Jet Noise*, Newsday, Aug. 26, 1978, at 9 (reporting on a comparative study which found mortality rates higher in the test community nearer to Los Angeles Airport); see also Sochor, *Down with decibels!*, UNESCO COURIER, April 1978, reprinted in SOCIAL ISSUES RESOURCES SERIES, 1 TRANSPORTATION ARTICLE 67 (1980). The author puts the airport noise problem in perspective:

There is nothing like noise to make a noise. While most people don't care a decibel about aircraft nuisances as long as they are not bothered themselves, the roar of planes at many airports is real enough for those living close by. Distant echoes are also heard by airline executives and international aviation bodies concerned with safe and efficient air transport.

*Id.*

35. See, e.g., Helms, *Noise Pollution and Airport Regulation*, 47 J. AIR L. & COM. 405, 408-09 (1982). Former FAA Administrator Helms discusses two possibilities explaining the siting of airports. First, there may have been existing residential areas around the site on



Airport proprietors are liable for the consequences of aircraft noise,<sup>36</sup> and the amount of this liability is staggering.<sup>37</sup> Conse-

which an airport has grown or was later developed. Second, perhaps due to a failure of local planning efforts or poor home site selection by developers and consumers, residences were built around a preexisting airport. *Id.* See also Blackman & Freeman, *supra* note 19, at 377-78 (explaining how unforeseeability of jet aircraft and its impact is responsible for much of the airport noise problem); Note, *Airport Noise: How State and Local Governments Can Protect Airports from Urban Encroachment*, 1986 ARIZ. ST. L.J. 309, 310-11 (authored by Jeffrey Schoen) (describing the process of urban encroachment around airports and how the growth of the airport may fuel community growth and vice versa, thus exacerbating eventual noise impacts). For an older, yet still useful, look at the conflict between airports and residential development, see Dworkin, *Planning For Airports In Urban Environments—A Survey of the Problem and its Possible Solutions*, 5 TRANSP. L.J. 183 (1973).

36. *Griggs v. Allegheny County*, 369 U.S. 84 (1962). In *Griggs*, the Supreme Court found Allegheny County, owner of Greater Pittsburgh Airport, liable for noise from overflights above plaintiff's property which constituted the taking of an air easement without just compensation as required by the fourteenth amendment. *Id.* at 90. The Court reasoned that the county as "promoter, owner, and lessor of the airport" decided "where the airport would be built, what runways it would need, their direction and length, and what land and navigation easements would be needed." *Id.* at 89 (footnote omitted). With these powers came the responsibility for the consequences of the county's actions, including the costs of the taking of an air easement due to the noise of aircraft landing and taking off. *Id.* In reaching this result the Court noted the federal government's financial and regulatory role in airport development, but refused to find federal authority so pervasive as to render it liable. *Id.*

Justice Black, joined by Justice Frankfurter, dissented. *Id.* at 90-94. Justice Black noted that the federal government's comprehensive national air transportation plan regulated "in minute detail virtually every aspect of air transit." *Id.* at 91. Moreover, he argued that Congressional declarations of "complete and exclusive national sovereignty in the air space," *Id.* at 92 (quoting 49 U.S.C. § 1508 (1938)); and the right of every citizen to "freedom of transit in air commerce," *Id.* (quoting 49 U.S.C. § 1304 (1938)); underscore the extent of federal control of, and hence liability for, airport noise. *Id.* at 91-94. Consequently, Justice Black viewed the imposition of liability on the local airport as a great financial burden which would frustrate the Congressional intent of fostering air transportation. *Id.* at 93-94. Amidst the proliferation of airport access regulations twenty five years later, *see infra* note 41 and accompanying text, Justice Black may have been right about the possibility of local liability for noise interfering with the national air transportation system. See also *United States v. Causby*, 328 U.S. 256, 266 (1945) (holding flights over private land "so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land" may constitute a taking).

*Cf.* Note, *Shifting Aircraft Noise Liability To The Federal Government*, 61 VA. L. REV. 1299 (1975) (arguing that the rationale behind *Griggs* is no longer applicable to the aircraft noise problem, because the nature of the problem and effectiveness of local remedies have changed dramatically).

37. See AIRPORT OPERATORS COUNCIL INTERNATIONAL, SURVEY ON LOCAL NOISE USE RESTRICTIONS, (1987) [hereinafter AOCI SURVEY]. Of the 99 airports responding to the AOCI survey, 11 airports of varying sizes reported that they had paid out \$32,146,000 for legal judgments against them on noise-related grounds during the preceding ten years. *Id.* at 7. Moreover 23 airports reported legal fees totalling \$7,118,778 for the same period. The breakdown by noise mitigation measure, also included: land acquisition \$312,456,133 (61.2% of total costs); relocation costs \$70,317,386 (13.8%); soundproofing \$43,648,000 (8.6%); noise monitoring \$13,353,000 (2.6%); ANCLUC or FAR Part 150 (noise studies and land use plans) \$8,816,613 (1.7%); earth berms \$6,799,000 (1.3%); aviation easements \$5,785,489

quently, approximately 400 local airports have taken some form of action to reduce aircraft noise or to mitigate its effects.<sup>38</sup> Many of the noise control strategies employed<sup>39</sup> are access or use regulations and restrictions.<sup>40</sup> Moreover, there has been a recent surge in the number of these regulations and restrictions,<sup>41</sup> which are frequently

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(1.1%); other \$9,811,045 (1.9%). The total noise cost for all responding airports was \$510,251,444. *Id.* at 7-13. The AOCI SURVEY, developed to counter Air Transport Association of America (ATA) allegations regarding the cost of local regulation, understates the total costs of airport liability because there were a limited number of respondents. *See id.* at i. In addition, recent noise cases indicate that airport proprietors in some jurisdictions may face even greater liability for noise in the future. *See* cases discussed *infra* note 69.

38. FEDERAL AVIATION ADMINISTRATION, OFFICE OF ENVIRONMENT AND ENERGY, AIRPORT NOISE CONTROL STRATEGIES 2 (1986) [hereinafter FAA, AIRPORT NOISE CONTROL STRATEGIES]. According to the Industry Task Force on Airport Capacity Improvement and Delay Reduction, there were 312 airports with at least one noise abatement restriction in place in 1986. WORKING GROUP REPORT, *supra* note 15, at 6. For a more recent and detailed survey of local noise use restrictions, see AOCI SURVEY, *supra* note 37 (reporting in Feb. 1987 on noise problems, programs and their perceived effectiveness, and related costs at ninety-nine airports responding to the AOCI's SURVEY).

39. *See* FAA, AIRPORT NOISE CONTROL STRATEGIES, *supra* note 38, at 3-7 (identifying 37 different noise control strategies).

40. FAA, AIRPORT NOISE CONTROL STRATEGIES, *supra* note 38, at 3-7 (9 of the 37 noise control strategies identified are access or use regulations). These regulations include state noise laws (related to airport/aircraft noise control), local noise laws and ordinances, limits on the number of aircraft operations by time intervals or noise capacity, aircraft use restrictions (based on aircraft type, noise levels, FAA regulations or noise standards), complete curfews (complete closure of an airport for noise during a given period of time, usually at night) and noise use fees (based on the relative noisiness of different aircraft). *Id.* *See also* AOCI SURVEY, *supra* note 37. The Airport Operators Council International reported that respondent airports employed 12 major noise use restrictions, about half of which are access regulations. *Id.* at 1-5. These access regulations include curfews, aircraft bans, slot and capacity limits, perimeter or distance limits on air carrier flights and noise limits. *Id.* at 1-5

41. *See, e.g.*, WORKING GROUP REPORT, *supra* note 15, at 6 (reporting that the number of airports with at least one noise restriction increased from 256 in 1983 to 312 in 1986); *Hearings Before the Federal Aviation Administration on the Proposed Policy Regarding Airport Access and Capacity* (1986) [hereinafter *FAA Hearings*] (including only the comments of representative statements of: Air Freight Association, Air Transport Association, Airport Operators Council International, City of Long Beach, and Regional Airline Association); comments of the Air Transport Association, Apr. 18, 1986, at 6-11 and comments of the Air Freight Association, April 18, 1986, at 4; ATA Proposal, *supra* note 21, at 43,020 (discussing threat posed by the proliferation of access restrictions); Ellett, *supra* note 13, at 2-5 (noting post deregulation increase in access and use regulations designed to counter noise problems arising from deregulation-inspired increases in aircraft operations); Ellett, *Airport Access Issues*, 3 AIR & SPACE LAW, 1, 17 (1987) (FAA Chief Counsel articulating FAA's concern over the rapidly increasing number of airports with access regulations); Ott, *supra* note 2, at 28.

In 1983, the Airport Access Task Force predicted that the growing number of noise-based access restrictions would continue to increase at least through the short term. AIRPORT ACCESS TASK FORCE REPORT, *supra* note 20, at 17. As the Task Force was made up of representatives from the aviation industry, government and citizens groups, its prediction lends further credibility to the industry's own forecasts and concerns. *Id.* at 11.

found at major urban facilities<sup>42</sup> as well as growing suburban airports.<sup>43</sup> In addition to a desire on the part of airport proprietors to minimize potential noise liability, the recent wave of local regulations can also be attributed to the substantial political pressure exerted by suburban homeowners.<sup>44</sup>

The federal government has also sought to alleviate aircraft

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42. A number of major urban airports or hubs are actively involved in aircraft noise and airport access issues. WORKING GROUP REPORT, *supra* note 15, at 6 (stating that "the majority of hub airports have some form of operating restriction related to noise."). Some of these airports are discussed in the case analyses presented *infra* notes 178-304 and accompanying text. San Francisco International, Boston's Logan, Newark, New York's LaGuardia and John F. Kennedy International and Chicago's Midway are perhaps the most notable among the major airports presently considering new noise or access regulations. See, e.g., O'Lone, *Airlines Oppose New Noise Abatement Regulation for San Francisco Airport*, AVIATION WK. & SPACE TECH., Jan. 11, 1988, at 76 (reporting on proposal to encourage greater use of quieter Stage 3 aircraft and a night curfew on noisier Stage 2 aircraft, and noting industry opposition due to impact on number and scheduling of flights); Hughes, *National Groups Prepare to Fight Plan to Restrict Access at Logan*, AVIATION WK. & SPACE TECH., Dec. 21, 1987, at 34-35 (discussing possible increases in landing fees during peak hours, perhaps based on passenger load, to ease congestion at Logan and three major New York airports); Hughes, *Opposition Grows to Plan For Fee Increase at Logan*, AVIATION WK. & SPACE TECH., Oct. 26, 1987, at 52 (reporting on opposition to Logan proposal from general aviation and regional airline interests); *General Aviation Fights Midway Fee Hike*, AVIATION WK. & SPACE TECH., Oct. 26, 1987, at 52 (noting safety concerns prompting bill to raise minimum general aviation landing fees). For an example of an earlier case upholding differential "take-off" fees for smaller aircraft in order to alleviate congestion, see *Aircraft Owners & Pilots Ass'n v. Port Auth.*, 305 F. Supp. 93 (E.D.N.Y. 1969).

43. See J. Murphy interview, *supra* note 1 (identifying the following suburban airports: New York's Long Island MacArthur and Westchester County, and California's Long Beach, John Wayne, and Burbank-Glendale-Pasadena); Morse, *Don't Localize Access*, COMMUTER ATR, Jan. 1985, at 2 (discussing the "terminal" or landside access problems and local airport legislation developed to limit airside access to suburban airports contending with dramatic increases in aircraft operations and related noise. The airports identified as such include: John Wayne Airport in Orange County, California; Westchester County/White Plains Airport in New York; Long Island MacArthur Airport in Islip, New York). See also Incantalupo, *Noisy Airports, Familiar Gripes*, *Newsday*, Feb. 3, 1985, at 76 (surveying the noise-related problems around the five suburban airports noted by Murphy interview, *supra* note 1, and attributing their growth, at least in part, to the congestion problems at nearby major airports). For more specific information concerning the regulations at these and other airports, see AOCI SURVEY, *supra* note 37; FAA, AIRPORT NOISE CONTROL STRATEGIES, *supra* note 38, at 21-111; ATA Proposal, *supra* note 21, at 43021-22. A detailed analysis of one such airport is provided, *infra* notes 305-66 and accompanying text.

44. See Ellett, *supra* note 13, at 2-5. See also Milch, *Feasible And Prudent Alternatives: Airport Development in the Age of Public Protest*, 24 PUBLIC POL'Y 81, 81-91 (1976) (detailing the history and background of opposition to airport related noise and development). One commentator has noted the greater attention focused on aircraft noise as a specific noise source is due to the severity of its impact and the political clout of the suburban homeowners subjected to it. F. GRAD, *supra* note 32, at § 5.03(1)(a)(i). One estimate of the total annual cost of property value depreciation caused by aircraft noise is \$3.25 billion. S. REP. NO. 96-52, 96th Cong., 1st Sess., 3 (1979), reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS at 91.

noise by regulating aircraft technology,<sup>45</sup> modifying aircraft operation methods at individual airports,<sup>46</sup> and more recently by seeking to mitigate the potential impact of aircraft noise through the development of compatible land uses.<sup>47</sup> This is consistent with the federal government's traditional policy of promoting air transportation.<sup>48</sup> Pursuant to this policy, the federal government has increasingly sought to maintain open access to the nation's airports and to expand overall airport capacity.<sup>49</sup>

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45. First promulgated by the FAA in 1969, Part 36 establishes technological noise abatement standards for the manufacturers and users of aircraft. *See* 14 C.F.R. § 36 (1987). *See also* Bell & Bell, *supra* note 34, at 636-44 (providing a detailed analysis of the history of, and problems with, Part 36); Rockenstein, *supra* note 32; *infra* notes 115-30 and accompanying text (discussing federal aircraft noise abatement technology regulation).

Largely due to the cessation of noisier aircraft operations and the corresponding increase of quieter aircraft because of this federal program, the number of severely noise impacted individuals has declined from six to five million over the past decade. *See House Hearings, supra* note 18, at 22 (testimony of then FAA Administrator Engen).

46. *See, e.g.*, S. REP. NO. 96-52, 96th Cong., 2d Sess. 5 (1979), *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS, at 93-94 (discussing FAA oversight and procedures employed by Northwest Airlines that reduce noise exposure, are more efficient economically and improve safety). *See also* Rockenstein *Aircraft Noise: The Untamed Beast Part 2: Operational Methods for Reducing and Spreading Aircraft Noise*, 2 AIR & SPACE LAW. 3 (1985). Such operational methods include: the "thrust cut-back take-off procedure" (maintaining slower post take-off climb reducing noise impact on outlying areas), various landing procedures and approaches allowing greater angle of descent, runway use techniques (using or rotating runways so as to minimize or re-distribute noise) and flight track techniques (managing flight tracks themselves to mitigate or redistribute noise). *Id.* at 4, 19-20.

47. *See* Aviation Safety and Noise Abatement Act of 1979, Pub. L. No. 96-193, 94 Stat. 50 (1980) (codified at 49 U.S.C. §§ 2101-08, 2121-25 (1982)); 14 C.F.R. § 150 (promulgated pursuant to the Act, establishing a nationwide program for measuring aircraft noise and planning for land uses compatible with airports); Note, *The 1980 Airport Noise Act: Noise Abatement or Just More Noise?*, 14 U.C. DAVIS L. REV. 1049 (1981) (authored by Kathryn Landreth); Comment, *Airport Noise: Did The Airport Safety And Noise Abatement Act Of 1979 Solve The Problem?*, 52 J. AIR L. & COM. 499 (1986) (authored by Robert Rockett); *infra* notes 158-72 and accompanying text.

48. *See, e.g.*, Federal Aviation Act, 49 U.S.C. § 1302(a)(11) (1982), which provides for "[t]he promotion, encouragement, and development of civil aeronautics and a viable, privately owned United States air transport industry." Section 1303(a) provides for "[t]he regulation of air commerce in such manner as to best promote its development . . ." *Id.* *See also* Blackman & Freeman, *supra* note 19, at 382 (noting national interest in promoting air transportation); Ellett, *supra* note 13, at 21-22 (describing federal promotion of air transportation); *infra* notes 70-108 and accompanying text.

49. *See* 49 U.S.C. § 1302(a)(10) (1982), which posits the following objective for federal aviation policy: "The encouragement of entry into air transportation markets by new air carriers, [and] the encouragement of entry into additional air transportation markets by existing air carriers . . ." *Id.* *See also* Ellett, *supra* note 13, at 21-22 (addressing federal goals of promoting air transportation and maintaining open access); Ellett, *supra* note 41, at 1, 16 (discussing the FAA's duty to aviation and its conflicting mandate to abate noise, both of which it has sought to meet while maintaining access and capacity).

Given the proliferation of local access restrictions,<sup>50</sup> there is considerable tension between federal and local approaches for regulating aircraft and airport noise.<sup>51</sup> While federal aviation and noise legislation and regulation, as well as the case law, delineate certain spheres of federal and local control, the precise boundaries of these spheres remain unclear with regard to airport access issues.<sup>52</sup> This imprecision, combined with the surge in local regulation and the resulting industry and federal opposition thereto, has heightened the tension.<sup>53</sup> Consequently, a number of new policy proposals have emerged as possible means of resolving the legal conflict concerning noise regulation.<sup>54</sup> The importance of the legal and political issues involved (i.e., federal preemption versus a local airport proprietor's control)<sup>55</sup> is underscored by the critical consequences of airport ac-

50. See *supra* notes 38-41 and accompanying text.

51. See *House Hearings, supra* note 18. Contrast the following comments to the FAA Proposal, *supra* note 21 (discussed in detail *infra* notes 411-23 and accompanying text). On the local side of the conflict, the FAA Proposal is viewed as a means of "muscling airport operators regarding capacity and use restrictions to the detriment of local citizens and airport management." *FAA Hearings, supra* note 41, statement of Robert R. Wigington, at 2 (Director of Governmental Affairs of the Airport Operators Council International, Feb. 20, 1986). This statement also contended the effect of airport use restrictions on access to interstate commerce. *Id.* at 6. The City of Long Beach commented that the proposal is "poorly reasoned and articulated and is probably counterproductive," as well as "preemptive without justification or legal authority [in the absence of Congressional action]." *FAA Hearings, supra* note 41, comment of the City of Long Beach, at 18 (Apr. 2, 1986). Air transportation industry groups advocate a stronger federal role with regard to access, especially in light of the large investments made to comply with existing federal noise abatement standards *FAA Hearings, supra* note 41, comments of the Air Transport Association, at 5-11 (Apr. 18, 1986); *FAA Hearings, supra* note 41, comments of the Air Freight Association, at 4 (Apr. 18, 1986).

For some insight into the views of two former FAA Administrators, see Helms, *supra* note 35; Ott, *supra* note 2 (Administrator Donald E. Engen stating: "[W]e can't allow individual fields [airports] to unilaterally change the character of air commerce in the U.S. . . .").

52. See, e.g., Blackman & Freeman, *supra* note 19, at 382 (stating: "The question of local authority to regulate the environmental side effects of the use of federally controlled airspace is, however, subject to considerably greater controversy."); Ellett, *supra* note 41, at 19 (FAA's Chief Counsel, in discussing a recent case, stating: "the scope of proprietor's rights is not yet clearly defined or limited.").

53. See, e.g., FAA Proposal, *supra* note 21, at 2986; ATA Proposal, *supra* note 21, at 43,021-22.

54. See, e.g., WORKING GROUP REPORT, *supra* note 15; FAA Proposal, *supra* note 21; ATA Proposal, *supra* note 21; AIRPORT ACCESS TASK FORCE REPORT, *supra* note 20; INDUSTRY TASK FORCE REPORT, *supra* note 13.

55. The central legal issues involved herein include: the extent of federal involvement and preemption in the areas of aircraft noise and airport access regulation, derived from the federal government's power to regulate interstate commerce, the discretionary authority left to local airport proprietors acting in their proprietary capacity, and what characteristics establish proprietorship. These issues will be more fully developed *infra* notes 178-304 and accompanying text. At the core of the related political analysis are concerns regarding federalism and

cess and noise regulation.

The regulation of airport access places additional limits on an already finite resource: overall capacity at the nation's airports.<sup>56</sup> Thus, limitations on access to individual airports affect the already inadequate capacity of the nation's airports, presenting serious policy questions.<sup>57</sup> Such regulation, especially when increasingly localized, is said to increase inefficiency and add to the problem of flight delays because airports are not isolated local facilities, but rather are part of an integrated national air transportation system.<sup>58</sup> It is also argued that ad hoc local access restrictions may impair the overall safety of the nation's airspace.<sup>59</sup> Furthermore, the noise that impacts people near airports and leads airport proprietors to adopt access regulations also affects the entire traveling and shipping public.<sup>60</sup>

While proponents of access restrictions claim that the health

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how, and at what level, these issues should be governed. See Blackman & Freeman, *supra* note 19, at 381-89.

56. See Helms, *supra* note 35, at 406-07.

57. See *supra* notes 13-25 and accompanying text (discussing shortage of airport capacity and the impact of access regulations). Others have joined in this assessment regarding the present and future challenge of airport access issues. See, e.g., Ellett, *supra* note 13, at 1 (FAA Chief Counsel); Manly, *\$73M Expansion For LaGuardia Terminal*, *Newsday*, Oct. 19, 1987, at 17 (quoting New York Governor Mario Cuomo: "The preservation and expansion of our airports . . . is necessary to maintain—and increase—New York state's share of goods and passengers. Failure to do so will seriously affect our state's competitive economic position.").

58. See FAA Proposal, *supra* note 21, at 2986; ATA Proposal, *supra* note 21, at 43,020-21; Helms, *supra* note 35, 407-08; Morse, *supra* note 43.

59. Helms, *supra* note 35, at 408 (arguing that the California noise laws force tradeoffs between noise and safety). See also *United States v. County of Westchester*, 571 F. Supp. 786, 796 (S.D.N.Y. 1983) (noting that a local airport curfew increased congestion in the airspace during operational hours before and after the curfew). Increased public concern over the safety of air travel further underscores the critical importance of the airport access controversy as it impacts on safety. See, e.g., Maynard, *Poll: More Express A Fear of Flying*, *Newsday*, Sept. 2, 1987, at 5 (discussing nationwide Gallup Survey in which 63% of those surveyed had less confidence in airline safety than they did a few years prior, contrasted with 15% who felt more secure).

60. Indeed, air freight lines and those businesses and individuals who use them may be most severely affected by access and noise regulations because freight carriers generally use noisier aircraft and are heavily dependent on less frequent, primarily night flights often barred by curfews. See, e.g., *House Hearings*, *supra* note 18, at 508, 522, 531, 543, 578, 740, 759 (reprinting testimony and statements of representatives of various air freight interests); P. SMITH, *AIR FREIGHT: OPERATIONS, MARKETING AND ECONOMICS* 175-78 (1974) (stressing the uniqueness of the impact of noise and access regulations on air freight operators). See also Mecham, *UPS Introduces 757 Freighters To Expand Service, Constrain Noise*, *AVIATION WK. & SPACE TECH.*, Sept. 14, 1987, at 49, 52 (reporting air courier's purchase of relatively quiet aircraft in large measure due to interest in averting noise regulations and related adverse political pressures).

benefits they provide are worthwhile,<sup>61</sup> opponents of access restrictions point to the significant economic consequences of such regulation.<sup>62</sup> For instance, the cost of flight delays due to capacity limits, and perhaps exacerbated by access regulations, has been estimated to run in the billions of dollars.<sup>63</sup> It is further argued that access regulations may cripple the air transportation system and stifle economic development<sup>64</sup> by fostering a decrease in aviation-related economic growth and a corresponding increase in unemployment.<sup>65</sup> Or, as the Second Circuit warned in *British Airways Board v. Port Authority*,<sup>66</sup> the proliferation of local access restrictions, with the accompanying "likelihood of multiple, inconsistent rules would be a dagger pointed at the heart of commerce . . . ."<sup>67</sup> Perhaps most importantly, these regulations are seen as undermining the positive features of airline deregulation, including freedom of market entry and exit and greater reliance on market forces.<sup>68</sup> In addition to these

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61. See generally, Bell & Bell, *supra* note 34 (discussing the impacts and human health effects of aircraft noise); Knack & Schwab, *supra* note 21 (discussing how communities around John Wayne Airport in Orange County California supported access restrictions to prevent a greater intensification of noise impacts); *infra* notes 343-44 and accompanying text (discussing effectiveness of such regulations at Long Island MacArthur Airport).

62. See FAA Proposal, *supra* note 21, at 2986; ATA Proposal, *supra* note 21, at 43,020. See generally Helms, *supra* note 35 (discussing both the economic impact to the local communities as well as the effect on the national air transport system).

63. See INDUSTRY TASK FORCE REPORT, *supra* note 13, at 1 (projecting the costs of air carrier delays to be \$2.7 billion a year by 1991). On a more positive note, the exacerbated delay problems have prompted new commercial ventures at large airports including the provision of business service and health centers to help beleaguered travelers make the most of their "downtime." Eichler, *A Wait That's Worth the Wait*, *ESQUIRE*, Sept. 1987, at 80. Fine, *Change of Venue*, *Nat'l L.J.*, Nov. 30, 1987, at 36, col. 1.

64. Helms, *supra* note 35, at 405.

65. *Id.* at 406-07. For an example of the economic benefits of aviation, the Helms cites New York's John F. Kennedy International Airport as the largest employer on Long Island which generates over \$400 million a year in wages and handles \$3 billion a year in trade. *Id.* at 407. See also LONG ISLAND REGIONAL PLANNING BOARD, LONG ISLAND MACARTHUR AIRPORT: ECONOMIC ANALYSIS AND IMPACT ON SURROUNDING AREA 46 (1984)[hereinafter LONG ISLAND REGIONAL PLANNING BOARD](concluding that Long Island MacArthur Airport, once an under-utilized suburban facility and still dwarfed by the likes of JFK and LaGuardia, generates direct and spin-off economic benefits of \$2 billion a year. Note, however, that this figure has been disputed by community groups). Long Island MacArthur Airport is discussed more fully *infra* notes 305-66 and accompanying text.

66. 558 F.2d 75 (2d Cir. 1977).

67. *Id.* at 83.

68. See, e.g., Hardaway, *supra* note 15, at 14-17 (discussing the threat to the pro-competitive portions of airline deregulation posed by increasing local regulation of access); Kahn interview, *supra* note 22 (explaining that the benefits of deregulation are threatened by restrictions on access which also constrain competition, particularly in markets dominated by one or two air carriers). See also *infra* notes 88-103 and accompanying text (discussing

macroeconomic costs, airline industry and federal challenges to access regulations have consumed large amounts of time and money for the parties involved.<sup>69</sup>

These direct and spillover economic effects of airport access regulations may have nationwide repercussions beyond the confines of a particular noise-impacted area. Consequently, the noise-based airport access controversy is a problem of considerable national, as well as local, concern.

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deregulation).

69. See Ellett, *supra* note 13, at 22-25 (discussing time consuming processes, costs, and noting problems associated with judicial decisions setting national air transportation policy); *Air Freight Group Votes Fund To Fight Airport Restrictions*, AIRPORTS, June 17, 1986, at 43 (discussing Air Freight Association's decision to create a fund to challenge airport access regulations). *But see* Blackman & Freeman, *supra* note 19, at 398 (arguing litigation costs do not mean access regulations are any less necessary or justifiable). Note that due to the costs of such litigation, air carriers often seek federal intervention through litigation or withdrawal of grant monies. Ellett, *supra* note 13, at 13-14. In addition, a recent case has greatly reduced private rights of action against airport regulations. *Id.* at 26-27, *citing* *Montauk-Caribbean Airways v. Hope*, 784 F.2d 91 (2d Cir.), *cert. denied*, 107 S. Ct. 248 (1986).

The noise-impacted property owner nuisance and inverse condemnation suits are perhaps more costly than airline industry actions against noise and access regulations. *See, e.g.*, AOCI SURVEY, *supra* note 37, at 13; Bell & Bell, *supra* note 34, at 617-19. If successfully litigated by those seeking relief from excessive noise, these suits may also have an effect on airport access and noise as well as providing monetary relief for noise-impacted residents. For examples of inverse condemnation and nuisance suits, otherwise beyond the scope of this Note, see *Griggs v. Allegheny County*, 369 U.S. 84 (1962) (inverse condemnation); *Greater Westchester Home Owners Ass'n v. City of Los Angeles*, 26 Cal. 3d 86, 603 P.2d 1329, 160 Cal. Rptr. 733 (1979), *cert. denied*, 449 U.S. 820 (1980) (inverse condemnation and nuisance including damages for emotional distress). Some more recent state cases evidence an expanding judicial bases for liability in certain jurisdictions. *See, e.g.*, *Alaska v. Doyle*, 735 P.2d 733, 737 (Alaska 1987) (going so far as to hold airport liable "for loss of appreciation in property" value when that value "would have been realized as of the date of the taking" or inverse condemnation); *Baker v. Burbank-Glendale-Pasadena Airport Auth.*, 39 Cal. 3d 862, 705 P.2d 866, 218 Cal. Rptr. 293 (1985), *cert. denied*, 106 S. Ct. 1200 (1986) (holding that inverse condemnation action could be maintained against airport authority which lacked power of eminent domain and that airport noise could be treated as a continuing, rather than permanent, nuisance). For additional insight into this general area and the *Baker* case in particular, see Werlich & Krinsky, *Recent Developments in Aircraft Noise Law*, 18 URB. LAW. 863 (1986) (discussing inverse condemnation and nuisance as well as possible defenses to these actions); Kelley & Ham, *Flying High Baker v. Burbank-Glendale-Pasadena Airport Authority Redefines The Nuisance Doctrine*, L.A. LAW. 9 (Mar. 1986) (article by attorneys for the airport authority arguing that the *Baker* court went too far); Note, *Baker v. Burbank-Glendale-Pasadena Airport Authority: The California Approach to Inverse Condemnation and Nuisance*, 17 PAC. L.J. 981 (1986) (authored by Lisa Kirk) (providing a detailed analysis of *Baker*). A most thorough account of airport noise litigation can be found in Berger, *Airport Noise in the 1980s: It's Time For Airport Operators To Acknowledge the Injury They Inflict On Neighbors*, INST. ON PLAN., ZONING & EMINENT DOMAIN Ch. 10 (1987).



### III. FEDERAL INVOLVEMENT WITH AIRPORT ACCESS AND NOISE ISSUES

For the purposes of this Note, federal legislation and regulation are organized into two categories. The first category includes the essential access-related areas of aviation in general, economic regulation of the airlines, and the development of airports and the national air transportation system. The second category focuses solely on noise.

#### A. Airport Access Related Legislation

The history of air transportation in the United States is marked by a continuously close relationship between airlines and the federal government.<sup>70</sup>

Federal involvement in the airline industry dates back to the first airmail deliveries in 1918.<sup>71</sup> Later, as the industry grew, air traffic safety and airline passenger travel became key areas of federal policy concern.<sup>72</sup> For instance, in the Air Commerce Act of 1926,<sup>73</sup> Congress declared that there existed a "public right of freedom of . . . air navigation through navigable airspace."<sup>74</sup>

In the 1930's the instability created by an increasingly competitive environment in the airline industry<sup>75</sup> inspired the larger air carriers to form the Air Transport Association of America (ATA) to

70. S. REP. NO. 631, 95th Cong., 2d Sess. 1-5 (1978). See also Ellett, *supra* note 41, at 16 (stating the federal government has always sought to foster "a vital and efficient air commerce system").

71. See P. BIEDERMAN, *THE U. S. AIRLINE INDUSTRY: END OF AN ERA* ix (1982). See also W. LEARY, *AERIAL PIONEERS: THE U.S. AIR MAIL SERVICE 1918-1927* 239 (1985) (concluding that the air mail experience was critical to the development and expansion of air transportation in the U.S.).

72. P. BIEDERMAN, *supra* note 71, at x-xii.

73. 44 Stat. 568 (1926).

74. *Id.* The 1926 Act also stated: "It shall be the duty of the Secretary of Commerce to foster air commerce . . . . To encourage the establishment of airports, civil airways and other air navigation facilities." *Id.* The Act was applauded by the industry that had sought such governmental intervention. W. LEARY, *supra* note 71, at 227. While the Act marked a key point in federal efforts to aid air navigation, little funding assistance was given localities until the 1930s. R. BILSTEIN, *FLIGHT PATTERNS: TRENDS OF AERONAUTICAL DEVELOPMENT IN THE UNITED STATES 1918-1929* 135-38 (1983). See also H. HOTCHKISS, *A TREATISE ON AVIATION LAW* 77-83 (2d ed. 1938) (discussing theoretical underpinnings of 1926 Act and the primary use of the commerce power as justification for the Act); C. SOLBERG, *CONQUEST OF THE SKIES: A HISTORY OF COMMERCIAL AVIATION IN AMERICA* (1979) (providing an informal legislative history and background of developments in the 1920s and 1930s as well as through to the late 1970s).

75. P. BIEDERMAN, *supra* note 71, at x.

lobby Congress for protective legislation.<sup>76</sup> Reflecting a political consensus that the infant airline industry would benefit from some sort of governmental regulation,<sup>77</sup> the Civil Aeronautics Authority (CAA), a portion of which later became the Civil Aeronautics Board (CAB), was created by the Civil Aeronautics Act of 1938.<sup>78</sup> The Act gave the CAA the authority to set airline fares, establish airline routes, and determine which airlines could service a particular route.<sup>79</sup> The Act thus gave the CAA authority to regulate airlines and, consequently, airport access.<sup>80</sup>

The Federal Aviation Act of 1958<sup>81</sup> completely recodified the Civil Aeronautics Act of 1938 and U.S. aviation law.<sup>82</sup> The Act created the Federal Aviation Administration (FAA),<sup>83</sup> sought to further promote air transportation and safety,<sup>84</sup> and provided for every citizen's right to "freedom of transit through the navigable airspace of

76. *Id.*

77. 4 B. SCHWARTZ, *THE ECONOMIC REGULATION OF BUSINESS AND INDUSTRY: A LEGISLATIVE HISTORY OF U.S. REGULATORY AGENCIES*, 2983-87 (B. Schwartz, ed. 1973) (commenting on the Civil Aeronautics Act).

There was, however, considerable controversy over who should be responsible for the regulation of the airline industry. President Roosevelt wanted the industry to come under the jurisdiction of the Interstate Commerce Commission (ICC). Congressional leaders preferred the establishment of a new independent regulatory agency. *Id.* at 2983-87. At the time, the ICC was already responsible for the regulation of railroads, and adding the airlines to its jurisdiction might have enabled the ICC to promote the development of one industry over another. On the other hand, delegation of airline regulation to the ICC may have resulted in more comprehensive and consistent regulation of the transportation industry.

78. Civil Aeronautics Act of 1938, Pub. L. No. 75-706, 52 Stat. 973 (codified at 49 U.S.C. §§ 401-722 (1982)). For a detailed presentation of the CAB's history and the regulation of air transport in the United States, see R. BURKHARDT, *CAB—THE CIVIL AERONAUTICS BOARD* (1974); W. JORDAN, *AIRLINE REGULATION IN AMERICA: EFFECTS AND IMPERFECTIONS* (1970); R. CAVES, *AIR TRASPOT AND ITS REGULATORS: AN INDUSTRY STUDY* (1962).

79. R. BURKHARDT, *supra* note 78, at 7-9; see P. BIEDERMAN, *supra* note 71, at xii.

80. P. BIEDERMAN, *supra* note 71, at xii. Determining what markets the airlines could service gave the CAB initial authority with regard to what airports an airline had access to. See also, Ferrar, *Route Assignments and the CAB*, 5 *TRANSP. L.J.* 215, 215 (1973) (stating: "Between any two nodes in the air transport network, the C.A.B. specifies the desirable flight frequency."). For an application of the CAB's power to determine access, see *Airport Comm'n of Forsyth County v. Civil Aeronautics Bd.*, 300 F.2d 185 (4th Cir. 1962)(consolidating access to one airport in a region).

81. Federal Aviation Act of 1958, Pub. L. No. 85-726, 72 Stat. 731 (codified at 49 U.S.C. §§ 1301-1552 (1982)). See H. REP. NO. 2360, 85th Cong., 2d Sess., *reprinted in* 1958 U.S. CODE CONG. & ADMIN. NEWS 3741 (discussing legislative history of the act).

82. 5 B. SCHWARTZ, *supra* note 77, at 3229-30 (commenting on the Federal Aviation Act).

83. Federal Aviation Act of 1958, Pub. L. No. 85-726, 72 Stat. 731 (codified at 49 U.S.C. §§ 1301-1552 (1982)).

84. *Id.*

the United States.”<sup>85</sup> The Act expanded federal regulation of aircraft operations to preempt state action with regard to aircraft in flight.<sup>86</sup> Its legislative history, however, indicates that airport proprietors were to retain the power to reasonably regulate the use of their airports, perhaps in order to control aircraft noise.<sup>87</sup>

Twenty years later, the need for regulatory reform with regard to the airline industry became apparent; the smallest major air carrier was larger than the entire industry had been in 1938.<sup>88</sup> While the industry and union interests served by the existing regulatory system were staunch foes of deregulation,<sup>89</sup> the diverse supporters of airline deregulation (including business leaders, consumer groups, small air carriers, liberals and conservatives) eventually succeeded.<sup>90</sup> After several years of debate over the extent of regulatory reform, the Airline Deregulation Act of 1978 (ADA) became law.<sup>91</sup> The ADA was enacted despite an effort on the part of the House of Representatives to link its passage to new federal noise control legislation.<sup>92</sup>

85. 49 U.S.C. § 1304 (1982).

86. See, e.g., 49 U.S.C. § 1348 (a) (1982); S. REP. NO. 1811, 85th Cong., 2d Sess. 5-6, 13-15, reprinted in 1958 U.S. CODE CONG. & ADMIN. NEWS 3741, 3741-43, 3754-55.

87. See H.R. REP. NO. 2360, 85th Cong., 2d Sess., reprinted in 1958 U.S. CODE CONG. & ADMIN. NEWS 3741; see also S. REP. NO. 1353, 90th Cong., 2d Sess., reprinted in 1968 U.S. CODE CONG. & ADMIN. NEWS 2688, 2693-94 (noting that the Aircraft Noise Abatement Act of 1968 amending the 1958 Federal Aviation Act was not intended to alter the rights of airport proprietors, to regulate their airports so as to establish permissible noise levels).

88. *Regulatory Reform In Air Transportation: Hearings Before the Subcomm. on Aviation of the Senate Comm. on Commerce, Science, and Transportation*, 94th Cong., 2d Sess. 230 (1976) (statement of William T. Coleman, Secretary, U.S. Dept. of Transp.).

89. See, e.g., *Regulatory Reform In Air Transportation, Hearings Before the Subcomm. on Aviation of the Senate Comm. on Commerce, Science and Transportation*, 95th Cong. 1st Sess. 467 (1977) (C.E. Meyer, President and Chief Airline Executive, Trans World Airways, states: “The airlines have long suffered from the unfortunate conflict of being highly regulated and, at the same time, highly competitive. The proposed legislation [airline deregulation] simply worsens that condition.”); see also *Hearings, supra* note 88, at 282 (William Simon, Secretary U.S. Dept. of the Treasury, states: “Interestingly enough airline management and aviation interest groups are among the strongest defenders of the status quo . . . I grow uneasy whenever the regulated grow too comfortable with the regulations imposed upon them.”).

90. See P. BIEDERMAN, *supra* note 71, at 77-83.

91. Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (codified at 49 U.S.C. § 1301 et seq. (1982) as an amendment to the Federal Aviation Act of 1958, *supra* note 81) [hereinafter ADA]. See H.R. REP. NO. 1211, 95th Cong., 2d Sess., reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 3737 (discussing legislative history of the Act).

92. 34 CONG. Q. ALMANAC, CONGRESS CLEARS AIRLINE DEREGULATION BILL 496-97, 504 (1978). The immediate linkage sought by members of the House was perhaps due to the more localized geo-politics of the House of Representatives. While Senators have statewide constituencies and the luxury of six-year terms, representatives have, in most cases, much more

The ADA sought to foster industry and airport growth by increasing the role of market forces in the airline industry.<sup>93</sup> Accordingly, the Act provided for a gradual phaseout of federal control over airline rates and routes, except in certain circumstances.<sup>94</sup> Consistent with this policy, the Act also mandated the dissolution of the CAB.<sup>95</sup>

By ending federal route regulation, the ADA's drafters sought to open access to all but the most congested airports.<sup>96</sup> For example, the Act's statement of policy encourages both the entry of new air carriers into air transportation markets and the entry of existing air carriers into additional air transportation markets.<sup>97</sup> To meet the objectives of open competition and open access, the ADA expressly preempted state and local action which would affect airline rates, routes, and services.<sup>98</sup> The drafters of the ADA were careful, however, to note that their intention was not to limit the proprietary powers and rights of the owners and operators of airports served by the affected air carriers.<sup>99</sup> Nevertheless, a conflict exists when the

localized constituencies that they are held accountable to every other year. Consequently, members of the House are more likely to be responsive to the problems of a particular community they represent. In this case, representatives with airport noise and land use conflicts in their districts can ill-afford to neglect their constituents.

93. See 49 U.S.C. § 1551 (1982).

94. *Id.* The excepted circumstances are the cases of small communities as per 49 U.S.C. § 1380 (1982), where air service is especially encouraged, and congested major airports where flight slots are limited as per 14 C.F.R. § 93 (1987). For a complete discussion of the effects of FAA involvement at congested airports, as well as an analysis of other noise and access regulations as threats to the spirit of deregulation, see Hardaway, *supra* note 15.

95. See 49 U.S.C. § 1551 (1982).

96. See 14 C.F.R. § 93 (1987).

97. See 49 U.S.C. § 1302(a)-(b) (Appendix 1982).

98. 49 U.S.C. § 1305(a)(1) (Appendix 1982), provides:

[N]o state or political subdivision thereof and no interstate agency or political agency of two or more states shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes or services of any air carrier having authority . . . to provide interstate air transportation.

*Id.* See 44 Fed. Reg. 9948 (1979); 14 C.F.R. § 399 (1987). Therein, the CAB articulated a concern over the imposition of "different priorities" than those pursued by the CAB's regulation of air carriers. 44 Fed. Reg. at 9951.

99. 49 U.S.C. § 1305(b) (Appendix 1982). The ADA provided:

Nothing in subsection (a) of this section [*supra* note 98] shall be construed to limit the authority of any State or political subdivision thereof or any interstate agency or other political agency of two or more States as the owner or operator of an airport served by any air carrier certificated by the Board to exercise its proprietary powers and rights.

*Id.* For an interesting analysis of the preemption and proprietary rights and powers section of the ADA, see *infra* notes 212-16 (analyzing *Pirola v. City of Clearwater*, 711 F.2d 1006 (11th Cir. 1983)).

exercise of proprietary powers impacts on rates, routes, and services. Arguably, many proprietary actions designed to control noise by restricting and regulating access, affect rates, routes and services.<sup>100</sup> An improper exercise of proprietary powers would seemingly be preempted if in conflict with the ADA or its policies,<sup>101</sup> even when the powers exercised were within the standards set forth by the CAB.<sup>102</sup> Interestingly, neither the ADA nor the CAB rulemaking explicitly addressed noise in the context of preemption and proprietary rights.<sup>103</sup>

Finally, the federal government has also financed airport projects in an effort to develop and expand the national air transportation system. The Airport and Airway Improvement Act of 1982,<sup>104</sup> like the Airport and Airway Development Act of 1970<sup>105</sup> which it repealed, provides federal funding for airport development and improvement projects.<sup>106</sup> As a condition precedent to receiving funds under the Act, airport proprietors must agree that the airport "will be available for public use on fair and reasonable terms and without

100. The CAB's implementation of the preemption section of the ADA, published at 44 Fed. Reg. 9948 (1979) (also codified at 14 C.F.R. § 399 (1987)), stated: "[W]e conclude that preemption extends to all of the economic factors that go into the provision of the *quid pro quo* for passenger's fare, including flight frequency and timing . . . and we hereby occupy these fields completely." 44 Fed. Reg. at 9951. Under this operationalization, capacity and slot limits as well as curfews would seem to be preempted.

101. 44 Fed. Reg. at 9951-52. Capacity and slot limits and curfews, as with any limits on access, would conflict with the policies of the ADA and as such would seemingly be preempted.

102. *Id.* The CAB stated:

This . . . shall not limit the authority of any State or political subdivision thereof or any interstate agency or other political agency of two or more States, as the owner or operator of any airport served by any air carrier certificated by the Board to exercise its proprietary powers and rights when such exercise is reasonable, nondiscriminatory, nonburdensome to interstate commerce and designed to accomplish a legitimate State objective in a manner that does not conflict with the provisions and policies of the Act.

*Id.*

103. See ADA, *supra* note 91; 14 C.F.R. § 399 (1987); 44 Fed. Reg. 9948 (1979). This issue was addressed in *Western Air Lines v. Port Auth.*, 817 F.2d 222 (2d Cir.), *petition for cert. filed sub nom. Delta Air Lines v. Port Auth.*, 108 S. Ct. 448 (1987); see *infra* notes 265-74 and accompanying text.

104. Airport and Airway Improvement Act of 1982, Pub. L. No. 97-248, 96 Stat. 671 (codified at 49 U.S.C. §§ 2201-25 (Appendix 1982)).

105. Airport and Airway Development Act of 1970, Pub. L. No. 91-258, 84 Stat. 219 (codified at 49 U.S.C. §§ 1701-43 (Appendix 1982)) (repealed 1982). The 1970 Act created the Airport and Airway Trust Fund financed by taxes on aircraft, aviation fuel and air travel. 49 U.S.C. § 1742 (Appendix 1982) (repealed 1982). The Airport and Airway Trust Fund is now codified at 26 U.S.C. § 9502 (1982) (also known as the Aviation Trust Fund).

106. See *supra* notes 104-05.

unjust discrimination."<sup>107</sup> This provides the FAA with an additional policy directive and lever for pressuring airport proprietors to maintain open access.<sup>108</sup>

### B. Noise Control Legislation and Regulation

Federal concern over the problem of aircraft noise dates back to at least 1959.<sup>109</sup> In 1965, the Housing and Urban Development Act,<sup>110</sup> noted both the adverse impact of aircraft noise on property values and the possibilities for soundproofing homes near airports.<sup>111</sup> More explicit legislative recognition of the problem came in 1966 with the passage of the Department of Transportation Act of 1966.<sup>112</sup> The Act required the newly formed department to study and address the feasibility of aircraft noise abatement technology necessary to mitigate the problem.<sup>113</sup> The Act did not, however, establish a separate Office of Aircraft Noise Abatement and Control, which might have compensated for purported institutional biases against more progressive aircraft noise control efforts.<sup>114</sup>

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107. 49 U.S.C. § 2210(a)(1) (Appendix 1982); *see also* FEDERAL AVIATION ADMINISTRATION, U.S. DEPT. OF TRANS., ADVISORY CIRCULAR NO. 150/5100-16, AIRPORT IMPROVEMENT PROGRAM GRANT ASSURANCE NUMBER ONE—GENERAL FEDERAL REQUIREMENTS appendix 1 (July 22, 1985). The airport sponsor is required to "make its airport available as an airport for public use on fair and reasonable terms and without unjust discrimination to all types, kinds, and classes of aeronautical uses." *Id.* at 5. The sponsor is, however, entitled to establish such fair, equal, and not unjustly discriminatory conditions to be met by all users of the airport as may be necessary for the safe and efficient operation of the airport. The sponsor may prohibit or limit any given type, kind, or class of aeronautical use of the airport if such action is necessary for the safe operation of the airport or necessary to serve the civil aviation needs of the public.

*Id.*

108. *See* FAA Proposal, *supra* note 21, at 2987-88; Helms, *supra* note 35, at 411; *see also* San Francisco v. Engen, 819 F.2d 873 (9th Cir. 1987) (involving threatened FAA withdrawal of grant monies because of a denial of access).

109. *See* S. REP. NO. 1353, 90th Cong., 2d Sess., *reprinted in* 1968 U.S. CODE CONG. & ADMIN. NEWS 2688, 2689.

110. 79 Stat. 451 (1965).

111. *Id.* (requiring the Secretary of HUD to study the problem).

112. Pub. L. No. 89-670, 80 Stat. 931 (codified at 49 U.S.C. §§ 1651-59 (Appendix 1982) (Repealed 1983)); H.R. REP. NO. 1701, 89th Cong., 2d Sess., *reprinted in* 1966 U.S. CODE CONG. & ADMIN. NEWS 3362, 3421-23, 3427-28 (discussing legislative history of the Act including an argument for a separate Office of Noise Abatement and Control within the department).

113. *See* sources cited *supra* note 112. Section 4(a) of the Act required the Secretary to "promote and undertake research and development relating to transportation, including noise abatement." S. REP. NO. 1353, *supra* note 109, at 2689.

114. *See* H.R. REP. NO. 1701, *supra* note 112, at 3421-23, 3427-28 (criticizing Congress' refusal to establish a separate office and arguing that it is needed because the private sector will not control noise without mandates and regulations due to the high cost of abate-

The first major attempt by Congress to legislate on the problem of aircraft noise was the Aircraft Noise Abatement Act of 1968.<sup>115</sup> The Act amended the Federal Aviation Act of 1958<sup>116</sup> and authorized the FAA to set noise control and abatement standards for aircraft.<sup>117</sup> Congress noted that the Act was not intended to affect the rights of airport proprietors to regulate noise, or to regulate access based on noise considerations.<sup>118</sup> As the Senate Commerce Committee stated in its report, a proprietor could still impose regulations, provided such regulations were “nondiscriminatory.”<sup>119</sup>

ment). See also 5 B. SCHWARTZ, *supra* note 77, at 3551-54 (reprinting portions of the floor debate concerning the Act). During floor debate, Representative Rosenthal, sponsor of the defeated amendment, argued that the lack of significant progress in alleviating aircraft noise was due to the lack of industry and government advocacy and the fact that noise-impacted “airport neighbors” are without effective representation. *Id.* at 3552. Representative Rosenthal quoted the President’s Special Panel on Jet Aircraft Noise, which stated:

Initiative for solving problems of jet aircraft noise can effectively only come from a source not compromised by economic interests in conflict with those of the major groups now involved—engine and aircraft manufacturers, airline operators, and local governments. And there is only one source of meeting this constraint which can be functionally effective—the Federal Government.

H.R. REP. NO. 1701, *supra* note 112, at 3422. Another particularly interesting and still timely quote, attributed to President Johnson, stated: “[A]s the volume of air travel expands the [aircraft noise] problem will take on [an] added dimension.” 5 B. SCHWARTZ, *supra* note 77, at 3552. In light of the dramatic increase in air travel since deregulation, the importance of the noise based access controversy is once again underscored. See Burnley, *Deregulation and Air Safety Are Not in Conflict*, *Newsday*, Aug. 26, 1987, at 77 (viewpoint column by then Deputy Secretary, now Secretary, U.S. Dept. of Transp., stating that the number of enplaned passengers in 1986 is 144 million greater than the number in 1978, a more than 50% increase since deregulation).

115. Aircraft Noise Abatement Act of 1968, Pub. L. No. 90-411, 82 Stat. 395 (codified at 49 U.S.C. § 1431 (Appendix 1982)); see also Rider, *A Chronological Listing of Legislation Affecting Civil Aviation 1938-1980*, 47 J. AIR L. & COM. 257-71 (1982) (providing a general overview of the history of federal aviation legislation).

116. Aircraft Noise Abatement Act of 1968, 49 U.S.C. 1301-1551 (Appendix 1982).

117. 49 U.S.C. § 1431 (Appendix 1982). These standards were to be “consistent with the highest degree of safety, . . . economically reasonable, and . . . technologically practicable.” S. REP. NO. 1353, 90th Cong., 2d Sess., reprinted in 1968 U.S. CODE CONG. & ADMIN. NEWS 2688, 2692; see also 14 C.F.R. § 36 (1987) (setting standards for aircraft noise).

118. S. REP. NO. 1353, 90th Cong., 2d Sess., reprinted in 1968 U.S. CODE CONG. & ADMIN. NEWS 2688, 2694. The report stated: “It is not in the intent of the committee in recommending this legislation to effect any change in the existing apportionment of powers between the Federal and State and local governments.” *Id.* at 2693. The report also noted the importance of state and local land use regulation and zoning in minimizing the impact of aircraft noise. *Id.* at 2694.

119. *Id.* at 2694. In the report, the commerce committee concurred with a letter from the Secretary of Transportation stating:

[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 air-

In 1969, the FAA promulgated the original "Part 36"<sup>120</sup> regulations regarding aircraft noise abatement technology,<sup>121</sup> which, like the 1968 Act, were not meant to preclude airport proprietors from establishing permissible noise levels.<sup>122</sup> Under Part 36, aircraft have been designated according to noise emissions as Stage 1, 2, or 3, the

port. Airport owners 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 nondiscriminatory.

*Id.* The rationale for this was explained as follows:

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 the aircraft. The Federal Government is in no position to require an airport to accept service by larger aircraft and, for that purpose, to obtain longer runways. Likewise, the Federal Government is in no position to require an airport to accept service by noisier aircraft, and for that purpose to obtain additional noise easements. The issue is the service desired by the airport owner and the steps it is willing to take to obtain the service. In dealing with this issue, the Federal Government should not substitute its judgment for that of the States or the elements of local government who, for the most part, own and operate our Nation's airports. The proposed legislation is not designed to do this and will not prevent airport proprietors from excluding any aircraft on the basis of noise considerations.

*Id.*

120. 14 C.F.R. § 36 (1970).

121. 14 C.F.R. § 36 (1987) [hereinafter Part 36] (regulating noise restrictions for aircraft and a system of ascertaining aircraft noise). For a good summation of the specific requirements of the Part 36 aircraft noise standards, see S. REP. NO. 96-52, 96th Cong., 2d Sess. 4-5 (1979), *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 89, 92-93 (providing a concise summary of the history of federal efforts to control aircraft noise at its source); Bell & Bell, *supra* note 34, at 637-44; Note, *FAA Regulatory Power—Noise Restrictions*, 52 J. AIR L. & COM. 193, 197-99 (1986).

122. 14 C.F.R. § 36.5 (1987) states:

Pursuant to 49 U.S.C. § 1431(b)(4), the noise levels in this part have been determined to be as low as is economically reasonable, technologically practicable, and appropriate to the type of aircraft to which they apply. No determination is made, under this part, that these noise levels are or should be acceptable for operation at, into, or out of, any airport.

*Id.* As the court in *Air Transp. Ass'n v. Crotti*, reported, the preamble to the original Part 36 provided:

Compliance with Part 36 is not to be construed as a Federal determination that the aircraft is "acceptable," from a noise standpoint, in particular airport environments. Responsibility for determining the permissible noise levels for aircraft using an airport remains with the proprietor of that airport. The noise limits specified in Part 36 are the technologically practicable and economically reasonable limits of aircraft noise reduction technology at the time of type certification and are not intended to substitute federally determined noise levels for those more restrictive limits determined to be necessary by individual airport proprietors in response to the locally determined desire for quiet and the locally determined need for the benefits of air commerce.

389 F. Supp. 58, 64 (N.D. Cal 1975).



last category being the most modern and noise efficient.<sup>123</sup> Part 36, which required the phaseout or modification of all Stage 1 aircraft by 1988, has contributed to a reduction in aircraft noise.<sup>124</sup> There has not, however, been any subsequent rulemaking to terminate the manufacture or operation of Stage 2 aircraft,<sup>125</sup> but it appears that such a rule may be forthcoming.<sup>126</sup> In addition, no Stage 4 aircraft noise abatement technology has been established.<sup>127</sup> Thus, despite decreasing noise by eliminating Stage 1 aircraft,<sup>128</sup> the long term implementation of this program has drawn criticism from those seeking relief from noise.<sup>129</sup> On the other hand, the high costs of air carrier compliance have been assailed.<sup>130</sup>

The Aircraft Noise Abatement Act was amended by the Noise Control Act of 1972,<sup>131</sup> which was aimed at addressing the general

123. 14 C.F.R. § 36.1(F) (1987) (defining different aircraft types). FAA, FLEET MODERNIZATION, *supra* note 33, at 5 n., concisely summarizes the development of Part 36:

Stage 1, 2, or 3 refers to noise standards for turbojet and transport category airplanes as defined in Part 36 of the Federal Aviation Regulations (14 CFR Part 36). Stage 1 aircraft are those which do not meet any noise standards. Stage 2 aircraft meet the initial standards first issued in 1969. Stage 3 aircraft meet the more stringent standards issued in 1977 and contain the best noise control technology currently available.

*Id.* See also 14 C.F.R. §§ 91.301-91.311 (1987) (containing Fleet Compliance Program or Fleet Noise Rule which phased out Stage 1 operation by 1985, with limited exceptions allowed until 1988).

124. See FAA, FLEET MODERNIZATION, *supra* note 33, at 10 (discussing noise reduction due to the introduction of quieter aircraft).

125. See *House Hearings*, *supra* note 18, at 55-56 (testimony of J. Donald Reilly, Executive Director, AOCI) (calling for a phaseout of stage 2 operations).

126. See WORKING GROUP REPORT, *supra* note 15, at 9-12; FAA, FLEET MODERNIZATION, *supra* note 33 (evaluating the acceleration of aircraft fleet modernization at the request of Congress); Proctor, *supra* note 26, at 108 (noting the high probability of a Stage 2 phaseout in the near future).

127. See *supra* note 125.

128. See FAA, FLEET MODERNIZATION, *supra* note 33, at 10; see also Bell & Bell, *supra* note 34, at 638 (stating "the Boeing 747, the first plane to meet the FAR 36 limits, is only half as noisy as the 707, although it is twice as large and heavy and can carry three times as many passengers"); Note, *supra* note 121, at 198 n.39 (describing Part 36 regulations and their implementation favorably. "The reduction in noise generated by aircraft through this process has been substantial." The author also provides a more detailed description of the noise reduction.).

129. See Note, *supra* note 47, at 1057 (the regulations affected only "large commercial aircraft of future design."). See generally Rockenstein, *supra* note 32, at 6 (noting that noise levels remain a significant problem).

130. See *House Hearings*, *supra* note 18, at 562-64 (comment of Gabriel Phillips) (noting costs of carrier compliance and that fleet modernization is a decision best left to the business judgment of the air carriers); Bell & Bell, *supra* note 34, at 640-44.

131. Noise Control Act of 1972, Pub. L. No. 92-574, 86 Stat. 1234 (codified at 42 U.S.C. §§ 4901-18 (1982); 49 U.S.C. § 1431 (Appendix 1982)).

problem of noise pollution.<sup>132</sup> Through this law, Congress brought the United States Environmental Protection Agency (EPA) into the realm of aircraft noise regulation.<sup>133</sup> The Act required the FAA to consult with the EPA with regard to aircraft noise abatement standards and exceptions.<sup>134</sup> The Act also gave the EPA authority to propose new noise level regulations to protect the public health and welfare. The FAA was in turn mandated to review and act upon the EPA's proposals.<sup>135</sup> The Act required the application of the best available demonstrated technology, to be determined jointly by the EPA and FAA on the basis of cost and technological availability.<sup>136</sup> The FAA was given veto power over aircraft noise emission standards when such standards would contravene attainment of the highest degree of safety in air commerce.<sup>137</sup> In the event the FAA chose not to adopt any EPA proposal, the Act forced the FAA to report and detail its reasons to the EPA and publish them in the Federal Register.<sup>138</sup> This made the FAA accountable not only to Congress and the general public with regard to aircraft and airport noise regulation, but also to the EPA.

On a more airport specific level, the 1972 Act also authorized the FAA to review flight and operational procedures to determine how they might be used to mitigate noise impacts.<sup>139</sup> While the Act preempted state and local governments from setting different noise emission standards, the Act's legislative history indicates that the responsibilities and powers of airport proprietors were not considered,

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132. *Id.*

133. 49 U.S.C. § 1431 (Appendix 1982); *see also* S. REP. NO. 92-1160, 92d Cong., 2d Sess., reprinted in 1972 U.S. CODE CONG. & ADMIN. NEWS 4655, 4661-63 (discussing the relative roles of the EPA and the FAA); Note, *supra* note 47, at 1058.

134. 49 U.S.C. § 1431 (Appendix 1982); Note, *supra* note 47, at 1058.

135. 49 U.S.C. § 1431 (Appendix 1982).

136. S. REP. NO. 92-1160, *supra* note 133, at 4662.

137. *Id.*

138. Note, *supra* note 47, at 1058. The nature of the FAA's action and related explanation was litigated in *Illinois v. FAA*, 832 F.2d 168 (D.C. Cir. 1987). Therein, Illinois challenged the FAA's final rule issued, in 1984, pursuant to the 1972 Act. Specifically, the state took exception to the voluntary aspect of the FAA's airport noise abatement program and to the FAA's failure to explain its decision not to adopt the EPA's 1976 proposal for mandatory airport participation. The court, however, found that the FAA's rule was in response to the earlier EPA proposal, thus no detailed explanation was required. *Id.* The FAA did though posit the following reasons for its rule: the unnecessary burden mandatory participation would place on airports without noise problems and the inappropriateness of using the airport certification process for dealing with noise issues. *Id.* at 170; *see also* 14 C.F.R. § 150 (1987) (codifying final rule); *infra* notes 158-72 and accompanying text (describing intervening legislation providing for a voluntary program).

139. 49 U.S.C. § 1431 (Appendix 1982).

nor were they to be altered.<sup>140</sup>

Despite the seemingly ambitious breadth of the 1972 Act, it drew strong criticism from Senator Edmund Muskie, a noted environmentalist.<sup>141</sup> Muskie found the Act inadequate in two fundamental ways. First, he criticized the dominant role of the FAA in determining standards for aircraft noise emissions.<sup>142</sup> Second, he proposed an additional means of forcing technology to respond to the noise problem in a manner that would require aircraft and airport operators to be sensitive to noise control.<sup>143</sup> Specifically, this proposal would require the EPA to set "cumulative noise exposure levels" (CNEL)<sup>144</sup> that would protect health and welfare regardless of existing aircraft noise abatement technology.<sup>145</sup> The EPA would also identify airports with noise problems above the CNEL standard.<sup>146</sup> Affected airports would then meet with federal officials to evaluate alternatives available for achieving CNEL compliance. Next, a report would be drafted and the federal agencies would have to use their respective authority to maximize noise reduction.<sup>147</sup> Moreover,

140. S. REP. No. 92-1160, *supra* note 133, at 4663.

141. *Id.* at 4670-75 (stating minority views of Mr. Muskie). At the end of his comments Muskie implied that what he described as the inadequacies in the Act may have been attributable to the presidential and senatorial elections of 1972. *Id.* at 4675. Apparently, the Nixon Administration wanted a noise bill regardless of the contents and shortcomings of any particular legislation. *Id.* The Senate refused to give floor consideration to "controversial measures reported after September 15." *Id.* The political appeal of passing environmental legislation at the time was great. See T. WHITE, *THE MAKING OF THE PRESIDENT 1972* 45 (1973) (White states "the environment[al] cause had swollen into the favorite sacred issue of all politicians, all TV networks, all writers, all good-willed people of any party.").

142. S. REP. No. 92-1160, *supra* note 133, at 4671-72. Muskie wrote that under federal law the FAA's "primary responsibility is to promote air commerce and protect [air] safety." *Id.* at 4671. Also quoted was an EPA report on noise pollution which stated: "[T]he control of unwanted sound is not a high priority issue for virtually any Federal agency or department . . . . For the FAA, aircraft noise is only an annoying interference in the basic goal of the Agency: the most efficient, safest and swiftest air travel possible." *Id.* at 4672. This view of the FAA's perspective on noise issues is underscored by the words of Nixon administration FAA Administrator John H. Shaffer who later stated: "[T]o the everlasting credit of the USA, we didn't fall for the misbelief that aircraft noise is really so bad . . . . Only seven million people are affected by airport noise in this country." P. EDDY, E. POTTER & B. PAGE, *DESTINATION DISASTER: FROM THE TRI-MOTOR TO THE DC-10: THE RISK OF FLYING 159* (1976); see also *supra* notes 133-38 and accompanying text (discussing the relative roles of the EPA and FAA under the 1972 Act).

143. S. REP. No. 92-1160, *supra* note 133, at 4672-73. Muskie's comments indicate that this proposal is modeled after the implementation plans required under the Clean Air Act. *Id.* at 4674.

144. *Id.* at 4673.

145. *Id.* at 4673-74.

146. *Id.* at 4673.

147. *Id.*

this proposal would impose a statutory duty on airport proprietors to regulate noise.<sup>148</sup>

The Department of Transportation (DOT) developed and issued its comprehensive Aviation Noise Abatement Policy in 1976.<sup>149</sup> The policy expressly rejected complete federal preemption of aircraft noise control.<sup>150</sup> In so doing, the policy also outlined the division of responsibilities necessary to achieve maximum noise reduction. The federal role remained limited to the regulation of noise at its source, flight and other operational procedures, the provision of financial and technical assistance, and the management of the air traffic control system and navigable airspace.<sup>151</sup> The policy also restated existing federal law with regard to the responsibilities of airport proprietors, government planning agencies, and air carriers.<sup>152</sup> The DOT went beyond existing federal aviation law in positing that the costs of noise pollution be internalized so that air travelers and shippers bear the economic burden of reducing noise.<sup>153</sup> Finally, the DOT noted the need for airport neighbors to gain a better understanding of the noise problem and the necessity of having prospective neighbors made aware of the problem.<sup>154</sup> This DOT document remains important as the seminal statement of executive branch policy in the field.

Authorization for the 1972 Act was extended by the Quiet

148. *Id.* Under the proposal a proprietor could "regulate the number, the frequency and the hours of flight or . . . impose land use controls." *Id.* This would seemingly create an affirmative duty to control noise in addition to the proprietor's existing tort liability for noise. See *supra* notes 36-37 and accompanying text.

149. U.S. DEPARTMENT OF TRANSPORTATION, AVIATION NOISE ABATEMENT POLICY (1976) [hereinafter DOT NOISE POLICY]. For two brief analyses of the policy, see F. GRAD, *supra* note 32, at § 5.03(1)(a)(ii); Note, *FAA Noise Abatement Policy Statement*, 1 HARV. ENVTL. L. REV. 425 (1976); see also Interview with John W. Barnum, Partner, White & Case, & United States Department of Transportation, Deputy Secretary 1974-77, Under Secretary 1973-74, General Counsel 1971-73 in Washington, D.C. (June 19, 1987) (discussing DOT NOISE POLICY in general and in particular federal reluctance to assume local responsibilities especially in light of associated costs and noting continued vitality of DOT position today).

150. DOT NOISE POLICY, *supra* note 149, at 34. The Department stated: "We have been urged to undertake—and have considered carefully and rejected—full and complete federal preemption of the field of aviation noise abatement. In our judgment the control and reduction of airport noise must remain a shared responsibility among airport proprietors, users, and governments." *Id.*

151. *Id.* at 5; see also *id.* at 35-60 (detailing federal response and policy).

152. *Id.* at 5-6, 29-34.

153. *Id.* at 6, 60. As the DOT stated, this would be consistent with established federal environmental policy. *Id.* at 6. The DOT did not however, provide a specific framework for implementing this.

154. *Id.* at 6.

Communities Act of 1978.<sup>155</sup> The Act also provided federal funding and material and technical assistance for a nationwide noise control program administered by state and local governments.<sup>156</sup> The program was intended to foster research regarding noise from sources like aircraft and to develop means of alleviating such noise.<sup>157</sup>

Finally, after attempted linkage to the passage of the aforementioned Airline Deregulation Act failed,<sup>158</sup> Congress enacted the Aviation Safety and Noise Abatement Act of 1979.<sup>159</sup> In the latter Act, Congress shifted its primary emphasis from aircraft noise control to noise compatibility planning (i.e., planning, zoning and other land-use controls).<sup>160</sup> This Act reflected a policy of reducing the impact of noise rather than attempting to reduce or eliminate the noise itself.<sup>161</sup> Pursuant to the Act, the FAA promulgated the Part 150 pro-

155. Pub. L. No. 95-609, 92 Stat. 3079 (codified in scattered sections of 42 U.S.C. §§ 4901-4918 (1982)); see also H.R. REP. NO. 1171, 95th Cong., 2d Sess., reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 7569 (discussing legislative history of the Act). The report expressed concern over the ineffective adversary relationship that had developed between EPA and FAA in their respective attempts to abate noise pursuant to the 1972 Act, discussed *supra* notes 133-38, 142 and accompanying text. H.R. REP. NO. 1171, *supra*, at 2-3, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 7570-71. Consequently, the bill reported out of committee sought to further involve airports and required greater cooperation between the EPA and DOT. *Id.* at 1, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 7569. Under the bill, airports with more than 40,000 departures a year and the government agencies with zoning power around them were required to submit noise abatement plans to the EPA and DOT, which were permitted to disapprove the plans if they didn't satisfy Congressionally set standards. *Id.* at 3, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 7571. Criteria for plan disapproval were: (1) inadequate protection of the public health and welfare (basis for EPA disapproval); (2) creation of a safety hazard; and (3) significant disruption of the national air transportation system (bases for DOT disapproval). *Id.* EPA was required to monitor implementation and EPA and DOT were to report jointly to Congress. *Id.* This portion of the bill did not find its way into the Act. See 92 Stat. 3079 (1982).

156. Quiet Communities Act, 42 U.S.C. § 4901-4918 (1982). For additional insight into the Quiet Communities Act from two key actors in its enactment and implementation see Costle, *A Balanced Approach to Noise Control*, EPA J., Oct. 1979, at 2 (EPA Administrator discussing public education and information responsibilities of states and localities); Culver, *Opportunities in the Quiet Communities Act*, EPA J., Oct. 1979, at 6 (Senate sponsor of the Act detailing the need for community level action to combat noise and the role of the Act in addressing that need).

157. See H.R. REP. NO. 1171, *supra* note 155, at 5-6, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 7573-74.

158. See *supra* note 92.

159. Pub. L. No. 96-193, 94 Stat. 50 (codified at 49 U.S.C. §§ 2101-08 (1982)); see also S. REP. NO. 52, 96th Cong., 2d Sess., reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 89 (discussing legislative history of the Act); Note, *supra* note 47 (analyzing the Act); Comment, *supra* note 47 (analyzing the Act).

160. Note, *supra* note 47, at 1060-1078. See S. REP. NO. 52, *supra* note 159.

161. S. REP. NO. 52, *supra* note 159, at 11-21, reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 99-110; Note, *supra* note 47, at 1062.

gram,<sup>162</sup> which provides a standard noise methodology model for assistance in planning and funding for the mitigation of noise impacts through the development of compatible land uses in those communities which participate in this voluntary program.<sup>163</sup> The program has the potential for the greatest benefit at new airports or those in relatively undeveloped areas,<sup>164</sup> and is currently being implemented at more than 100 airports.<sup>165</sup>

To encourage airport participation in the program, Congress provided that the Part 150 study noise maps and other information were to be inadmissible into evidence in lawsuits to recover damages for aircraft noise.<sup>166</sup> In addition, the Act limited the right of recovery in aircraft noise lawsuits brought by persons who acquired property after completion of the Part 150 study.<sup>167</sup> Given the staggering amount of past and prospective airport liability for noise,<sup>168</sup> these are powerful incentives.

The standardized framework and required procedure of the Part 150 program are designed to provide for airport access and noise regulations that are "reasonable, fair, and responsive to the needs of both air commerce and the community."<sup>169</sup> Furthermore, while allowing for individualized airport analysis and planning efforts, participation in the program gives the FAA greater input into access

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162. 14 C.F.R. § 150 (1987). For an excellent guide to the Part 150 Program, see FEDERAL AVIATION ADMINISTRATION, NOISE CONTROL AND COMPATIBILITY PLANNING FOR AIRPORTS, Advisory Circular No. 150/5020-1 (Aug. 5, 1983). This document also provides a good overview of airport proprietor options, *id.* at 27-32; and state and local government options. *Id.* at 33-39. See also Address by Robert B. Hixson, FAA, Transportation Research Board 66th Annual Meeting (Jan. 1987) (on file at Hofstra Law Review) [hereinafter Hixson] (discussing status of the program).

163. 14 C.F.R. § 150 (1987). Part 150 provides standard measures of noise and standard means of determining the exposure of individuals to airport noise. *Id.* For a complete explanation of the methodology involved, see FAA, Advisory Circular, *supra* note 162, at 8-24.

164. See Knack & Schwab, *supra* note 21, at 13-14 (describing Clark County, Nevada, which used its planning expertise and zoning powers to provide for compatible land use development around McCarran International Airport).

165. Hixson, *supra* note 162, at 1.

166. See S. REP. NO. 52, *supra* note 159, at 22, reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 111; H.R. CONF. REP. NO. 715, 96th Cong., 2d Sess. 18, reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 118.

167. See H.R. CONF. REP. NO. 715, *supra* note 166, at 18-19, reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 118-19. A person acquiring property after submission of the Part 150 maps must show a significant post-acquisition change in activity at the airport and that the damages suffered were caused by this change or increase in activity. *Id.*

168. See *supra* notes 36-37 and accompanying text; *supra* note 69.

169. Preamble to Part 150, 49 Fed. Reg. 49260, 49263 (Dec. 18, 1984) (codified at 14 C.F.R. § 150 (1987)).

and noise regulations at each participating airport. Each participating airport must base its regulations on its noise study and analysis, and these regulations are subject to FAA review and approval.<sup>170</sup> However, to avoid an appearance of preemption contrary to the expressed Congressional intent,<sup>171</sup> FAA disapproval of a plan would only affect airport eligibility for grant monies.<sup>172</sup>

Today, after nearly two decades of federal efforts to legislate means of alleviating aircraft and airport noise, the problem remains a real one in many noise-impacted communities.<sup>173</sup> The problem is especially severe around congested major airports<sup>174</sup> and is one of increasing concern in the areas around growing secondary and suburban airports.<sup>175</sup> Recent landmark aviation legislation, like airline deregulation, may also be exacerbating the airport noise problem by increasing air carrier traffic at certain airports.<sup>176</sup> Consequently, state and local governments and airport proprietors have taken increasingly bolder steps to regulate airport access as a means of attacking the noise problem.<sup>177</sup> As the following section illustrates,

170. 14 C.F.R. § 150.33 (1987). To be approved a program must:

[1] not create an undue burden on interstate or foreign commerce; [2] . . . provide for revision of the [noise exposure] map if a change in aircraft operations at the airport would create any substantial new noncompatible land use; [3] . . . be reasonably consistent with the goal of reducing existing noncompatible uses and preventing the introduction of additional noncompatible uses.

S. REP. NO. 52, *supra* note 159, reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 101 (numbers added). The FAA must also review flight and operational procedures proposed as part of an airport's plan. *Id.*

171. S. REP. NO. 52, *supra* note 159, at 13-14, reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 101-02. The report stated:

[N]othing in this bill is intended to alter the respective legal responsibilities of the Federal Government and local airport proprietors for the control of aviation noise. This bill recognizes that there are two tiers of responsibility and authority in the area of aviation noise abatement . . . . It is intended to encourage airport noise abatement efforts, and does not limit in any way the airport operator's proprietary rights . . . . [Consequently, plan disapproval] would not constitute the Secretary's judgment that noise levels around a particular airport as reflected in such a plan are acceptable or unacceptable.

*Id.*

172. S. REP. NO. 52, *supra* note 159, at 13, reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 101-02.

173. See *supra* notes 32-35 and accompanying text.

174. See AIRPORT ACCESS TASK FORCE REPORT, *supra* note 20, at 17 (stating that noise-related regulations on existing capacity have been imposed at 19 of the 35 largest airports).

175. See *supra* notes 43-44 and accompanying text.

176. See LONG ISLAND REGIONAL PLANNING BOARD, *supra* note 65, at 2 (citing deregulation as a source of growth at suburban Long Island MacArthur Airport).

177. See *supra* notes 38-44 and accompanying text.

many of these regulations have been litigated.

#### IV. AIRPORT ACCESS AND NOISE REGULATION CASES

##### A. *Nonproprietor Cases*

One of the earliest cases in which a regulation enacted by a nonproprietor was held unconstitutional was *Allegheny Airlines v. Village of Cedarhurst*.<sup>178</sup> The village of Cedarhurst, New York, heavily impacted by noise from nearby Idlewild (now John F. Kennedy International) Airport, sought to prohibit the operation of aircraft below an altitude of 1000 feet above the village.<sup>179</sup> A combination of airlines, trade groups and the airport's proprietor (the Port Authority of New York and New Jersey) challenged the constitutionality of the ordinance, and argued that for safety reasons it was sometimes necessary to fly less than 1000 feet above the village.<sup>180</sup> In finding against the village, the Second Circuit noted that Congress had the power to regulate interstate commerce, including air transportation, under the commerce clause.<sup>181</sup> When Congress regulates to an extent amounting to preemption, contrary local regulations are precluded.<sup>182</sup> Since the 1938 Civil Aeronautics Act preempted the field of navigable airspace,<sup>183</sup> and Cedarhurst's ordinance was contrary to the Act, the court held the ordinance unconstitutional.<sup>184</sup>

In *American Airlines v. Town of Hempstead*,<sup>185</sup> a similar case involving another suburban community outside of John F. Kennedy International Airport (JFK), the Second Circuit followed its decision in *Cedarhurst*.<sup>186</sup> In *American Airlines*, a local noise ordinance was enacted which would have determined aircraft altitudes and flight paths over JFK in a manner inconsistent with existing traffic patterns and FAA procedures.<sup>187</sup> It was found that the ordinance was in direct conflict with federal regulation<sup>188</sup> and it was thus held invalid.<sup>189</sup> The Second Circuit's decision was made within the context of

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178. 132 F. Supp. 871 (E.D.N.Y. 1955), *aff'd*, 238 F.2d 812 (2d Cir. 1956).

179. *Id.* at 873.

180. *Id.* at 882.

181. *Id.* at 879-81.

182. *Id.* at 880.

183. *Id.* at 881; *see also* Civil Aeronautics Act of 1938, 49 U.S.C. § 401-722 (1982).

184. 132 F. Supp. at 885.

185. 398 F.2d 369 (2d Cir. 1968), *cert. denied*, 393 U.S. 1017 (1969).

186. *Id.* at 375-76.

187. *Id.* at 370-72, 374.

188. *Id.* at 372.

189. *Id.* at 376.



a sharper conflict between federal and local regulation than that found in *Cedarhurst*.<sup>190</sup>

The United States Supreme Court finally considered the subject of airport access in *Burbank v. Lockheed Air Terminal, Inc.*, in 1973.<sup>191</sup> The city of Burbank enacted an ordinance which made it unlawful for jet aircraft to take off from Hollywood-Burbank Airport between the hours of eleven p.m. and seven a.m. and forbade the operator of the airport from allowing such aircraft to take off during those same hours.<sup>192</sup> The district court invalidated the ordinances,<sup>193</sup> and the court of appeals affirmed.<sup>194</sup> The Supreme Court affirmed, noting that although federal legislation (including the Noise Control Act of 1972) contained no express preemption provisions,<sup>195</sup> the "pervasive nature" of federal regulation of aircraft noise made a finding of federal preemption necessary.<sup>196</sup> To support its conclusion, the Court quoted Justice Jackson's concurrence in *Northwest Airlines v. Minnesota*:<sup>197</sup> "Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands."<sup>198</sup> The Court also noted that upholding the ordinance might lead to increasingly fractionalized local control over air traffic, increased congestion in the navigable airspace, and decreased air safety.<sup>199</sup>

*Burbank* is the leading case in this area because of what has come to be known as the "*Burbank* exception," which originated

190. *Id.* at 372 (the Federal Aviation Act of 1958, which was enacted after *Cedarhurst*, gave the FAA exclusive authority to regulate regarding navigable airspace); *see also supra* notes 81-87 and accompanying text.

191. 411 U.S. 624 (1973).

192. *Id.* at 625-26. At the time, the airport was privately owned; thus, Burbank was not an airport proprietor. *Id.* at 635 n.14.

193. 318 F. Supp. at 914 (finding the ordinance unconstitutional on both supremacy clause and commerce clause grounds).

194. 457 F.2d at 667 (affirming on the grounds of the supremacy clause with regard to preemption and conflict).

195. *Id.* at 633.

196. *Id.* at 633-34. The Court reached this conclusion despite the amicus arguments of the federal government against a finding of preemption. *Id.* at 627. *But cf. id.* at 640 (Rehnquist, J., dissenting) (arguing that Congress intended to allow local regulation, or in the alternative that Congress did not intend to go so far as to allow the court to find the "implied" preemption of local regulation).

197. 322 U.S. 292, 303 (1944).

198. *Burbank*, 411 U.S. at 633-34.

199. *Id.* at 639.

from a footnote to the Court's opinion, but which actually left the question of a proprietor's power unresolved.<sup>200</sup> The basis of this exception, which has subsequently been used to allow airport proprietors to limit access based on nondiscriminatory noise criteria, is straightforward and simple. Since proprietors are liable for any noise-related damages caused by the operation of the airport,<sup>201</sup> they should retain the power to limit this liability.<sup>202</sup>

An interesting factual twist to this line of cases arose in a 1982 Ninth Circuit case, *San Diego Unified Port District v. Gianturco*.<sup>203</sup> The State of California attempted to impose more stringent noise

200. *Id.* at 635 n.14. The relevant text in the opinion discussed the legislative history of federal noise control legislation and how the federal government preempted state and local governments from using their police power to regulate aircraft noise, but did not address the "powers or responsibility" of proprietors. Footnote 14 then turned to the role of airport proprietors as explained by a letter from Secretary of Transportation Boyd to the Senate Committee. The footnote, in its entirety, provided:

The letter from the Secretary of Transportation also expressed the view that "the proposed legislation will not affect the rights of a State or local public agency, as the proprietor of an airport, from issuing regulations or establishing requirements as to the permissible level of noise which can be created by aircraft using the airport. Airport owners 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 nondiscriminatory. . . ."

Appellants and the Solicitor General submit that this indicates that a municipality with jurisdiction over an airport has the power to impose a curfew on the airport, notwithstanding federal responsibility in the area. But, we are concerned here not with an ordinance imposed by the City of Burbank as "proprietor" of the airport, but with the exercise of police power. While the Hollywood-Burbank Airport may be the only major airport which is privately owned, many airports are owned by one municipality yet physically located in another. For example, the principal airport serving Cincinnati is located in Kentucky. Thus, authority that a municipality may have as a landlord is not necessarily congruent with its police power. *We do not consider here what limits, if any, apply to a municipality as a proprietor.*

*Id.* (emphasis in original in first paragraph, emphasis added in second paragraph). Note that the Rehnquist dissent did not recognize any distinction between proprietors and non-proprietors. *Id.* at 651.

201. See *Griggs v. Allegheny County*, 369 U.S. 84 (1962) (holding airport proprietor liable for airport noise in an inverse condemnation action for the taking of property); see also *San Diego Unified Port Dist. v. Gianturco*, 651 F.2d 1306, 1316-17 (9th Cir. 1981), cert. denied, 455 U.S. 1000 (1982) (providing a subsequent explanation of the *Griggs*-based *Burbank* exception: fairness dictates that liability for noise be accompanied by the power to protect against such liability); *infra* notes 203-11 and accompanying text.

202. *Gianturco*, 651 F.2d at 1316-17.

203. *Id.* at 1306. For an even more interesting twist to these nonproprietor cases, see *United States v. California*, 639 F. Supp. 199 (E.D. Cal. 1986) (wherein the State of California sought to prohibit additional flights at a Nevada airport by bringing an action to enforce California's environmental review law, however, citing the abstention doctrine, the federal court deferred to an ongoing proceeding in the California courts).

control regulations on a political subdivision, which was also an airport proprietor.<sup>204</sup> While the court noted the availability of alternative noise abatement actions that would not interfere with aircraft operations (i.e., planning and zoning), it found that the state's use of its police power to impose a curfew on an unwilling airport proprietor was a preempted form of regulation.<sup>205</sup>

Following *Burbank*, the court in *Gianturco* posited a clear definition of proprietorship.<sup>206</sup> The definition was based on the rationale behind the *Burbank* proprietor's exception that fairness requires that proprietors retain the power to protect themselves from liability for excessive noise.<sup>207</sup> As stated by the court, the bases of *Burbank* proprietorship (or in the alternative, liability for excessive noise) include: "ownership, operation, promotion, and the ability to acquire necessary approach easements."<sup>208</sup> In *Gianturco*, since California had granted the Port District all these powers,<sup>209</sup> the Port District

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204. *Gianturco*, 651 F.2d at 1308. The Port District imposed a midnight to six a.m. curfew on all commercial jet takeoffs, as well as strict noise standards for jet landings during the same period. The state sought to apply a law which required airports like the Port District's Lindbergh Field to obtain variances to continue operations above a certain noise level. The state granted the Port District a conditional variance subject to the extension of the curfew at the airport. The Port District refused and challenged enforcement of the condition. *Id.* at 1308-09.

For a discussion of two cases under which even the Port District's proprietary curfew would likely be held invalid, see *infra* notes 280-90 and accompanying text.

205. In *Gianturco*, the court applied *Burbank* and found the state's action to be preempted. 651 F.2d at 1309-16. Also, as the state was not a proprietor, the *Burbank* proprietor's exception was inapplicable. *Id.* at 1316-19. For an example of state action held valid, see *Air Transp. Ass'n of Am. v. Crotti*, 389 F. Supp. 58 (N.D. Cal. 1975) (holding noise mitigation measures at ground level and planning for compatible land uses pursuant to state mandate as acceptable actions).

206. 651 F.2d at 1316-17.

207. *Id.*

208. *Id.* at 1317. When an airport proprietor possesses these characteristics, the use of the proprietary power to regulate noise may be upheld. The cases that follow put these characteristics into sharper focus. Note that ownership alone, without any other proprietary trait or role, may not be sufficient to establish the exception. See *Pirola v. City of Clearwater*, 711 F.2d 1006 (11th Cir.), *reh'g denied*, 720 F.2d 688 (1983) (holding that municipality, which owned airport but leased it to another party to operate, had contracted away its proprietary powers and thus had no power to regulate noise or access); *infra* notes 212-16 and accompanying text. *But see* *Santa Monica Airport Ass'n v. City of Santa Monica*, 659 F.2d 100 (9th Cir. 1981) (upholding noise restrictions under the proprietor's exception because the city owned and operated the airport and had not contracted away its right to impose noise restrictions); *infra* notes 242-48 and accompanying text.

209. *Gianturco*, 651 F.2d at 1317-18. When the state created the Port District, it established the necessary powers of proprietorship therein: ownership, operation, promotion, ability to acquire easements, and capability of being sued and being held liable for noise, independent of the state. *Id.*

was the sole proprietor<sup>210</sup> and the state therefore could not regulate airport noise or access.<sup>211</sup>

In *Pirola v. City of Clearwater*,<sup>212</sup> a local municipality sought to impose access regulations upon the operator to whom it leased its airport, and the Eleventh Circuit's conclusion was similar to that in *Gianturco*.<sup>213</sup> Whereas in *Gianturco* the state had granted away all proprietary powers, in *Pirola* the municipality seeking to regulate access by limiting night operations was held to have contracted away its proprietary powers, despite the fact that the municipality retained ownership of the airport.<sup>214</sup> Thus, the court declined to apply the *Burbank* proprietor's exception.<sup>215</sup> However, a different conclusion might have been reached had the municipality sought to regulate access in the original lease.<sup>216</sup>

210. *Id.* at 1318-19.

211. *Id.*

212. 711 F.2d 1006 (11th Cir.), *reh'g denied*, 720 F.2d 688 (1983).

213. *Id.* at 1008-10. The municipality herein entered a thirty year lease to let a private party operate the airport. The lease contained no restrictions on airport operations. A sublease was then executed by the original lessee. Later, the municipality amended the lease to require its consent for night flying. The court found these ordinances and restrictions invalid as an exercise of the police power rather than the proprietary power. *Id.*

214. *Id.* at 1009. The court so held despite the city's claim that as airport owner it retained the power to acquire air easements and potential liability for excessive noise which it argued was a determining factor in establishing proprietor status. *Id.* at 1009. *See Gianturco*, 651 F.2d at 1318-19.

215. *Pirola*, 711 F.2d at 1009.

216. *Id.* at 1008, 1010. The court's language indicates that had the noise restrictions been placed in the original lease or been approved by the sublessor, such restrictions may have been upheld. For example, the court states "[t]he lease was amended . . . to permit the desired [noise] restrictions, but the sublessor was not a party to the amendment and therefore it is not binding on [the sublessor]." *Id.* at 1010.

The municipality might have fared differently had it attempted a creative construction of the Airline Deregulation Act's sections on preemption, 49 U.S.C. § 1305(a)(1) (Appendix 1982) (quoted *supra* note 98), and proprietary powers and rights, 49 U.S.C. § 1305(b)(1) (Appendix 1982) (quoted *supra* note 99). The municipality could have argued that, read together, those provisions only preempt action by a political entity that is neither an "owner or operator of an airport" because neither are preempted from exercising their proprietary powers and rights under such a reading (emphasis added). As the municipality retained ownership, a characteristic sufficient to allow it to exercise proprietary power under federal statute, it should have been able to enforce its access regulations.

A somewhat similar nonproprietary regulation was litigated in *Gary Leasing, Inc. v. Town of Pendleton*, 127 Misc. 2d 194, 485 N.Y.S.2d 693 (1985). After purchasing Lockport Aviation Center, the plaintiff was granted a town permit which did not place any "restrictions or conditions" on the operation of the airport. *Id.* at 195, 485 N.Y.S.2d at 694. Later, in response to complaints about noise and safety concerns, the town enacted a curfew and capped the number of planes that could be based at the airport. *Id.* at 194-95, 485 N.Y.S.2d at 694. While the town conceded that it lacked the authority to impose the curfew, it maintained that under state environmental and business law it could review and pass upon the airport's opera-

*City of South Lake Tahoe v. Tahoe Regional Planning Agency*,<sup>217</sup> involved a regional planning agency order limiting the number of flights per day and on a weekly basis.<sup>218</sup> Citing the post-deregulation Congressionally enacted Compact that established the agency and provided its mandate, the court upheld the flight limits.<sup>219</sup> The court stated that the Compact and the unique nature of the agency made preemption theories inapplicable.<sup>220</sup> Additionally, the court noted that given the geographically specific impact and environmental nature of the regulation, the aims of both the Compact and airline deregulation could be achieved concurrently.<sup>221</sup> This last reason appears unconvincing as regulations at one airport by necessity influence behavior at more than one point. Also, such arguments could possibly be asserted by other local governments or governmental agencies with federal mandates to protect the environment, perhaps in the form of a post-deregulation grant.

### B. Proprietor Cases

1. Valid Proprietor Regulations.— *National Aviation v. City of Hayward*,<sup>222</sup> is the first post-*Burbank* case in which a proprietary regulation was upheld.<sup>223</sup> The city of Hayward, California was the owner and operator of its airport, and it prohibited the night operation of aircraft which produced noise above a specified level.<sup>224</sup> The court upheld the regulation based on its conclusion that proprietary regulation was not preempted and there was, at most, only an incidental burden on interstate commerce.<sup>225</sup> While *Burbank* held that a municipality could not use its police power to regulate noise at an

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tion. *Id.* The court disagreed, finding these laws inapplicable to a privately owned company. *Id.* Finally, the court found the thirty plane limit was preempted because it was, in effect, an attempt to regulate air navigation. *Id.* at 196, 485 N.Y.S.2d at 696.

217. 664 F. Supp. 1375 (E.D. Cal. 1987).

218. *Id.* at 1376.

219. *Id.* at 1376-77.

220. *Id.* at 1377.

221. *Id.*

222. 418 F. Supp. 417 (N.D. Cal. 1976).

223. *Id.*

224. *Id.* at 418. The ordinance prohibited the night operation of aircraft which produced noise greater than 75 dB (dB is an abbreviation for decibels, a standard measure of noise); see also FAA, AVIATION NOISE EFFECTS, *supra* note 32, at 2-17 (providing a detailed discussion of the dBs and noise metrics. For example, a "jet aircraft" 500 feet overhead will produce 115 dBs); Bell & Bell, *supra* note 32, at 608 (providing specific information regarding noise levels, for example, "[n]oise levels of eighty-seven decibels require that two people in conversation shout to be heard.").

225. *National Aviation*, 418 F. Supp. at 427.

airport of which it was not a proprietor, the court in *Hayward* found no such preemption of proprietary regulation.<sup>226</sup> The court further noted that the Congressional intent, in enacting the noise regulations which amended the Federal Aviation Act, was not to "prevent airport proprietors from excluding any aircraft on the basis of noise considerations."<sup>227</sup> The court also found that the regulation placed only a minimal burden on interstate commerce, and this burden was outweighed by the legitimate and worthy aim of controlling airport noise.<sup>228</sup> In addition, the court dismissed the possibility of a proliferation of such ordinances as mere speculation.<sup>229</sup>

The proprietor's power to regulate was directly at issue in *British Airways Board v. Port Authority*.<sup>230</sup> The Port Authority (the proprietor of JFK) temporarily banned the Concorde despite a grant of federal approval for it to fly into and out of JFK.<sup>231</sup> After the district court invalidated the ban, the Second Circuit reversed and remanded for an evidentiary hearing on the reasonableness of the regulation.<sup>232</sup> The court's decision included a strong statement on the potential problems of local access regulations, warning that a proliferation of such regulations would amount to "a dagger pointed

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226. *Id.* at 424-25. See *Burbank*, 411 U.S., at 635; see also *supra* note 200 and accompanying text (indicating that *Burbank* left the issue of the status of proprietor regulations unresolved).

227. *National Aviation*, 418 F. Supp. at 424.

228. *Id.* at 428.

229. *Id.* at 429.

230. 431 F. Supp. 1216 (S.D.N.Y.), *rev'd*, 558 F.2d 75 (2d Cir.), *on remand* 437 F. Supp. 804 (S.D.N.Y.), *modified*, 564 F.2d 1002 (2d Cir. 1977). These are referred to as "Concorde" cases I and II. For a British perspective on noise and the hostile reception given the Concorde here in the states, see K. OWEN, CONCORDE: NEW SHAPE IN THE SKY 109-15, 186-201 (1982).

231. *British Airways*, 431 F. Supp. at 1217. In what the court praised as a well-reasoned administrative decision, then Secretary of Transportation William T. Coleman granted the Concorde temporary approval, on the basis of an EIS and FAA control of airspace and required federal aircraft certification, subject to certain restrictions, to fly into JFK twice daily and into Dulles International Airport once daily (the FAA was then proprietor of Dulles). Neither Secretary Coleman nor his successor attempted to preempt the Port Authority's right to impose reasonable, nondiscriminatory noise regulations.

Rather than apply its existing noise rule to the Concorde, the Port Authority banned the supersonic aircraft pending further study of its noise impact. At the time the case first came to the Second Circuit, the ban had been in effect for 13 months, and the Port Authority had yet to complete its study. On the first appeal to the Second Circuit, it was the United States, as *amicus*, that challenged the reasonableness of this delay. This led the court to remand for an evidentiary hearing. *British Airways*, 558 F.2d at 75.

232. *British Airways*, 558 F.2d at 75. On remand, the district court found the regulation unreasonable and this finding was basically upheld by the Second Circuit. See *infra* notes 239-41 and accompanying text.

at the heart of commerce."<sup>233</sup> The court, however, also noted that given the localized impact of noise, the airport proprietor may be more effective in regulating noise at the local level.<sup>234</sup>

While the court in *British Airways* upheld the proprietor's authority to regulate access,<sup>235</sup> it also posited limits on that authority.<sup>236</sup> The court established a "reasonableness" test, which defined the scope of a proprietor's regulatory power with regard to the related concerns of noise and access.<sup>237</sup> The court's opinion indicates that fair, reasonable and nondiscriminatory regulations of the permissible level of noise would be upheld.<sup>238</sup>

On remand, the district court found the ban on the Concorde unreasonable and ordered its dissolution.<sup>239</sup> The Second Circuit affirmed with one modification;<sup>240</sup> it held that the Port Authority had the power to adopt a "new, uniform [i.e., applicable to all aircraft not just the supersonic Concorde] and reasonable noise standard in the future" in the event the existing noise regulation which the Concorde will theoretically meet is found upon a reasonable basis to be inadequate.<sup>241</sup>

*Santa Monica Airport Association v. City of Santa Monica*,<sup>242</sup> provides specific examples of the boundaries of the *Burbank* proprietor's exception.<sup>243</sup> The city of Santa Monica responded to an increase in the use of jets and helicopters at its city owned and oper-

233. *British Airways*, 558 F.2d at 83. The court stated:

It is understandable that the numerous localities in the vicinity of major airports cannot be permitted an independent role in controlling the noise of passing aircraft. The likelihood of multiple, inconsistent rules would be a dagger pointed at the heart of commerce—and the rule applied might come literally to depend on which way the wind was blowing.

*Id.*

234. *Id.* at 84. The court stated, "The proper domain of the operator is the issuance of regulations or establishment of requirements as to the permissible level of noise which can be created by aircraft using the airport." *Id.* (emphasis omitted). However, the court also cautioned that "[a]ny other conduct by an airport proprietor would frustrate the statutory scheme and unconstitutionally burden the commerce Congress sought to foster." *Id.*

235. *Id.*

236. *Id.* A proprietor possesses only "the power to promulgate reasonable, nonarbitrary and non-discriminatory regulations that establish acceptable noise levels for the airport and its immediate environs." *Id.*

237. *Id.*

238. *Id.* at 84-85.

239. 437 F. Supp. 804, 806.

240. 564 F.2d at 1012-13.

241. *Id.* at 1013.

242. 659 F.2d 100 (9th Cir. 1981).

243. *Id.*

ated airport by enacting several ordinances relating to noise and access.<sup>244</sup> These ordinances included a night curfew on takeoffs and landings, a prohibition on certain low altitude aircraft approaches on weekends, a prohibition on helicopter training, the establishment of a maximum single event noise exposure level (SENEL) of 100 decibels, a prohibition on jets at the airport, and a fine for any jet landings or takeoffs.<sup>245</sup> The district court found that the first four enumerated ordinances were reasonable regulations necessary to maintain acceptable noise levels for the airport and its environs.<sup>246</sup> The Ninth Circuit affirmed.<sup>247</sup> Both courts, however, found that the blanket prohibition of jets and the fine for any jet takeoffs or landings were not reasonable, and that they violated the equal protection and commerce clauses by discriminating against jet aircraft as a class and placing an undue burden on interstate commerce.<sup>248</sup> Therefore, even an airport proprietor does not have unlimited authority to issue airport noise or access regulations.

*Global International Airways Corp. v. Port Authority*<sup>249</sup> went further in providing a very ambitious, judicially sanctioned proprietor-enacted regulation. The Second Circuit upheld the Port Authority's Interim Rule regarding the number of operations (takeoffs and landings) per one-quarter year, which required air carriers to use set percentages of noise-compliant aircraft to meet established noise budgets.<sup>250</sup> The court noted the respective roles of the federal government and airport proprietors, particularly the federal government's power to regulate noise by controlling flight patterns of aircraft taking off and landing at airports.<sup>251</sup> In addition, the Aircraft

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244. *Id.* at 102.

245. *Id.* The SENEL regulation effectively prohibited any aircraft measured at a dB level of 100 or above from using the airport.

246. *Id.* The district court found that all of the ordinances: (1) were not preempted; (2) did not violate FAA grant agreements or the airport lease; (3) did not violate the Federal Aviation Act; and (4) that the first four ordinances did not violate the equal protection or commerce clauses of the Constitution (but the ban on all jet aircraft did); *see also*, *Santa Monica Airport Ass'n v. City of Santa Monica*, 481 F. Supp. 927 (C.D. Cal. 1979).

247. *Santa Monica*, 659 F.2d at 102

248. *Id.*

249. 727 F. 2d 246, *reh'g denied*, 731 F.2d 127 (2d Cir. 1984).

250. *Id.* The court found the regulation of cumulative noise exposure did not on its face conflict with the goals of the FAA's Fleet Compliance Program, but found that it may be in conflict with regard to individual air carriers who may be forced to accelerate compliance or endure economic hardships, because of the Port Authority's rule. If upon an air carrier's application for relief, the district court was to find such a situation, the air carrier would be entitled to injunctive relief from the rule. *Id.* at 252.

251. *Id.* at 248.



Noise Abatement Act of 1968 and the FAA's Part 36 standards, promulgated pursuant to the Act, were held to mandate the eventual composition of air carrier fleets.<sup>252</sup> Nevertheless, the court found that these laws and regulations provide, either expressly or in their legislative histories, that airport proprietors retain the power to set more restrictive noise limits if they are deemed necessary.<sup>253</sup> Consequently, the Port Authority's attempt to regulate the cumulative noise exposure at its airports and their environs, though forcing air carriers to allocate their FAA regulated aircraft types in a certain manner, constituted a valid regulation in that it did not conflict with federal regulations, but added to them.<sup>254</sup>

In *Arrow Air, Inc. v. Port Authority*,<sup>255</sup> a proprietary noise regulation which prevented an air carrier from gaining access for its noisier aircraft was upheld despite a federal exemption from Part 36 requirements that allowed the operation of the aircraft.<sup>256</sup> The Second Circuit found that under *Burbank*, as well as under the Aviation Safety and Noise Abatement Act of 1979, proprietors were not preempted from establishing "fair, even-handed and nondiscriminatory [noise] regulations."<sup>257</sup> The court also noted that the challenged regulations utilized reasonable procedures,<sup>258</sup> were designed to serve a legitimate interest,<sup>259</sup> and imposed merely an incidental burden on interstate commerce.<sup>260</sup>

In *Town of Islip v. Eastern Air Lines*,<sup>261</sup> the Second Circuit approvingly discussed an oral agreement between a local government

252. *Id.* at 248-49; see also *supra* notes 120-30 and accompanying text (discussing Part 36 and related programs).

253. *Global Airways*, at 248.

254. *Id.* at 250-52.

255. 602 F. Supp. 314 (S.D.N.Y. 1985).

256. *Id.*

257. *Id.* at 318.

258. *Id.* at 321. The Port Authority's rule regarding exemptions for foreign air carriers like Arrow with noncompliant (Stage 1) aircraft required: (1) that the carrier provide the only scheduled passenger service between New York and a foreign country with New York as the carrier's primary United States market; (2) an FAA exemption from federal noise regulations; (3) a United States Department of State written request for the exemption based on "foreign relations and national security" and the "unique situation of the airline"; and (4) an agreement that the carrier will make reasonable efforts to obtain and use complaint aircraft at JFK. *Id.* at 320.

259. *Id.* at 321. The Port Authority has faced liability for damages based on excessive noise. This rule is, therefore, designed to decrease noise around its airports and it has done so. *Id.* at 318.

260. *Id.*

261. 793 F.2d 79 (2d Cir. 1986).

airport proprietor and a major air carrier limiting access (here, the number of flights).<sup>262</sup> Thus, it would appear that airport proprietors may be able to contract with airport users to limit access.<sup>263</sup> However, such actions must be undertaken with great care because of the possible specter of antitrust liability for airport proprietors.<sup>264</sup>

An additional access regulation case, though not explicitly involving noise concerns, warrants mention because of its possible implications. The Second Circuit's decision in *Western Air Lines v. Port Authority*,<sup>265</sup> sustained a proprietor's "perimeter rule" which prohibited airline access for nonstop flights of over 1500 miles.<sup>266</sup> Western challenged the rule as being preempted by the Airline Deregulation Act.<sup>267</sup> Western also argued that the rule violated the Airport and Airway Improvement Act,<sup>268</sup> which prohibited the granting of an "exclusive right for the use of any landing area or air navigation facility"<sup>269</sup> and also required federally funded airports to "be available for public use on fair and reasonable terms and without unjust discrimination . . ." <sup>270</sup> While the court found that no private right of action existed under these statutes,<sup>271</sup> it held that a preempt-

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262. *Id.*

263. *Id.*

264. See Comment, *Antitrust Liability for Municipal Airport Operations: Will It Fly?*, 49 J. AIR. L. & COM. 245 (1983) (for a thorough discussion of the subject of antitrust liability for airport proprietors); Note, *Airport Access*, *supra* note 21, at 172-79.

265. 817 F.2d 222 (2d Cir. 1987), *petition for cert. filed sub nom. Delta Air Lines v. Port Auth.*, 108 S. Ct. 448 (1987) (No. 87-333) (order inviting solicitor general to file brief). The rule was promulgated to encourage business travelers to use LaGuardia Airport. It is believed that business flyers generally take shorter trips and do not exacerbate air terminal congestion to the extent that vacationing people do (who travel farther and have more luggage. *Id.* at 223.

266. *Id.*

267. *Id.* at 223-24; see also 49 U.S.C. § 1305 (1982 & Supp. III 1985); *supra* notes 88-103 and accompanying text (discussing the ADA).

268. *Western Air Lines*, 817 F.2d at 224; see also *supra* notes 104-08 (discussing the Act).

269. *Western Air Lines*, 817 F.2d at 224 (citing 49 U.S.C. § 1349 (1982)).

270. *Id.* (citing 49 U.S.C. § 2210 (1982)), which requires, as conditions precedent to any grant awarded for an airport project, written assurances that:

the airport to which the project relates will be available for public use on fair and reasonable terms and without unjust discrimination, including the requirement that (A) each air carrier using such airport (whether as a tenant, nontenant, or subtenant of another air carrier tenant) shall be subject to such nondiscriminatory and substantially comparable rates, fees, rentals, and other charges and such nondiscriminatory and substantially comparable rules, regulations, and conditions as are applicable to all such air carriers which make similar use of such airport and which utilize similar facilities, subject to reasonable classifications . . . .

49 U.S.C. § 2210 (1982).

271. *Id.* at 225-26; see also *Montauk-Caribbean Airways v. Hope*, 784 F.2d 91 (2d

tion challenge was properly brought under the supremacy clause.<sup>272</sup> The court, however, still found that the perimeter rule was within the bounds of proprietary power exempted from preemption under the ADA because the Port Authority is a “multi-airport proprietor.”<sup>273</sup> Allowing such an access regulation when a proprietor theoretically has the power to provide access at another airport, though distinguishable from the case of a single airport proprietor, could conceivably encourage proprietors within close proximity to other airports to undertake similar regulations.<sup>274</sup>

Finally, in *Alaska Airlines v. City of Long Beach*,<sup>275</sup> the district court modified a preliminary injunction against a proprietor to require that proprietor to increase the number of flights permitted at its airport.<sup>276</sup> After noting the competing environmental and economic interests at stake, the court questioned the proprietor’s delay in planning for airport improvements and the reasonableness and fairness of limitations on airport growth.<sup>277</sup> The Ninth Circuit found

Cir.), *cert. denied*, 107 S. Ct. 248 (1986) (holding no private right of action exists under the Federal Aviation Act to challenge proprietor’s denial of access to service the airport on a more than seasonal basis).

272. *Western Air Lines*, 817 F.2d at 225-26.

273. *Id.* at 226. The court’s decision recognized that the regulation could have been preempted under 49 U.S.C. § 1305(a)(1) (Supp. III 1985), but that it also fell within the proprietary exemption of 49 U.S.C. § 1305(b)(1) (1982), because of the “multi-airport proprietor” status of the Port Authority. Such a construction of § 1305 does little to resolve the conflict and contradictions between (a) and (b), discussed *supra* notes 96-103 and accompanying text, and seemingly renders the rest of the proprietary exemption meaningless. That is, the proprietary exemption, when in conflict with the preemption provision, can only be invoked on behalf of a “multi-airport proprietor.” Given that many access regulations conflict with the preemption provision, see *supra* notes 96-103 and accompanying text, this is a significant interpretation.

The court cited *City of Houston v. FAA*, 679 F.2d 1184, 1196 (5th Cir. 1982), as its only explanation for the multi-airport proprietor exemption. Therein, Houston challenged a similar perimeter rule imposed by the FAA to limit access to congested Washington National Airport while encouraging the use of Dulles International Airport. The FAA was the proprietor of both airports. The court upheld the perimeter rule based on the FAA’s proprietorship of the two airports and buttressed its decision with reference to the Federal Aviation Act and other sources of federal authority, sometimes blurring the two.

274. While the court in *Western Air Lines* did not explicitly consider this, the court in *City of Houston* did and provided two examples. 679 F.2d at 1194. One example involved a rural airstrip, and the other an actual case involving John Wayne Airport in Orange County, California. Perimeter rule actions by the single airport proprietor of either airport would be invalidated because of preemption. *Id.*

275. No. CV 83-4065 (C.D. Cal. Oct. 17, 1986) (order modifying preliminary injunction), *aff’d*, 815 F.2d 714 (9th Cir.), *cert. denied sub nom.* *City of Long Beach v. AirCal, Inc.*, 108 S. Ct. 96 (1987).

276. *Id.*

277. *Id.* at 3.

that the district court did not abuse its discretion and affirmed the order pending trial on the merits.<sup>278</sup> This case raises many interesting issues, including the question of liability for noise damages due to the increased number of flights ordered. Moreover, it opens the door for future aggressive judicial intervention into airport operations.

2. Invalid Proprietor Regulations.<sup>279</sup>— In *United States v. New York*,<sup>280</sup> a proprietor's complete ban on aircraft operations from eleven p.m. to seven a.m. was held invalid.<sup>281</sup> The court found the curfew "overbroad, unreasonable and arbitrary" because it banned "all aircraft, regardless of the *degree* of accompanying emitted noise."<sup>282</sup> In view of conflicting federal law, including grant assurances that the airport be open to all,<sup>283</sup> the court held the overbroad curfew regulation to be preempted.<sup>284</sup>

A nearly identical curfew was held invalid in *United States v. County of Westchester*.<sup>285</sup> The court based its holding on findings of preemption,<sup>286</sup> the "unreasonable, arbitrary, discriminatory and overbroad" nature of the regulation,<sup>287</sup> the imposition of an undue

278. 815 F.2d at 714.

279. *Santa Monica Airport Ass'n v. City of Santa Monica*, 659 F.2d 100 (9th Cir. 1981); *supra* notes 242-48; *see also* the *Concorde* cases, *supra* notes 230-41 and accompanying text.

280. 552 F. Supp. 255 (N.D.N.Y. 1982), *aff'd*, 708 F.2d 92 (2d Cir. 1983), *cert. denied*, 466 U.S. 936 (1984).

281. *Id.*

282. *Id.* at 265 (emphasis in original). The court also found the regulation particularly unreasonable in light of the sparsity of flights during curfew hours. *Id.*

283. *Id.* at 257-59 (listing applicable federal laws and describing federal grant conditions under the Airport and Airway Development Act of 1970); *see also supra* notes 104-08 and accompanying text. One particular federal grant condition provided that the airport will be "open to all types, kinds, and classes of aeronautical use on fair and reasonable terms without discrimination between such types, kinds, and classes." 552 F. Supp. at 259 (emphasis in original). Moreover, the grant also allowed for the establishment of "fair, equal, and not unjustly discriminatory conditions to be met by all users of the [a]irport as may be necessary for the safe and efficient operation of the [a]irport." *Id.*

284. *Id.* at 265.

285. 571 F. Supp. 786 (S.D.N.Y. 1983) (the Westchester County curfew was imposed from midnight to seven a.m.; thus, it began an hour later than the New York State curfew at Republic Airport). *But see* *Santa Monica Airport Ass'n v. City of Santa Monica*, 481 F. Supp. 927, 938-39 (C.D. Cal. 1979), *aff'd*, 659 F.2d 100 (9th Cir. 1981) (upholding challenged curfew as rationally related to a legitimate state interest in preserving sleep); *National Aviation v. City of Hayward*, 418 F. Supp. 417 (N.D. Cal. 1976) (upholding night operation ban of aircraft producing noise greater than 75 dB as not being preempted, nor imposing anything more than an incidental burden on interstate commerce); *see also infra* notes 329-34 and accompanying text (discussing similar regulation at Long Island MacArthur Airport).

286. *County of Westchester*, 571 F. Supp. at 797.

287. *Id.*

burden on interstate commerce,<sup>288</sup> an unlawful exercise of police power,<sup>289</sup> and a violation of grant agreements with the FAA.<sup>290</sup>

Finally, exercises of proprietary power, perhaps in violation of FAA grant agreements, may have serious repercussions for wayward proprietors. For instance, in *San Francisco v. Engen*,<sup>291</sup> the San Francisco Airport Commission denied an air freight line permission to fly Boeing 707s into its airport.<sup>292</sup> The airline then filed a complaint with the FAA challenging the local noise regulation.<sup>293</sup> The FAA staff proposed to suspend current and deny future (post 1985) grants to San Francisco.<sup>294</sup> San Francisco challenged the first part of the proposal before any final FAA action, but this challenge was dismissed for lack of jurisdiction pending a final administrative determination.<sup>295</sup> San Francisco's challenge to the second portion of the FAA proposal was also found wanting as any such decision would be within the discretion of FAA administrators under the Federal Aviation Act, and any such decision was not reviewable under the asserted grounds for judicial review.<sup>296</sup>

### C. Summary of the Case Law

Proprietors do not have unlimited power to regulate aircraft noise and airport access.<sup>297</sup> While the precise bounds of proprietary power are unsettled,<sup>298</sup> regulations must be "fair, reasonable and nondiscriminatory,"<sup>299</sup> and must be intended to serve the legitimate public interest of reducing noise at the airport and its environs.<sup>300</sup> Regulations which fail to meet these standards,<sup>301</sup> or which are

288. *Id.* The burden results from the interference with and prevention of the efficient use of the navigable airspace in the New York metropolitan area because of the peak travel time bunching of flights due to the curfews. *Id.*

289. *Id.* at 797-98.

290. *Id.* at 798. The curfew violated the county grant assurances to the FAA that it would "make the Airport available for public use on fair and reasonable terms, without unjust discrimination." *Id.*

291. 819 F.2d 873 (9th Cir. 1987).

292. *Id.* at 874.

293. *Id.*

294. *Id.*

295. *Id.* at 875.

296. *Id.*

297. See *supra* notes 279-96 and accompanying text.

298. See Blackman & Freeman, *supra* note 19, at 389-96; Ellett, *supra* note 13, at 5-8; Ellett, *supra* note 41, at 19.

299. See *supra* notes 235-37, 257 and accompanying text.

300. See *supra* note 246 and accompanying text.

301. See *supra* notes 279-96 and accompanying text; see also *New York Airlines v.*

found to be in conflict with or preempted by federal law,<sup>302</sup> or which impose an undue burden on interstate commerce,<sup>303</sup> will not withstand judicial scrutiny.<sup>304</sup>

## V. LOCAL REGULATION: THE CASE OF LONG ISLAND MACARTHUR AIRPORT

As the litigation profile illustrates, while aircraft noise at and around airports is a critical problem of national scope and concern, the impact of this noise is highly localized.<sup>305</sup> Moreover, it is the public outcry regarding this impact and responsive political actions that are at the heart of the airport access controversy.<sup>306</sup> Thus, to put the law as surveyed and the ongoing debate in perspective, a more detailed analysis of a representative airport is warranted. To the extent that such a case study provides a better understanding of the proliferation of access and noise regulations, it may also yield insights into what may be effective future policies.

For the purposes of this Note, Long Island MacArthur Airport was chosen for closer analysis. Long Island MacArthur is facing increased pressure to expand,<sup>307</sup> heightened by the capacity problems

Dukes County, 623 F. Supp. 1435 (D. Mass. 1985) (holding that proprietor could not deny access for economic reasons, such as fear of competition or because added service was regarded as unnecessary).

302. See *supra* notes 249-54 and accompanying text (analyzing case finding proprietor regulation did not conflict with federal law but supplemented it).

303. See *supra* note 302 and accompanying text.

304. For an excellent analysis of the extent of proprietor power addressing the commerce clause, police power and scope of judicial deference to regulations, see Blackman & Freeman, *supra* note 19.

305. See *supra* notes 32-44 and accompanying text.

306. *Id.*

307. See, e.g., *Koppelman Hopeful on Air/Rail Terminal*, Long Island Business News, Dec. 14, 1987, at 22 (discussing planned multi-modal transportation hub at the airport); *LIMBA Renews Push For MacArthur*, Long Island Business News, Jan. 28, 1987, at 21 (detailing Long Island MidSuffolk Business Action group's latest campaign lobbying for expanded facilities and service). Long Island's only daily newspaper, Newsday, has run numerous editorials advocating expansion of MacArthur. See, e.g., *Struggling to Keep an Airport From Growing*, Newsday, June 3, 1986, at 70; *An Airport Dilemma: To Grow or Not to Grow*, Newsday, Feb. 12, 1985, at 42; *Living With Growth at LI MacArthur Airport*, Newsday, Aug. 22, 1984, at 54; *Don't Stifle Expansion at LI MacArthur Airport*, Newsday, Mar. 5, 1984, at 40; *Speed Up the Expansion of LI MacArthur Airport*, Newsday, Nov. 22, 1983, at 40; *Don't Wait to Expand LI-MacArthur Airport*, Newsday, Oct. 19, 1983, at 56; *Planning Transportation for the Island's Future*, Newsday, May 4, 1983, at 60; *Breaking the Cycle at LI MacArthur*, Newsday, Mar. 31, 1981, at 46; *Why MacArthur Airport Needs More Flights*, Newsday, Sept. 5, 1978, at 44. These editorials are consistent with a regional objective set forth by Newsday in its *For Long Island's Future: "Here's What We Can Do"*, Newsday, Mar. 1978, at 61 (Long Island at the Crossroads Reprint) (calling for "Expand[ed] ser-

at the major New York airports.<sup>308</sup> More importantly, Long Island MacArthur is representative of the growing number of suburban airports around the country which are actively engaged in the access controversy.<sup>309</sup>

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vance at Islip-MacArthur Airport to the point where it becomes the primary Long Island airport.”).

308. See LONG ISLAND REGIONAL PLANNING BOARD, *supra* note 65, at 2 (predicting increased congestion at Kennedy and LaGuardia airports will fuel the growth of MacArthur); *How Can We Get More Airport Capacity?* *Newsday*, May 14, 1987, at 94 (editorial addressing problem of limited airport capacity in the New York area and the resistance to expanding access to or capacity at outlying airports including MacArthur); interview with Benito Bartolomei, C.E. (and former Deputy Director Airports Division), FAA Eastern Region, at Long Island MacArthur Airport (Jan. 25, 1988) [hereinafter Bartolomei interview] (noting critical role of MacArthur as a regional airport serving the air travel needs of Long Islanders who would otherwise have to use over-capacity airports like LaGuardia). See generally Schmitt, *Vast Growth Set for New York Airports*, *N.Y. Times*, Feb. 2, 1987, at A1, col. 3 (discussing the New York metropolitan area’s three major airports: Kennedy, LaGuardia, and Newark).

309. See Morse, *Don’t Localize Access*, *COMMUTER AIR*, Jan. 1985, at 2 (identifying MacArthur as a key suburban airport which has responded to increased noise by limiting access); Schmitt, *At Airport in Suffolk, Growth Brings Protests*, *N.Y. Times*, June 23, 1987, at B4, col. 1 (describing the situation at MacArthur as “a familiar suburban struggle” and comparing it to Republic Airport in East Farmingdale, New York and Westchester County Airport, New York); Incantalupo, *Noisy Airports, Familiar Gripes*, *Newsday*, Feb. 3, 1985, at 76 (stating the most controversial growing airports, including MacArthur, are found in the New York and Los Angeles areas. The growth of these airports is, at least in part, due to the overcrowding at the major metropolitan airports in those areas); McQuiston, *Airports’ Expansion Raises Basic Issues*, *N.Y. Times*, Apr. 29, 1984, § 11, at 1, col. 1 (discussing MacArthur and Republic airports); Lindsey, *Service to L.I. by Major Airline, To Start April 26, Stirs Dispute*, *N.Y. Times*, Apr. 18, 1971, at BQ83, 106, col. 1 (stating “The controversy that has surrounded MacArthur’s entry into the jet age has, in many ways, been a microcosm of a growing national reappraisal of public values concerning airports.”); Bartolomei interview, *supra* note 308 (explaining pattern of localities seeking FAA support to expand airports until noise issue becomes a political liability at which time growth at airports like MacArthur, Westchester County, New York and John Wayne, Orange County California, was thwarted by the same localities); interview with Lee Koppelman, Executive Director, Long Island Regional Planning Board & Suffolk County Department of Planning, in Hauppauge, New York (Jan. 20, 1988) [hereinafter Koppelman interview] (discussing evolution of Long Island MacArthur Airport from a primarily general aviation field to a commercial airport and how this pattern of development coupled with municipalities allowing incompatible residential areas to expand around airports has been repeated at many airports around the country). Town of Islip actions at MacArthur have also drawn national attention from the airline industry. See ATA Proposal, *supra* note 21, at 43,022 (noting concern over town efforts to restrict access); J. Murphy interview, *supra* note 1 (discussing ATA concerns with noise-based access regulations at growing suburban airports including MacArthur).

One columnist has argued that the controversy at MacArthur is representative of other more basic struggles between citizens and their governments. That is, the plight of those impacted by noise around MacArthur is akin to those minorities seeking to be heard by the unresponsive majority. Sexton, *Living With Airport Noise In Islip Is No Tea Party*, *Newsday*, Apr. 22, 1984, Ideas at 1. If Sexton is correct in this assessment, the insights gained from studying MacArthur and the aircraft noise/airport access problem go well beyond the ken of

Long Island MacArthur Airport is a suburban facility<sup>310</sup> owned and operated by the town of Islip, New York.<sup>311</sup> Located near the geographic center of Long Island, approximately fifty miles east of Manhattan, MacArthur was built by the federal government in 1942.<sup>312</sup> MacArthur was turned over to the town in 1945 and the town leased out the facility until it assumed control of airport operations in 1952.<sup>313</sup> In 1956, the town began efforts to attract commercial air service to MacArthur.<sup>314</sup>

airports.

310. See LONG ISLAND REGIONAL PLANNING BOARD, *supra* note 65, at 1; Schmitt, *supra* note 309, at B1, col. 2; Incantalupo, *supra* note 309. See also interviews with C. Lee Rosche, Deputy Commissioner, Town of Islip Department of Aviation & Transportation, and Assistant Airport Manager, Long Island MacArthur Airport, (Jan. 25, 1988 & Feb. 11, 1987) [hereinafter Rosche interviews] [data provided at that time hereinafter Long Island MacArthur Airport data base] (on file at Hofstra Law Review). The dramatic growth at MacArthur is illustrated by the number of passengers traveling through it. For example, after reaching a ten-year low in passengers in 1981 (164,336) the number of passengers grew to an unprecedented level in 1987 (1,196,278). Long Island MacArthur Airport data base, *supra*. This is particularly notable due to the absence of, now bankrupt, Northeastern Airlines, which had enplaned nearly 53% of all passengers at the airport in 1983 and 1984. *Id.* Consider, as an indication of the growth of MacArthur, the following passage from a 1976 Newsday article on MacArthur:

One afternoon last week, as the holiday season drew to a close and thousands of harried travelers crowded into airline terminals across the country, four passengers at Islip MacArthur Airport in Bohemia waited leisurely for a flight to Washington, D.C. Around them, the large oval-shaped terminal building was nearly empty and footsteps echoed off the maroon terrazzo floor . . . .

Fresco, *Where the Flying is Easy*, Newsday, Jan. 9, 1976, at 4A. Conversely, in 1988, the parking area, though no longer free, is overflowing and the terminal building is often crammed full of people at peak hours. Fagin, *Conquering Space Problem at Airport*, Newsday, Feb. 16, 1988, at 21 (stating: "The narrow cramped waiting room for passengers flying out of Long Island MacArthur Airport sometimes resembles a crowded subway car, with empty seats as scarce as standby tickets to Florida in February."); see also Fagin, *LI Airport: Good News, Bad News*, Newsday, Nov. 24, 1987, at 23 (discussing overcrowded parking situation as "nightmarish"); *infra* notes 319-25 and accompanying text (discussing growth at MacArthur further).

311. LONG ISLAND REGIONAL PLANNING BOARD, *supra* note 65, at 3.

312. *Significant dates in LI MacArthur Airport history*, LI DAILY REV., Oct. 15, 1969, § 2, at 10. Built on town owned land, the airport was originally designated a defense landing area. *Id.*

313. *Id.*

314. *Id.* The town first petitioned the CAB for scheduled airline service in 1956. *Id.* Subsequent town actions to stimulate growth included additional requests for service made to the CAB. *Id.* See also Remarks by Alfred T. McDonough, Program Manager for Heliports, FAA Eastern Region, before Long Island Mid-Suffolk Business Ass'n in Ronkonkoma, New York (Feb. 26, 1988) (stating that until recently "the town of Islip was probably the most aviation supportive government in the region."). This general policy of promoting the airport was carried on by succeeding town administrations through the early 1980s. See *infra* note 318 and accompanying text.



Upon the advent of commercial air and jet service in the 1960s, the residents of the then less populated neighboring communities made noise and safety concerns major issues.<sup>315</sup> These issues faded after a few years, as commercial airline activity declined.<sup>316</sup> Unfortunately, no major corrective planning action was taken to mitigate future noise problems at MacArthur.<sup>317</sup> This shortcoming of local land-use policy is especially ironic given the town of Islip's continued efforts to attract air service to MacArthur in the 1970s and early 1980s.<sup>318</sup>

315. See, e.g., Lindsey, *supra* note 309 (reporting on noise and environmental problems raised by citizen groups); Carrega, *Proposal would limit expansion*, Suffolk Sun, Sept. 22, 1969, at 1A (discussing residents' safety concerns and opposition to expansion); *Jet Plans Stir Protest and Planning*, Newsday, Sept. 22, 1969, at 4 (detailing opposition to scheduled jet service); *Residents Continue Protest of MacArthur Expansion Plan*, Suffolk County News, Sept. 18, 1969, at 1, col. 4 (noting citizens' fears of increased activity at the airport and the possibility of MacArthur becoming the New York metropolitan area's fourth major jetport). MacArthur is surrounded by a number of residential areas. Among the most severely noise-impacted are the town of Islip hamlets of Bohemia and Holbrook. While these communities pre-date the airport, they were lightly settled until the 1960s. Here, population figures are illustrative. For instance, Holbrook had a population of 1,273 in 1960, 8,104 by 1970 and 19,414 inhabitants in 1980. Bohemia's population increased from 2,860 in 1960 to 8,935 a decade later and then to 11,146 in 1980. 7H TOWN OF ISLIP DEPARTMENT OF PLANNING & DEVELOPMENT, COMPREHENSIVE PLAN COMMUNITY IDENTITY (Holbrook-Bohemia) 9, 11, 67-69 (1981) (discussing history and demographics of these communities). Other noise impacted communities include Lakeland and Ronkonkoma in the town of Islip and Ronkonkoma and Holtsville in the town of Brookhaven.

316. See Long Island MacArthur Airport data base, *supra* note 310 (showing the stagnation and decline of commercial air service in the 1970s).

317. See *A Belated Building Ban at MacArthur Airport*, Newsday, July 31, 1984, at 48 (editorial discussing land use restrictions around the airport and how they "would have been more appropriate and useful 20 years ago."); interview with Eugene J. Murphy, Principal Planner, Town of Islip Department of Planning & Development, at Islip Town Hall, Islip, New York (Jan. 25, 1988) [hereinafter E. Murphy interview] (explaining that town lacked a planning department in the 1950s and 1960s and that although there were major town sponsored rezonings during that period, attention was focused on the more developed bay communities); Koppelman interview, *supra* note 309 (discussing town's laxness in planning for growth in some off-site areas); see also Lindsey, *supra* note 309, at BQ83, col. 1 (quoting community leader calling for town planning and zoning efforts to address the problem of future incompatible development). *But cf.* Letter from Martin Gach, Noise Abatement Officer, FAA, Eastern Region, to Martin J. Gesualdi, Jr., Chairman, Environmental & Community Relations, Long Island MacArthur Airport (July 23, 1970) (on file at Hofstra Law Review) (noting but one or two noise complaints from the MacArthur area and concluding: "From an environmental point of view it would appear that present efforts in the structuring of the land use around MacArthur Airport to this date [have] been successful from a noise abatement standpoint.").

318. See *MacArthur To Build First Cargo Terminal*, Long Island Business News, Sept. 28, 1987, at 3 (terminal built to accommodate and attract freight service); *Incantalupo, LI Airport Touted to Travel Agents*, Newsday, Mar. 26, 1981, at 43 (cooperative program initiated by businesses and governments, including the town, to push attractiveness of airport); Moreno, *Radio Ad Campaign Prepared To Boost MacArthur Airport*, Newsday, Feb. 10, 1981, at 27

Since 1981, MacArthur Airport has experienced a dramatic increase in commercial activity.<sup>319</sup> MacArthur's growth, like that of similarly situated suburban airports,<sup>320</sup> has led to increased aircraft noise.<sup>321</sup> The noise problem has distressed nearby residents<sup>322</sup> and

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(town co-sponsored program to encourage airport use noting amenities like free parking, itself a town policy); Morris, *State Told of LI's Need for More Air Service*, Newsday, Sept. 8, 1978, at 25 (quoting then Islip Supervisor Cohalan on need to add new air routes); Davidson, *Islip Official Backs Atlanta Flights*, Newsday, Dec. 7, 1977, at 37 (reporting Supervisor Cohalan's efforts to gain flights); Kangeiser, *Industrial growth is just beginning . . .*, LI DAILY REV., Oct. 15, 1969, § 2, at 6 (article by then Islip Supervisor Kangeiser stating town's intent to expand the airport). Note, however, that town airport policy has changed in recent years. See *infra* notes 326-66 and accompanying text.

319. Long Island MacArthur Airport data base, *supra* note 310. From 1981 to 1987 the number of commercial airlines serving MacArthur increased from 4 to 12, while the number of passengers has risen from 164,336 to 1,196,278. *Id.*; Koppelman interview, *supra* note 309; Rosche interviews, *supra* note 310; see also *supra* note 310 (regarding growth of MacArthur). The economic importance of MacArthur Airport is notable. One study has estimated the direct and spinoff economic benefits of the airport at \$2 billion annually. LONG ISLAND REGIONAL PLANNING BOARD, *supra* note 65, at 46. Tenants and operators situated on airport property have been found to generate gross operating budgets of over \$90 million annually. LONG ISLAND MACARTHUR AIRPORT, AIRPORT MANAGER'S OFFICE, LONG ISLAND MACARTHUR AIRPORT 1984 ECONOMIC SURVEY (1984). These figures, however, have been disputed by community groups that have consistently pointed to other causes of this economic activity including the natural eastward progression of development on Long Island and town of Islip industrial property tax abatements. See, e.g., interview with representatives of the Bohemia Civic Association (Jan. 13, 1988) [hereinafter Bohemia Civic Association interview].

320. See *supra* notes 309-10 and accompanying text (also discussing growth at MacArthur and representative suburban airports).

321. See Long Island MacArthur Airport data base, *supra* note 310; Morse, *supra* note 309, at 2; Bohemia Civic Ass'n interview, *supra* note 319. From 1982 to 1984 noise increased one hundred percent at MacArthur. Ketcham, *Airlines and Residents Causing Turbulence for MacArthur Airport*, N.Y. Times, June 16, 1985, § 11, at 1, col. 3 (quoting Airport Manager Alfred E. Werner).

Another indication of the increased noise at MacArthur is the town of Islip's establishment of a noise complaint hotline. Letter from Michael A. LoGrande, Supervisor, Town of Islip, to Residents, at 3 (Aug. 31, 1984) (on file at Hofstra Law Review). Over a thousand noise complaints were recorded during the first year of the hotline's existence. Long Island MacArthur Airport data base, *supra* note 310. During the summer of 1987 however, there was a drop in the number of complaints recorded. Bohemia Civic Association, Newsletter, Oct. 5, 1987, at 1 (on file at Hofstra Law Review). The total number of noise complaints for 1987 was also down to 304. Long Island MacArthur Airport data base, *supra* note 310. These developments are interesting for two reasons. First, aircraft noise is generally most bothersome in the summer when people are often outdoors and homes have windows open. Second, this decline may indicate either the effectiveness of noise abatement efforts at MacArthur or a feeling of inefficacy on the part of residents.

Interestingly enough, the town of Islip has also stepped up the frequency of its own "noise" regarding noise at MacArthur. That is, town public relations efforts for the airport have undergone a change. In the late 1970s and early 1980s, the town's public relations posture was that "Islip's aviation minded town government has centered its development resources and planning on the continued growth of Islip MacArthur Airport." Long Island MacArthur Airport data base, *supra* note 310 (taken from a late 1970s town advertisement). From early

has fostered considerable debate over the causes and consequences of MacArthur's growth. The town of Islip has continually asserted that airline deregulation has been the primary cause of growth and that deregulation has stripped the town of control over the airport.<sup>323</sup>

1984 to mid-1985 the town issued twenty-three press releases on the airport and its activities to control airport growth. Interview with Warren Greene, Public Information Officer, Town of Islip Office of Public Information, at Islip Town Hall (May 3, 1985); *see also* Long Island MacArthur Airport data base, *supra* note 310. A consistent theme of the town's releases on the airport has been the town's conflict with the federal government and the role airline deregulation has played in undermining the authority of airport proprietors. One such statement asserted that: "the Town of Islip is engaged in a dispute with the Federal government over the Town's fundamental right to control activities at an airport which we own and operate." Letter from Michael A. LoGrande, Supervisor, Town of Islip, to Residents, at 1 (Aug. 31, 1984) (on file at Hofstra Law Review) (discussing town actions regarding airport noise). This view of deregulation as a factor in exacerbating airport noise problems underscores the importance of looking at the airport access controversy in light of all federal aviation law, not merely noise legislation and regulation. Moreover, if economics is at work in fostering airport noise problems, economic approaches, aimed at reducing noise, warrant further consideration. *See infra* notes 325, 461, 478 and accompanying text.

322. *See* Bohemia Civic Association interview, *supra* note 319 (discussing noise, safety, quality of life and property value concerns relating to the airport); *Schmitt*, *supra* note 309, at B1, col. 2 (reporting on the continued vigilance of some residents who view the situation as involving the "most pressing problems in suburbia" and the quality of life); Ketcham, *supra* note 321, § 11, at 1, col. 5 (noting residents political involvement with the issue). *See also* Mintz, *U.S. Study On Airport Noise Irks Bohemia*, *Newsday*, Dec. 19, 1985, at 25; Letter from Edward Kalbaugh, Chairman, CAPMAC, Holbrook, to the Editor, *Newsday*, Feb. 27, 1985, at 53. Shaman, *MacArthur's Growth Angers Neighbors*, *N.Y. Times*, Aug. 19, 1984, § 8, at 10, col. 1; Smith, *LoGrande Lends an Ear*, *Newsday*, May 9, 1984, at 23; McQuiston, *Airports' Expansion Raises Basic Issues*, *N.Y. Times*, Apr. 29, 1984, § 11, at 1, 11, col. 1; Sexton, *Living With Airport Noise In Islip Is No Tea Party*, *Newsday*, Apr. 22, 1984, Ideas at 8; Letter from Sasha J. Harding, President, South Holbrook Development Civic Association, to the Editor, *Newsday*, Apr. 19, 1984, at 79; Incantalupo, *MacArthur Airport Neighbors Sound Off*, *Newsday*, Apr. 13, 1984, at 6; Kern, *MacArthur Neighbors Can't Rest Easy With Fly-by-Night Field*, *Newsday*, Mar. 29, 1984, at 80 (As I See It column by Vice President of Bohemians for Responsive Airport Development); Incantalupo, *Airport wary about new popularity*, *Newsday*, Mar. 12, 1984, Part III, at 3; Morgo, *Airport Expansion: What the Neighbors Think*, *N.Y. Times*, Feb. 26, 1984, § 21, at 14, col. 1 ("Long Island Opinion" column by Suffolk County Legislator Morgo); Freedman, *Boom On at MacArthur Airport*, *Newsday*, Oct. 16, 1983, at 7; Smith, *Residents Near MacArthur Say Noise Is Up at Airport*, *Newsday*, Oct. 7, 1982, at 31. *Cf.* Hogeboom, *The MacArthur Airport Debate: It's a Boon to Many, but. . .*, *N.Y. Times*, Apr. 15, 1984, § 11, at 24, col. 1 ("Long Island Opinion" column by resident of nearby community of Oakdale, stressing the economic and transportation advantages of the growth of the airport, especially if growth is controlled to accommodate troubled residents' concerns).

323. *See* Letter from Michael A. LoGrande, Supervisor, Town of Islip, to Residents (Aug. 31, 1984) (on file at Hofstra Law Review) (explaining deregulation and how it has restricted town authority to control growth). A number of town press releases have brought this theme home, including the following town of Islip Department of Public Information News Releases: *Restrictions On Overnight Flights At MacArthur Formally Set By Islip* (May 4, 1985) (stating "The Supervisor once again pointed to the 1978 Federal Deregulation Act as the prime factor for many of the problems currently being experienced at MacArthur . . . In

Community groups have argued that the town's historically pro-development policies are responsible for the upswing in activity at the airport.<sup>324</sup> While both theories offer partial explanations for the airport's growth, the overriding force has been the size and affluence of the Long Island market the airport serves.<sup>325</sup>

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effect, it is the airline industry that is running municipal airports.”); *LoGrande Stops Airport Runway Expansion* (Aug. 24, 1984) (calling deregulation a “catalyst in unwelcome airport expansion throughout the country”); *Islip Tightens Grip At Airport* (June 8, 1984) (noting town's attempt to “wrest control of their airport from the airline industry”); *LoGrande Says “No” To American At MacArthur* (Feb. 2, 1984) (noting airline freedom to enter and exit markets under deregulation). Long Island MacArthur Airport data base, *supra* note 310. For additional support for the town's position, see LONG ISLAND REGIONAL PLANNING BOARD, *supra* note 65, at 2; *Struggling to Keep an Airport From Growing*, *Newsday*, June 3, 1986, at 70 (editorial stating deregulation “brought commercial success” to MacArthur); McQuiston, *Islip Moves To Curb Growth Of Airport*, *N.Y. Times*, July 1, 1984, § 21, at 1, col. 1; Incantalupo, *Airport wary about new popularity*, *Newsday*, Mar. 12, 1984, Pt. III, at 3 (noting deregulation made it easy for new entrants into the airline industry and also allowed for market and fare flexibility). Ironically, the town once feared deregulation would curtail service to the airport (which it did for a few years). See Cook, *Islip Airport Afraid of Deregulation*, *Newsday*, Feb. 26, 1976, at 39. But see Kahn, *House OKs Airline Deregulation Bill*, *Newsday*, Sept. 22, 1978, at 41 (reporting that CAB official believed deregulation would stimulate regional airports like MacArthur). See also *supra* notes 88-103 and accompanying text (discussing deregulation).

324. Bohemia Civic Association interview, *supra* note 319 (statement of Ms. Gwozdo) (noting town efforts to advance the airport with planning initiatives primarily aimed at the commercial end of airport policy and also mentioning the role of deregulation); telephone interview with Edward Kalbaugh, President, Community Action Project MacArthur Airport Coalition (May 4, 1985) (calling town pricing of airport space and services “sinfully low”). Town established landing fees, for instance, though constant in nominal dollars for most of the 1980s, declined in real dollars. Long Island MacArthur Airport data base, *supra* note 310. Various pro-development policies are discussed, *supra* note 318. It is not unusual for airport proprietors to seek to expand their facilities, to a point. Bartolomei interview, *supra* note 308; see also R. CAVES, *supra* note 78, at 108 (decribng seemingly uniform practice of pricing airport services at or near cost to attract airlines). Thus, such pro-development policies are not unique to town of Islip policies at Long Island MacArthur Airport.

325. This is the conclusion reached in an empirical study of MacArthur and other airports. J. Gesualdi, *An Evaluation of Airline Deregulation and the Growth of Long Island MacArthur Airport* (May 1985) (unpublished manuscript on file at Hofstra Law Review). This study reports that while deregulation and town policies contributed to airport growth it is the Long Island market that was the primary factor behind the growth. When compared with the other airports in the same FAA classification as MacArthur (based on physical features and capacity and number of passengers) at the time of deregulation (1978), MacArthur's post-deregulation growth is an anomaly. The same result occurs when the airports in MacArthur's post-deregulation (1985) classification are compared. The universal application of deregulation to all airports and the similarities between policies at different airports thus points to the uniqueness of the Long Island market. *Id.* If this is true of other growing suburban airports, a market based approach to the problem might prove effective. Unless, however, such an approach would reduce or control noise as well as it might raise revenue, noise-impacted residents may not be impressed or responsive. Bohemia Civic Association interview, *supra* note 319 (statement of Mr. Wilhemy) (“can [try a market based approach] but planes are still

The town of Islip responded to the airport's growth by changing its policies at MacArthur. Specifically, the town has adopted access regulations<sup>326</sup> and taken other measures<sup>327</sup> that have heightened tensions among the town, air carriers, and the FAA.<sup>328</sup>

One of Islip's regulations, limits the night operation of aircraft based on noise standards,<sup>329</sup> provides for a fine for its violation,<sup>330</sup>

going to fly over my head, over my house . . . someone will be willing to pay the price regardless if they want it"). To many residents, limiting airport access is the only effective measure. *Id.* (voicing group sentiments).

326. See TOWN OF ISLIP CODE ch. 3B (1984) (night operations regulation), ch. 3D (1986) (noise allocation plan); see also *infra* notes 329-48 and accompanying text (discussing regulations and their effectiveness).

327. The town of Islip is preparing a Part 150 study for MacArthur Airport which will define the scope of future access and noise regulation at MacArthur. Rosche interviews, *supra* note 310 (regarding grant conditions); see also 14 C.F.R. § 150 (1987) (as discussed *supra* notes 162-72 and accompanying text). The town is revising its Master Plan for the airport. Rosche interviews, *supra* note 310. The town's suspension of a federally funded runway extension project led the FAA to withdraw about two and a half million dollars in grant money. Charles, *FAA Yanks \$2.6 M in MacArthur Airport Funding*, *Newsday*, Feb. 19, 1987, at 27. Additional town actions include: enacting a moratorium on residential development around the airport, establishing a noise complaint hotline, halting improvements to the terminal building and parking area, Letter from Michael A. LoGrande, Supervisor, Town of Islip, to Residents at 2-3 (Aug. 31, 1984) (on file at Hofstra Law Review), and imposing soundproofing requirements on new residential construction around the airport. E. Murphy interview, *supra* note 317. The town also initiated parking fees for non-residents using the airport. Long Island MacArthur Airport data base, *supra* note 310. In 1987, these fees generated approximately one million dollars in revenue. Negron, *No Tax Increase in Islip Budget Plan*, *Newsday*, Sept. 30, 1987, at 29. Additionally, the town has raised landing rights fees at the airport. Negron, *MacArthur Fee Hike*, *Newsday*, Feb. 24, 1988, at 26.

328. See Bartolomei interview, *supra* note 308 (discussing FAA's frustration with changes in town policy at MacArthur, in direct violation of the town's prior grant assurances to the FAA); Domash, *U.S. and Islip Battle on Airport*, *N.Y. Times*, June 15, 1986, § 21, at 9, col. 1 (describing divergent views of town and FAA on growth at MacArthur); Shaman, *supra* note 322, § 8, at 10, col. 1 (noting that the FAA challenged night operations regulation barring large jets between eleven p.m. and six-thirty a.m. The town continued this "curfew" by closing its airport rescue operation at eleven p.m., effectively preventing airliners from landing after that hour, given FAA requirements that rescue operations be available for air carrier aircraft to land); Charles, *supra* note 327, at 27 (noting that the FAA withdrew funds due to town delay in completing controversial runway extension). The town has subsequently acted to completely abandon the runway extension and restore the runway to its pre-existing condition. *Town Board action okays runway lights*, *Suffolk Life*, Dec. 16, 1987, at 18C (quoting Supervisor Jones, the "runway extension is dead"); Fagin, *Cost of Runway Lights Plan Doubled*, *Newsday*, Dec. 4, 1987, at 33. See also Ketcham, *supra* note 321 (describing airline criticism of town noise regulations); *Piloting Airline Full Throttle*, *Newsday*, Nov. 11, 1984, at 88 (quoting Northeastern International Airways President Stephen Quinto as criticizing town's parochial interest in light of regional needs MacArthur serves and deregulation); Smith, *Northeastern says it will fly in face of Islip airline limits*, *Suffolk County News*, Nov. 8, 1984, at 1 (regarding confrontation between town and air carriers); *infra* notes 350-61 and accompanying text (describing air carrier litigation against the town).

329. TOWN OF ISLIP CODE ch. 3B (1984). Specifically, the ordinance bans takeoffs of

and is similar to the night curfew upheld in some Ninth Circuit cases, but rejected in similar Second Circuit decisions.<sup>331</sup> The ordinance also gives the Airport Manager discretion to waive these restrictions under extreme conditions on a case-by-case basis, as the town recognizes "that the airport is an integral part of the National Air Transportation System."<sup>332</sup> Although Islip is MacArthur's proprietor, the ordinance is drafted in classic police power language.<sup>333</sup>

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aircraft producing 72dBA and landings generating 85dBA between eleven p.m. and six a.m. The ordinance also makes it a violation to maneuver around FAR Part 36 measuring points. *Id.* at § 3b-2. Note that dBA stands for A-weighted decibels. For a technical discussion, see FAA, AVIATION NOISE EFFECTS, *supra* note 32, at 9-11.

330. TOWN OF ISLIP CODE § 3B (1984). The first summons for a violation of this regulation was issued on September 17, 1984. *Night Flight Leads To L.I. Summons*, N.Y. Times, Sept. 18, 1984, § 2, at 2, col. 6. Residents have criticised enforcement of the ordinance. Bohemia Civic Association interview, *supra* note 319 (statement of Ms. Ekstam).

331. Compare Santa Monica Airport Ass'n v. City of Santa Monica, 481 F. Supp. 927, 938-39 (C.D. Cal. 1979), *aff'd.*, 659 F.2d 100 (9th Cir. 1981) (upholding night curfew, but at airport not capable of accommodating commercial airlines); National Aviation v. City of Hayward, 418 F. Supp. 417 (N.D. Cal. 1976) (upholding night operation ban on aircraft producing noise greater than 75dB) with United States v. New York, 552 F. Supp. 255 (N.D.N.Y. 1982), *aff'd.*, 708 F.2d 92 (2d Cir. 1983), *cert. denied*, 466 U.S. 936 (1984) (holding complete ban on aircraft operations at night invalid) and United States v. County of Westchester, 571 F. Supp. 786 (S.D.N.Y. 1983) (finding curfew invalid).

The following are among the leading cases holding nonproprietor enacted night access regulations invalid: Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973) (city imposed curfew on privately owned airport), discussed *supra* notes 191-202 and accompanying text; Pirollo v. City of Clearwater, 711 F.2d 1006 (11th Cir. 1983) (municipality that owned but leased out airport could not subsequently limit night operations), discussed *supra* notes 212-16 and accompanying text; San Diego Unified Port Dist. v. Gianturco, 651 F.2d 1306 (9th Cir. 1981) (state sought to impose more stringent curfew than that developed by the proprietor, itself a political subdivision of the state), discussed *supra* notes 203-11 and accompanying text.

332. TOWN OF ISLIP CODE § 3B-1 (1984). Specific situations within which the ordinance may be waived include: "extreme weather or operational conditions, which may cause flight arrival delays beyond the control of the airlines . . ." *Id.* (emphasis added). While the statute shows the town's recognition of the airport's role in the national system, the statute and other town access regulations undercut the efficient operation of that system. See Morse, *supra* note 309, at 2.

333. TOWN OF ISLIP CODE § 3B-1 (1984). The ordinance provides:

The Town Board of the Town of Islip hereby declares its intent to promote an environment free from unreasonably loud, disturbing and unnecessary noises since they are deemed to be detrimental to the life, health, welfare, safety and good order of the people of the Township of Islip. By its enactment, the Town Board intends to promote the health, safety, morale and general welfare of the people of the Town of Islip by seeking to reduce noise levels for nighttime operations of aircraft to and from MacArthur Airport, and, in the exercise of its police powers in this regard, the Town Board of the Town of Islip does hereby enact the following ordinance.

*Id.* (emphasis added). In addition to the explicit invocation of the police power, the promotion of the "health, safety, morale and general welfare" are considered classic justifications for the exercise of police power. See, e.g., Village of Euclid v. Amber Realty Co., 272 U.S. 365, 395

Contrary to case law and legislation which preempts the exercise of police power to regulate aircraft noise, the ordinance expressly states that it is enacted by the town "in the exercise of its police powers."<sup>334</sup>

A second regulation at MacArthur is the Noise Allocation Plan, which sets a cap on the daily cumulative noise level around the airport, but does not directly cap the number of flights or limit access.<sup>335</sup> As such, it would appear to be a judicially sustainable regulation particularly given prior Second Circuit decisions.<sup>336</sup> According to the plan, airlines are randomly awarded noise allocations or budg-

(1926); BLACK'S LAW DICTIONARY 1041 (5th ed. 1979) (defining police power).

334. TOWN OF ISLIP CODE § 3B-1 (1984). The quoted language in the text may render the ordinance facially defective. However, given that the town of Islip is also the proprietor of MacArthur Airport, the language may not be that critical if one looks through form to substance. See Blackman & Freeman, *supra* note 19, at 381-89 (discussing the necessity of proprietors' use of the police power to give their regulations effect beyond simple contract remedies against airport users); letter from Lawrence Donahue, Deputy Town Attorney, Town of Islip (Dec. 15, 1987) (on file at Hofstra Law Review) (arguing exercise of police power is connected to powers arising out of proprietary exception).

335. TOWN OF ISLIP CODE ch. 3D (1986). See Long Island MacArthur Airport data base, *supra* note 310 (setting forth the Long Island MacArthur Airport Interim Environmental Management Plan, which implements the Noise Allocation Plan of Chapter 3D). This ordinance was developed by the town in cooperation with the FAA. Rosche interviews *supra* note 310; Bartolomei interview, *supra* note 308; Defendant's Memorandum In Opposition To Motion For Preliminary Injunction at 1-3, *New York Airlines v. Town of Islip*, 85 Civ. 85-1723 (E.D.N.Y. 1985). See also Knack & Schwab, *supra* note 21, at 15 (discussing a similar regulation at John Wayne Airport). Cf. Bohemia Civic Association interview *supra* note 319 (statement of Ms. Ekstam):

A noise limit does not necessarily imply an access limit i.e. the number of flights using the airport. However, it can imply an access limit in regard to the type of aircraft using the airport. As in the case of MacArthur, the noise limit in no way limited the number of flights.

*Id.*

336. See *Global Int'l Airways Corp. v. Port Auth.*, 727 F.2d 246 (2d Cir. 1984) (upholding interim proprietor regulation requiring airlines to use a set percentage of quieter aircraft to limit cumulative noise exposure); *Arrow Air, Inc. v. Port Auth.*, 602 F. Supp. 314 (S.D.N.Y. 1985) (allowing as reasonable a proprietor ban of noisier aircraft despite a federal exemption from Part 36 requirements); *supra* notes 141-48 and accompanying text (discussing 1972 proposal by Senator Muskie calling for the establishment of "cumulative noise exposure levels" at and around airports). These regulations evidence political and judicial recognition of the reasonableness and probable lawfulness of the town of Islip's Noise Allocation Plan, especially on an interim basis. *But see Western Air Lines v. Port Auth.*, 817 F.2d 22 (2d Cir. 1987) (allowing multiple airport proprietor to limit access to one airport); *City of Houston v. FAA*, 679 F.2d 1184, 1194 (5th Cir. 1982) (citing case where single airport proprietor sought to impose perimeter rule prohibiting flights from beyond a certain distance, a regulation which does not necessarily limit overall access but was still invalidated). Though distinguishable, the MacArthur noise budget could conceivably prohibit access once the cumulative noise level is reached. In such an instance the regulation might be invalidated as an access prohibition enacted by a single airport proprietor.

ets until the cumulative noise level for all aircraft operations is reached.<sup>337</sup> Airlines may then schedule as many flights as their total noise allocation allows.<sup>338</sup> Thus, the more noise-efficient the aircraft used at MacArthur are, the more flights an airline can schedule.<sup>339</sup> Although also drafted in police power language,<sup>340</sup> the ordinance explicitly states the need to regulate access “on a fair, reasonable and nondiscriminatory basis,”<sup>341</sup> thus tracking the language of earlier regulations and cases.<sup>342</sup>

These two ordinances have had a significant effect. Noise has been reduced at the most sensitive nighttime and morning hours as has the overall noise impact.<sup>343</sup> This is primarily due to the marked increase in the number of Stage 3 operations at MacArthur. Whereas only twenty-three percent of air carrier operations involved quieter Stage 3 aircraft prior to adoption of the Noise Allocation

337. TOWN OF ISLIP CODE ch. 3D (1986).

338. *Id.*

339. *Id.*; Rosche interviews, *supra* note 310.

340. TOWN OF ISLIP CODE ch. 3D (1986). The ordinance seeks to “promote and protect the health, safety and welfare of the public.” *Id.* at § 3D-1. For a brief discussion of such language, see *supra* note 333. As the deputy town attorney has stated:

Any regulation enacted by the proprietor must be reasonably related to the health, safety and welfare of the Town’s residents. Thus, to us, it is entirely appropriate to refer in the Noise Allocation Plan Ordinance to health, safety and welfare. If our position is correct, then the failure to relate the regulation to such factors would render it facially defective.

Letter from Lawrence Donahue, Deputy Town Attorney, Town of Islip (Dec. 15, 1987) (on file at Hofstra Law Review); see also Blackman & Freeman, *supra* note 19, at 381-89 (discussing police power).

341. TOWN OF ISLIP CODE § 3D-1 (1986). The ordinance states:

The Town Board of the Town of Islip hereby declares its intent to promote and protect the health, safety and welfare of the public from excessive noise generated by commercial jet aircraft operating at Long Island MacArthur Airport. By its enactment, the Town Board recognizes the overdemand for and overutilization of existing airport facilities; the resulting detriment to the life, health, welfare, safety and good order of the people of the Township of Islip; the necessity of *conforming the access demands of the commercial air carriers*; and the necessity and desire to achieve such a balance between environmental protection and access demands on a fair, reasonable and nondiscriminatory basis to all commercial air carriers requesting use of the facilities.

*Id.* (emphasis added).

342. See, e.g., *British Airways Bd. v. Port Auth.*, 558 F.2d 75, 84 (2d Cir. 1977) (stating airport proprietor may “promulgate reasonable, nonarbitrary and non-discriminatory regulations that establish acceptable noise levels for the airport and its immediate environs”).

343. Most commentators agree with this evaluation. Rosche interviews, *supra* note 310; Bohemia Civic Association interview, *supra* note 319; Koppelman interview, *supra* note 309. In addition, the airport has continued to grow. Long Island MacArthur data base, *supra* note 310.



Plan, at present fifty-two percent of operations are of Stage 3 aircraft.<sup>344</sup> Other reasons for the noise reduction include the federally mandated termination of Stage 1 operations<sup>345</sup> and the demise of the deregulation era new entrant airline that reinvigorated MacArthur while operating noisy Stage 1 aircraft and consistently violating the previous curfew.<sup>346</sup>

Despite the effectiveness of these regulations, they are only interim in nature pending completion of the town's Part 150 study and FAA approval of the related Part 150 plan.<sup>347</sup> Legally, it would appear that the regulations are sustainable, to a point, as long as they remain interim in nature.<sup>348</sup> Beyond that, the legal status of the regulations is an open issue.<sup>349</sup>

While these two regulations have yet to be challenged in court, related town of Islip actions at MacArthur Airport have been litigated. For instance, in *New York Airlines v. Town of Islip*,<sup>350</sup> an airline challenged a temporary moratorium on new jet flights at MacArthur.<sup>351</sup> The moratorium was imposed following the enactment of two earlier access regulation plans sharply criticised by the FAA.<sup>352</sup> The suit was brought while the town of Islip was developing the Noise Allocation Plan.<sup>353</sup> The district court upheld the morato-

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344. Rosche interviews, *supra* note 310. *But see* FAA, FLEET MODERNIZATION, *supra* note 33, at 6, Table 1 (reporting that in 1985 Stage 3 aircraft made up 20.4% of the United States fleet).

345. Bartolomei interview, *supra* note 308; *see also* notes 120-30 and accompanying text (discussing Part 36 and the end of Stage 1 operations).

346. Bartolomei interview, *supra* note 308.

347. Rosche interviews, *supra* note 310; Bartolomei interview, *supra* note 308; Defendants' Memorandum in Opposition to Motion for Preliminary Injunction, at 10, *New York Airlines v. Town of Islip*, 85 Civ. 85-1723 (E.D.N.Y. 1985) (stating "It is understood by both Islip and the FAA that the noise plan being currently developed is only interim in nature pending completion of the detailed Part 150 noise study and the updated master plan."); *see also* notes 162-72 and accompanying text (discussing Part 150 program).

348. *See e.g.*, *New York Airlines v. Town of Islip*, 85 Civ. 85-1723 (E.D.N.Y. 1985) (upholding interim flight moratorium at MacArthur). The case is discussed more fully *infra* notes 350-54 and accompanying text. *But see* *British Airways Bd. v. Port Auth.*, 564 F.2d 1004 (2d Cir. 1977) (positing reasonableness test of proprietor regulations and noting that delay in studying and acting in such a manner may render a regulation unreasonable).

349. *See supra* notes 331, 336 and accompanying text (analyzing the regulations in light of some prior cases).

350. 85 Civ. 85-1723 (E.D.N.Y. June 4, 1985) (denying request for a preliminary injunction).

351. *Id.* at 2.

352. Defendants' Memorandum in Opposition to Motion for Preliminary Injunction at 7-9, *New York Airlines v. Town of Islip*, 85 Civ. 85-1723 (E.D.N.Y. 1985) (noting FAA criticism of plans based on terminal and landside capacity constraints).

353. *Id.*

rium as "a reasonable and nondiscriminatory interim measure."<sup>354</sup>

In *Town of Islip v. Eastern Air Lines*,<sup>355</sup> an oral agreement between the town and an air carrier serving MacArthur was found by the district court to be a valid means of limiting the carrier's flights.<sup>356</sup> The agreement, outside of the prior Noise Allocation Plan,<sup>357</sup> was entered into when the highest volume carrier at the airport filed for bankruptcy and relinquished its slots.<sup>358</sup> Despite contrary theories on the extent of the agreement,<sup>359</sup> the district court granted the town a permanent injunction based on the town's argument that the agreement was meant to preserve MacArthur's noise-based flight cap.<sup>360</sup> While the Second Circuit vacated the district court's contempt order against the airline for noncompliance with what it found to be an ambiguous order, the court affirmed the permanent injunction.<sup>361</sup>

Drawing upon the experience of MacArthur Airport, some conclusions regarding access regulations are readily apparent. For one, they are an effective means of controlling noise.<sup>362</sup> Moreover, the effectiveness of these regulations makes them politically attractive.<sup>363</sup> While regulations like the Noise Allocation Plan seem promising in that they do not directly restrict access, any local regulation still im-

354. *Id.* See *Midway Airlines v. County of Westchester*, 584 F. Supp. 436 (S.D.N.Y. 1984) (upholding airport's deferral of review of air carrier application for access while completing study on "rational and nondiscriminatory rules" needed to allocate access in a way that would serve local environmental and safety concerns). For other similar interim airport moratoriums or rules, see *Global Int'l Airways Corp. v. Port Auth.*, 727 F.2d 246 (2d Cir. 1984); *supra* notes 249-54 and accompanying text; *British Airways Bd. v. Port Auth.*, 558 F.2d 75 (2d Cir. 1977); *supra* notes 230-41 and accompanying text.

355. 793 F.2d 79 (2d Cir. 1986). The agreement required the air carrier to relinquish its flight slots upon the renewal of flight operations by the bankrupt air carrier that had previously held the slots. *Id.*

356. *Id.* at 80 (discussing the district court's issuance of oral and later unpublished written permanent injunction against air carrier).

357. *Id.* The prior plan was called the "Interim Environmental Management Plan." *Id.* at 82.

358. *Id.* at 80.

359. *Id.* at 80-85.

360. *Id.* at 85 (noting affirmance of district court's permanent injunction and vacation of contempt order).

361. *Id.* The result required the air carrier to request the slots through the noise allocation lottery process.

362. See *supra* notes 343-44 and accompanying text; Blackman & Freeman, *supra* note 19, at 376.

363. See Bartolomei interview, *supra* note 308; Koppelman interview, *supra* note 309 (noting that community leaders opposing town airport policies later sought town office); see also Ellett, *supra* note 13, at 2-5.

pacts the system, some more than others.<sup>364</sup> Still, such regulations are perhaps more equitable as they force aircraft operators to internalize the externalities of aircraft noise.<sup>365</sup> Finally, the case of Long Island MacArthur Airport underscores the uncertain bounds of authority with regard to airport access issues.<sup>366</sup>

## VI. PROPOSALS REGARDING THE AIRPORT ACCESS PROBLEM: 1982-87

The following section analyzes some of the possible approaches to the airport access problem, as proposed by various groups between 1982 and 1987. These proposals provide an essential foundation for understanding the present state of the access controversy and the potentials and problems of future directions in this area of the law.

### A. *Industry Task Force on Airport Capacity Improvement and Delay Reduction*

The Industry Task Force on Airport Capacity Improvement and Delay Reduction (Industry Task Force), comprised of representatives from all sectors of the aviation industry,<sup>367</sup> was formed in 1982 and reported its recommendations to the FAA later that same year.<sup>368</sup> With regard to noise, the Industry Task Force noted that despite past efforts to mitigate its effect, noise was "one of the most significant factor[s] negatively affecting the growth and development of airports and aviation required to satisfy capacity demands."<sup>369</sup> The group's limited recommendations<sup>370</sup> for alleviating noise stressed both the need for continued enforcement of existing federal regulations, including Part 36,<sup>371</sup> Part 91,<sup>372</sup> and the key role of planning

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364. See, e.g., Ellett, *supra* note 13, at 29; Ellett, *supra* note 41, at 19.

365. See Blackman & Freeman, *supra* note 19, at 399-400.

366. See Rosche interviews, *supra* note 310 (criticizing lack of consistent federal policy); Bartolomei interview, *supra* note 308 (arguing that town's actions at airport were in contravention of prior grant assurances); *supra* notes 331, 336 and accompanying text (analyzing legality of town regulations).

367. INDUSTRY TASK FORCE REPORT, *supra* note 13.

368. *Id.* The group consisted of "23 representatives of airports, airlines, airframe manufacturers, pilots, air traffic controllers, aircraft owners, and academia" and was assisted by FAA personnel. *Id.* (Letter of transmittal from J. Donald Reilly, Chairman, to Lynn Helms, FAA Administrator, September 29, 1982).

369. *Id.* at 18.

370. *Id.* The report stated, "This Task Force has not been able to develop a complete, unified noise position or plan of action which can be presented to the FAA." *Id.*

371. *Id.*; see also *supra* notes 120-30 and accompanying text (discussing Part 36).

372. INDUSTRY TASK FORCE REPORT, *supra* note 13, at 18; see also *supra* notes 124-25 and accompanying text (discussing Part 91, the Fleet Noise Rule).

efforts, particularly those under Part 150.<sup>373</sup>

The Industry Task Force's most notable recommendation called for federal preemption in the noise area and the concomitant assumption of financial liability for noise.<sup>374</sup> This proposal was particularly significant in light of the federal government's continued aversion to any action bordering on preemption which might render it liable for the consequences of aircraft and airport noise.<sup>375</sup> Given the existing burden of liability on proprietors and the adverse effects proprietary regulations can have on the airline industry, this recommendation is consistent with both groups' interests. The interests of noise-impacted communities may be compromised, however, at least in the short and intermediate terms, by such an enhanced federal role. That is, the political and other efforts exerted by those concerned with noise at an individual airport may prove unavailing when directed at the traditionally pro-aviation FAA. Conversely, federal control might prevent noise-impacted communities from wielding influence disproportionate to their noise problem. In either case, while federal control would shift costs and perhaps promote efficiency in the air transportation system, the proposal set forth by the Industry Task Force raises serious questions of equity.

### B. *Airport Access Task Force*

At the time the Industry Task Force was completing its work, Congress enacted the Airport and Airway Improvement Act of 1982<sup>376</sup> which required the Secretary of Transportation to appoint an Airport Access Task Force.<sup>377</sup> This group's mandate was to study and report on "the problems of allocating the use of airport facilities and airspace . . . among persons using or seeking to use such facilities."<sup>378</sup> Members appointed included federal and state government officials,<sup>379</sup> representatives of different types of air carriers,<sup>380</sup> finan-

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373. INDUSTRY TASK FORCE REPORT, *supra* note 13, at 18; *see also supra* notes 162-72 and accompanying text (discussing Part 150). The Industry Task Force's recommendations also called for "greater efficiency and cooperation in: (a) integration of municipal and airport planning . . . [and] (b) the establishment of efficient zoning laws . . ." INDUSTRY TASK FORCE REPORT, *supra* note 13, at 18.

374. *Id.*

375. *See* AIRPORT ACCESS TASK FORCE REPORT, *supra* note 20, at 36-37 (stating minority comments of the United States Department of Transportation).

376. Airport and Airway Improvement Act of 1982, 49 U.S.C. § 2223 (1982); *see also supra* notes 104-08 and accompanying text (discussing Act).

377. 49 U.S.C. § 2223(a) (Appendix 1982).

378. *Id.*

379. *Id.* § 2223(b). The Act provided that the Chairman of the CAB chair the Task

cial institutions with aviation interests, consumer groups, and airport owners and operators.<sup>381</sup> In 1983, the Airport Access Task Force reported to Congress on three distinct aspects of the access problem: noise and environmental constraints, terminal space and gates, and groundside congestion.<sup>382</sup>

The Airport Access Task Force's recommendations regarding noise were similar to, but more specific and far-reaching than those of the Industry Task Force.<sup>383</sup> For instance, the Airport Access Task Force proposed legislation that would provide for FAA review of local noise restrictions and federal liability for noise "to the extent [the] FAA mandates any change to local rules."<sup>384</sup> Under this suggested legislation the FAA would review proposed airport regulations to determine: (1) "whether meaningful noise abatement will result;"<sup>385</sup> and (2) if there is "an undue burden on interstate com-

Force. It also required that the Departments of Transportation and Justice be represented. *Id.*

380. *Id.* The different types of air carriers included were: trunks (major national airlines), regional, charter, commuter and all-cargo air carriers. General aviation interests were also represented. *Id.* Such diverse industry representation seemingly served two purposes—one practical, one political. Because distinct classes of air carriers use different types and sizes of aircraft and also conduct operations at different times (e.g. all-cargo or air freight carriers often run the bulk of their operations at night) their interests may not always coincide. See *FAA Hearings, supra* note 41, comments of the Air Freight Association, at 4. Rather, they may sometimes be in conflict. Moreover, widespread industry representation could well serve to enhance the prospects for reforms to be translated into reality once they make it back to the political arena.

381. 49 U.S.C. § 2223(b) (Appendix 1982). The Act specifically required that representative airports include those "owners and operators of airports . . . which do not restrict access, but which provide service to airports where access is currently restricted or is expected to be restricted in the future." *Id.* This provision insured a more balanced proprietor perspective on access issues. Combined with the lack of explicit recognition of noise-impacted communities, this requirement may have possibly undercut Task Force consideration of noise as a legitimate ground for constraining access and the importance of access restrictions in some cases. The comments of one Task Force member indicated the group may have underestimated the complexity of the noise problem and the continued need for access regulations. AIRPORT ACCESS TASK FORCE REPORT, *supra* note 13, at 38 (minority comments of Eric L. Bernthal); see also Hardaway, *supra* note 15, at 50-55 (discussing the work of the Task Force).

382. AIRPORT ACCESS TASK FORCE REPORT, *supra* note 20, at 30. The issues involved with terminal space and gates and groundside congestion are interesting and somewhat relevant to this Note in that some airports allow these factors to constrain access and capacity in order to mitigate noise. See, e.g., *supra* note 21 (discussing access in general and airports using landside access and capacity to constrain growth and limit noise). For the purposes of this Note, however, analysis of the Task Force focuses on noise and environmental constraints.

383. Compare AIRPORT ACCESS TASK FORCE REPORT, *supra* note 20, at 30 with INDUSTRY TASK FORCE REPORT, *supra* note 13, at 18.

384. AIRPORT ACCESS TASK FORCE REPORT, *supra* note 20, at 30.

385. *Id.*

merce.”<sup>386</sup> More formal FAA involvement would also “assure noise reduction to the maximum extent practical.”<sup>387</sup> This framework would apparently allow the FAA to weigh the localized benefits of any regulation against the costs it might impose on the national air transportation system. Consistent with this framework, the Task Force also called for a reduction in local regulations and restrictions on Stage 2 and Stage 3 aircraft.<sup>388</sup>

In addition to proposing federal liability for noise, the Task Force urged action which would further the federal government’s financial role in alleviating noise. The Task Force recommended new economic and tax incentives for air carrier fleet modernization<sup>389</sup> and the conversion of noise-impacted property to compatible or more noise insulated land uses.<sup>390</sup>

The Report of the Airport Access Task Force also contained strongly worded minority comments submitted by the Departments of Transportation (DOT) and Justice (DOJ). The DOT argued that the group had failed “to document a problem warranting further Federal action,”<sup>391</sup> and that the present allocation of responsibilities was proper in that the amount of air service and noise a community wants should be a local decision.<sup>392</sup> Additionally, it argued that the FAA’s existing authority to challenge access restrictions and to withdraw grant monies provides an adequate protection against excessive local regulation.<sup>393</sup> Consequently, the DOT reaffirmed its 1976 policy statement and rejected the recommendation of federal preemption.<sup>394</sup> The DOT and the DOJ criticized the group’s call for subsidies for air carrier fleet modernization and strongly encouraged the use of market mechanisms like noise fees to deal with the problem.<sup>395</sup> Such charges could serve to compensate noise-impacted property owners while also encouraging aircraft operators to make noise-based management and investment decisions.<sup>396</sup>

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386. *Id.*

387. *Id.*

388. *Id.*

389. *Id.*

390. *Id.*

391. *Id.* at 37.

392. *Id.* at 36-37.

393. *Id.* at 36.

394. *Id.* at 36-37.

395. *Id.* at 37 (stating minority comments of the DOT); *id.* at 43-47 (stating minority comments of the DOJ); see also Nierenberg, *Incentives versus Regulation: The Case for Airport Noise Charges*, 2 GEO. MASON U.L. REV. 167 (1978).

396. AIRPORT ACCESS TASK FORCE REPORT, *supra* note 20, at 45-46 (stating minority

### C. *Airline Industry Proposal*

The airline industry and its trade group, the ATA, have grown increasingly distressed at the federal government's failure to act with regard to the proliferation of local access regulations.<sup>397</sup> Whereas noise-impacted communities and airport proprietors believe the federal government's noise control efforts have not gone far enough in taking responsibility for noise, and have gone too far in restricting their power,<sup>398</sup> the airlines believe the federal government has been too tolerant of local access restrictions.<sup>399</sup> Consequently, in 1984 the ATA petitioned the FAA for rulemaking to address the access problem.<sup>400</sup>

The first part of the ATA's proposal calls for the FAA to adopt more precise policy guidelines with regard to access regulations and for the FAA to alert airport proprietors that it will take aggressive action with regard to access restrictions.<sup>401</sup> Of particular concern to the ATA are access restrictions that impair safety, efficiency, or commerce, or those which are unjust, arbitrary, or which impose burdens on airport users disproportionate to the anticipated benefits.<sup>402</sup>

The second part of the ATA proposal would seek to promote greater uniformity among local access regulations.<sup>403</sup> To this end, airport proprietors would be required to submit a kind of regulatory impact statement and analysis of new regulations to the FAA for

comments of the DOJ).

397. *FAA Hearings*, *supra* note 41, comments of the ATA; ATA Proposal, *supra* note 21, at 43,020. Recently sixteen ATA member airlines formed a new lobbying group to lead their efforts to increase airport capacity. Dissatisfaction with ATA efforts in the area and recognition of the need to establish a broader base of support on capacity issues was the impetus behind the creation of this organization. Ott, *Airline Lobby to Take Reins From ATA on Capacity Issues*, AVIATION WK. & SPACE TECH., Mar. 7, 1988, at 60-61.

398. See *FAA Hearings*, *supra* note 41, comments of the Airport Operators Council International, at 8; *FAA Hearings*, *supra* note 41, comments of the city of Long Beach, at 12. The concerns of these communities and airport proprietors were also embodied in a 1984 petition for rulemaking to phaseout Stage 2 operations. 49 Fed. Reg. 13,375 (1984) (Petition for Rulemaking of the National Organization to Insure a Sound-Controlled Environment (NOISE) & AOCI). The NOISE/AOCI proposal noted that in considering the aircraft-noise problem: "More important than accoustical expressions such as Ldn or sheer acreage is the personal human impact of the individual noise event." *Id.* at 13,377.

399. ATA Proposal, *supra* note 21.

400. *Id.*

401. *Id.* at 43,022.

402. *Id.* at 43,020-21.

403. *Id.* at 43,023.

review based on its new policy initiatives.<sup>404</sup> The FAA would then assert its expert opinion as to whether the regulation was consistent with federal aviation and constitutional law.<sup>405</sup> If found inconsistent with the law, the FAA would institute appropriate action against the proprietor.<sup>406</sup> According to the ATA, the FAA's findings would eventually serve as guidelines for proprietors to use in shaping their regulations.<sup>407</sup>

The FAA would neither approve nor disapprove the regulations it reviewed.<sup>408</sup> This provision is similar to the present informal advisement process used by the FAA.<sup>409</sup> In contrast to the Industry and Airport Access Task Force's proposals, this provision would continue to insulate the federal government from liability for noise damages.<sup>410</sup>

The proposal also perpetuates some of the problems it seeks to address. First, the formal FAA review process would add another layer of delay in the access conflict controversy. Second, if a dissatisfied party were involved, the validity of the regulation would ultimately be litigated. The courts have the same statutory and common law to guide them as the FAA, but there is no guarantee that they would develop any more uniform standards.

#### D. *FAA Proposal*

The FAA acknowledged the ATA proposal in a 1986 notice of proposed policy for airport access and capacity.<sup>411</sup> The notice stated the FAA's concern with maintaining sufficient airport capacity<sup>412</sup>

404. *Id.*

405. *Id.*

406. *Id.* Such action might consist of a review of the airport proprietor's agreements with the FAA, including the airport's certification, or perhaps initiating litigation. *See, e.g., San Francisco v. Engen*, 819 F.2d 873 (9th Cir. 1987).

407. ATA Proposal, *supra* note 21, at 43,023.

408. *Id.*

409. *Id.* at 43,023-24.

410. *Id.* at 43,024. Airport and community interests have argued, however, that any kind of review delaying implementation of a noise-related program may amount to a partial preemption and hence federal liability for noise during the period of delay. *See House Hearings, supra* note 18, at 367-68 (remarks of Martin J. Butler, Mayor of Park Ridge, Illinois, Chairman of Suburban O'Hare Commission).

411. FAA Proposal, *supra* note 21, at 2986.

412. *Id.* at 2986. Sufficient capacity is to be attained "in a safe, efficient and environmentally sound manner." *Id.* The other major objectives posited by the FAA were to clearly delineate FAA and proprietor roles and to reduce federal intervention in access cases on an ad hoc basis. *Id.*



and delineated FAA policy principles in four related areas.<sup>413</sup> First, the FAA noted that the goal of increasing airport capacity was second only to safety, and that federal monies and contract terms would be used to attain this goal, particularly to insure airports operate at capacity levels commensurate with that federal funds were intended to establish.<sup>414</sup> Second, runway and taxiway use, the FAA's role in promoting safety and efficiency, and the prohibition of arbitrary airport regulations were outlined.<sup>415</sup> In addition, imposition of noise restrictions should be preceded by an application of Part 150 guidelines as well as consultation with the FAA.<sup>416</sup> Third, the FAA acknowledged a proprietor responsibility for terminal and landside facility use when consistent with airside capacity.<sup>417</sup> Finally, the proposal noted that the FAA and airport proprietors shared responsibilities for environmental impact management.<sup>418</sup>

The FAA proposal has generated a myriad of reactions. While then FAA Administrator Engen asserted that the proposal was merely a reaffirmation of existing federal policy, other interests disagreed vehemently.<sup>419</sup> For instance, the AOCI, airport proprietors, state and local governments, and citizen groups argued that the proposal was an unwanted intrusion into local airport policy, amounting to preemption and was likely to exacerbate the problem by making airport proprietors and opponents more wary of improvement projects.<sup>420</sup> Alternatively, these groups called for an end to Stage 2 operations and, in some cases, the development of aircraft noise abatement technology beyond that of existing Stage 3 aircraft.<sup>421</sup>

413. *Id.* at 2987-88.

414. *Id.* at 2987. That is, at the capacity level consistent with that which should be maintained given previous federal aid to a specific airport. The coercive use of grant monies has been litigated in *San Francisco v. Engen*, 819 F.2d 873 (9th Cir. 1987), discussed *supra* notes 291-96 and accompanying text.

415. FAA Proposal, *supra* note 21, at 2987.

416. *Id.* at 2988.

417. *Id.*; see also Note, *Airport Regulation*, *supra* note 21, at 332-37.

418. FAA Proposal, *supra* note 21, at 2987-88.

419. *House Hearings*, *supra* note 18, at 23-24 (testimony of Administrator Engen) (that the proposal "does not represent a major change in the approach we have been following in cases when airport access has become an issue, but rather is a clarification or, if you will, a reaffirmation of our current approach.").

420. See *id.* at 50-56 (testimony of J. Donald Reilly, Executive Director, AOCI); *id.* at 190-204 (statement of the Port Authority of New York and New Jersey); *id.* 314-23 (testimony of the city of Long Beach); *id.* at 59-61 (testimony of Thomas N. Duffy, Executive Director, NOISE).

421. See *id.* at 56 (testimony of J. Donald Reilly, Executive Director, AOCI); *id.* at 60-61 (testimony of Thomas N. Duffy, Executive Director, NOISE).

Conversely, airline, air cargo and other aviation interests have uniformly supported the FAA proposal and asserted that the proposal is, for the most part, consistent with federal law, although full preemption may also be desirable.<sup>422</sup>

In short, the FAA proposal, as with any such proposal seeking to clarify federal policy in this area, is incapable of gaining widespread acceptance without incorporation of other offsetting measures including a Stage 2 phase-out and perhaps even complete preemption. Without addressing these underlying political realities, this proposal takes an approach to the problem that imposes a perhaps inequitable distribution of the costs.<sup>423</sup>

#### E. Working Group on Aircraft Noise/Airport Capacity

An additional blueprint for addressing the aircraft noise problem, as it relates to airport access and capacity, was recently presented by the Working Group on Aircraft Noise/Airport Capacity.<sup>424</sup> Composed of equal numbers of airline and airport representatives,<sup>425</sup> the Working Group's recommendations reflect significant and potentially far-reaching compromises on the part of both sides.<sup>426</sup> These recommendations address aircraft noise abatement technology, land use measures around airports, noise and access re-

422. *Id.* at 551-65 (statement of Gabriel Phillips, Executive Vice President, Administration & Industry Programs, ATA); *id.* at 566-74 (testimony of Alan R. Stephan, Executive Vice President, Regional Airline Association); *id.* at 522-30 (statement of Frederick W. Smith, Chairman, Federal Express Corp.).

423. See *infra* notes 441-52 and accompanying text (discussing the equities and political realities of a subsequent proposal).

424. WORKING GROUP REPORT, *supra* note 15. The Working Group is a more specialized offshoot of the Industry Task Force, discussed *supra* notes 367-75 and accompanying text. See also telephone interview with Siegbert Poritzky, Vice President, Technical Affairs, Airport Operators Council International (Jan. 21, 1988) (noting continuing efforts of the Working Group) [hereinafter Poritzky interview]; J. Murphy interview, *supra* note 1 (discussing background of the Working Group and its concerns); *Stage 2 Cutoff Dates Recommended by U.S. Task Force*, AVIATION WK. & SPACE TECH., Sept. 28, 1987, at 37; Preble, *Industry Group Urges Stage 2 Phase-Out, Halt to Noise Limits*, AVIATION WK. & SPACE TECH., July 13, 1987, at 30-31; *Industry Task Force Recommends Grounding Older Aircraft*, AVIATION DAILY, July 7, 1987, at 25-26 (all three articles discuss the Working Group's background and proposals).

425. The Working Group is comprised of eight members from each "side." Air freight, regional and national air carriers, as well as the ATA, are represented within the industry portion of the Working Group. Airport interests represented include single and multiple airport proprietors and the Airport Operators Council International, the ATA's counterpart on the airport side. WORKING GROUP REPORT, *supra* note 15, at Appendix 1.

426. WORKING GROUP REPORT, *supra* note 15, at 9-22.

strictions, funding sources and public awareness.<sup>427</sup>

Drawing upon the FAA's 1986 report to Congress on fleet modernization,<sup>428</sup> the Working Group's proposal calls for ending production, and limiting future importation and registration of Stage 2 aircraft.<sup>429</sup> This would be accompanied by the phase-out of all Stage 2 operations by the end of 2009.<sup>430</sup> Under the group's proposal, FAA submission of the Stage 2 phase-out plan to Congress would trigger a one year moratorium on new airport access restrictions based on the time of day and the type or number of aircraft.<sup>431</sup> If enacted, the group's plan would contain legislation extending the moratorium by preempting airports from imposing access regulations and transferring related noise liability to the federal government.<sup>432</sup>

Legislative modifications to the Part 150 program are also proposed. Recommendations in this area include: fine-tuning the FAA's integrated noise model,<sup>433</sup> revising Part 150 to account for the characteristics of different airports and the diversity of development surrounding them,<sup>434</sup> and mandating state legislation to require written notice of the airport be given to any potential property buyers within a two mile radius of the airport.<sup>435</sup> Greater state involvement with

427. *Id.*

428. FAA, FLEET MODERNIZATION; *supra* note 33.

429. WORKING GROUP REPORT, *supra* note 15, at 9-12.

430. *Id.* at 10. The proposal provides for five three-year periods, commencing at the end of 1994, within each of which an air carrier must retire 20% of its Stage 2 fleet. Credits would be available to carriers retiring additional Stage 2 aircraft before a particular deadline. In addition, air cargo carriers and new entrant airlines could request limited exceptions from the FAA. *Id.* at 10-11.

431. *Id.* at 18. The proposal allows proprietors to continue to regulate non-access matters like aircraft operational procedures, landside management of airport facilities and various land use measures. *Id.* at 19. Congressional failure to enact the group's plan within one year of submission would terminate the moratorium. *Id.* at 18.

432. *Id.* at 18. This portion of the Working Group's plan mirrors earlier proposals advocating federal preemption in this area. See AIRPORT ACCESS TASK FORCE REPORT, *supra* note 20; *supra* notes 383-88, 391-96 and accompanying text; INDUSTRY TASK FORCE REPORT, *supra* note 13; *supra* notes 374-75 and accompanying text. *But see* ATA Proposal, *supra* note 21; *supra* notes 403-10 and accompanying text (eschewing federal preemption).

433. WORKING GROUP REPORT, *supra* note 15, at 22.

434. *Id.* at 14. The proposal indicates that an airport's classification would determine the appropriate noise control actions at a particular airport. *Id.* Given the existing Part 150 airport specific consultation and planning process, *see supra* notes 162-72 and accompanying text, this particular recommendation does not appear very different or innovative. This proposal may, however, minimize or eliminate the input citizens presently have in the Part 150 planning process.

435. WORKING GROUP REPORT, *supra* note 15, at 16. "Real estate brokers, title insurers, mortgagees and/or lenders" would be required to provide such notice. Like a comparable provision under Part 150, notice is intended to serve as a bar to recovery in a suit for noise

off-site property would be strongly encouraged through the creation of Airport Environmental Protection Areas (AEPAs) around public airports.<sup>436</sup> In addition, local Environmental Management Boards (EMBs) would be vested with authority for promoting compatible land uses and developing off-site noise mitigation plans.<sup>437</sup>

The Working Group proposal also included recommendations to use the aviation trust fund to pay for airport projects addressing noise and capacity problems.<sup>438</sup> Furthermore, the proposal recommended that additional economic incentives be developed to encourage air carriers to accelerate fleet modernization.<sup>439</sup> Finally, a program to promote greater public awareness of the benefits of air transportation was urged.<sup>440</sup>

A number of additional observations regarding the Working Group's recommendations ought to be noted. That the proposal represents a set of meaningful compromises is most noteworthy<sup>441</sup> and may make the package a workable one. Ironically, this also makes the possible enactment of the recommendations problematic at best. For instance, the Stage 2 phase-out would impose substantial costs on air carriers and denies them some flexibility in making business judgments. At the same time, the phase-out provides air carriers with a certain planning horizon in which to make investment decisions.<sup>442</sup> Interestingly, the time frame of the phase-out does not differ

related damages. *Id.*

436. *Id.* at 15.

437. *Id.* EMB authority would be limited to non-airport property within the 65 Ldn line. *Id.*

438. *Id.* at 21-22. Trust fund backed loans would be made available to address these concerns.

439. *Id.* at 21-22; see also FAA, FLEET MODERNIZATION, *supra* note 33 (describing different economic incentives, advantages and disadvantages of each).

440. WORKING GROUP REPORT, *supra* note 15, at 20.

441. See *id.*, at 2, stating:

Central to the program recommendations is a needed commitment by the entire aviation industry to the serious compromises that must be made in a spirit of shared responsibility with the Federal Government and the general public. It is only through a full acceptance of this public and private responsibility for shared solutions, including a sharing of the benefits and drawbacks of the solutions, that we will achieve the broad economic and social gains offered by the civil aviation system for our nation and, particularly, for the general public in the individual communities served by our nation's system of public airports.

*Id.*

442. See Preble, *Inaction on Noise Standards Raises Industry Concern Over Stage 2 Fleet*, AVIATION WK. & SPACE TECH., Jul. 6, 1987, at 38 (quoting industry consultant discussing valuation and amortization problems due to uncertainty over the future life of Stage 2 aircraft).

significantly from the projected rate of fleet modernization without a mandated phase-out of Stage 2 aircraft.<sup>443</sup>

Additionally, the proposal would strip airport proprietors and local governments of the power to regulate access and land use respectively, without necessarily reducing noise beyond what the market might accomplish.<sup>444</sup> Of course, the shift of financial liability to the federal government would lessen the fiscal burden on local policy makers, but political pressures on them may remain undiminished.<sup>445</sup> That is, without significant noise reduction, local policy makers may still encounter considerable political pressure while having even less power to respond to it than they do at present. One alternative to the Working Group proposal could involve preserving the proprietors' rights while also shifting airport management from government to public or private airport authorities.<sup>446</sup> The effect would be to somewhat de-politicize airport policy, keep financial liability on the airport and its users, and maintain greater local accessibility to decision-makers.

The Working Group's recommendation of federal preemption also provides the federal government with a difficult, if not impossible choice. At the least, legislation to that effect would signal a marked shift in federal policy that has strenuously avoided preemption of airport proprietors.<sup>447</sup> Even with the advent of a new political

443. See WORKING GROUP REPORT, *supra* note 15, at 10 (proposing phase-out of all Stage 2 low-bypass operations by Dec. 31, 2009). *But see* FAA, FLEET MODERNIZATION, *supra* note 33, at 6, Table 1 (forecasting that Stage 2 aircraft will make up only 11.3 percent of the total U.S. fleet by 2005 based on current trends without any governmental intervention). See also Airport Operators Council International, Res. No. 19 (1987) (U.S. Members Only) (On the Industry Task Force Report on Airport Noise/Capacity) [hereinafter AOCL, Res. No. 19] (noting reservations about WORKING GROUP REPORT including imbalance of what proprietors would forego in exchange for modest acceleration of fleet modernization).

444. WORKING GROUP REPORT, *supra* note 15, at 10; see also AOCL, Res. No. 19, *supra* note 443 (identifying concern about effects on state and local governments and suggesting earlier phase-out of Stage 2 aircraft with the aid of federal economic incentives).

445. See Rosche interviews, *supra* note 310 (expressing concern over "home rule"); E. Murphy interview, *supra* note 317 (voicing reservations over fragmentation of the planning function through the creation of the EMBs, especially in areas where the airport proprietor already has the power to regulate land uses); AOCL, Res. No. 19, *supra* note 443 (stating similar reservations).

446. Bartolomei interview, *supra* note 308 (suggesting this possibility in lieu of federal preemption).

447. See AIRPORT ACCESS TASK FORCE REPORT, *supra* note 20, at 36-37, 43-47 (minority comments of Departments of Transportation and Justice reaffirming federal policy of rejecting the idea of preemption); DOT NOISE POLICY, *supra* note 149, at 34 (rejecting preemption).

administration,<sup>448</sup> other national priorities and fiscal constraints would seem formidable obstacles to federal preemption.<sup>449</sup>

In closing, with regard to the Working Group, it is critically important not to underestimate the group's efforts and its mission. For one, the group's efforts continued into 1988<sup>450</sup> and these and other related efforts are sure to continue until the airport access problem is resolved. Without a final new FAA policy released as yet,<sup>451</sup> the group's final recommendations may indeed play a large role in the forthcoming policy. Moreover, if there is one point on which nearly all of those involved with the aircraft noise/airport access problem can agree, it is the need for a massive cooperative effort to meet the challenges these issues present.<sup>452</sup>

## VII. FUTURE DIRECTIONS FOR RESOLVING THE AIRPORT ACCESS PROBLEM

The aforementioned approaches are but some of the avenues open to address the access problem. What follows are some modest proposals that seek to use the best and most workable of what has,

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448. Preemption would clearly be inconsistent with Reagan administration policies. See AIRPORT ACCESS TASK FORCE REPORT, *supra* note 20, at 36-37 (minority comments of the Department of Transportation). Moreover, the President's Commission On Privatization recently issued recommendations that would seek to reduce the federal role in the air traffic system by: encouraging airports to increase the amount of funding received from airport users, including passengers; advocating peak hour fees to minimize congestion; and urging federal airport monies be generated from higher user fees. PRESIDENT'S COMMISSION ON PRIVATIZATION, *PRIVATIZATION: TOWARD MORE EFFECTIVE GOVERNMENT* 65-89 (1988). The Commission did, however, note that the revenue from these fees could be used to support noise abatement programs. *Id.* at 75. Furthermore, the costs of noise liability borne out of preemption would undercut these proposals or perhaps require huge increases in user fees. See *supra*, notes 37, 69 (discussing costs of noise liability). Conversely, the proliferation of access regulations may undermine some of the post-deregulation benefits supported by the administration.

449. See, e.g., *supra* note 448.

450. Poritzky interview, *supra* note 424.

451. The latest projected date for such a pronouncement from the FAA is April 1988. AV. L. REP., Nov. 9, 1987, at 4-5; Proctor, *supra* note 26, at 108 (noting that this proposal "will make use of—but not necessarily incorporate—recommendations [of the Working Group]").

452. See WORKING GROUP REPORT, *supra* note 15, at 2; see also Scott, *Conferees Urge Establishment of National Airspace, Airport Development Program*, AVIATION WK. & SPACE TECH., Dec. 14, 1987, at 41 (reporting on Air Traffic Control Association's annual conference, noting that all parties must cooperate, suggesting need for politically independent FAA and public education and addressing environmental concerns so as to expand and build more airports); Mordoff, *Forum Urges Initiation of Joint Efforts To Expand Airport, Airway Capacity*, AVIATION WK. & SPACE TECH., Oct. 12, 1987, at 49 (emphasizing great need for cooperative effort to overcome noise problem in order to meet future airport capacity demands).

and has not, been set forth earlier.<sup>453</sup>

To begin with, Congress must articulate an integrated aircraft noise/airport access and capacity policy that anticipates the needs of the twenty-first century. This policy must give explicit recognition to the need for the utmost cooperation from all those involved. As two commentators recently wrote, “[t]he solution to the [airport access and] capacity problem, however, will not come on the back of any one element of the system.”<sup>454</sup>

Tracking earlier legislative efforts, the first area of Congressional concern should be aircraft noise abatement technology. Future addition of Stage 2 aircraft into the domestic fleet should be prohibited.<sup>455</sup> Furthermore, a Stage 2 operations termination date should be established immediately. This would allow aircraft users and manufacturers greater leeway in planning future purchases. The latest possible date considered should be earlier than the Working Group’s recommendation of 2009 and closer to its projected target of 2000 with the help of financial incentives.<sup>456</sup> Financial incentives such as those suggested by the Working Group,<sup>457</sup> including loans and grants from the Aviation Trust Fund, should be provided to relieve some of the financial burden imposed on aircraft operators.<sup>458</sup> In addition, development of Stage 4 technology should be fostered, perhaps through the use of research grants.<sup>459</sup>

453. Given the attempted breadth of this Note, the following ideas are set out for discussion without the more detailed analysis that is, in some cases, warranted.

454. Blackman & Freeman, *supra* note 19, at 398 n.68. Congressional intervention is needed because FAA action in the absence of Congressional direction and support is likely to be more controversial and perhaps subject to additional litigation. Ironically, without widespread agreement on a particular course of action, Congress itself may be less likely to act. As a recent editorial noted, “no national noise policy is going to be popular.” *The Noise Issue*, AVIATION WK. & SPACE TECH., Mar. 21, 1988, at 9. The editorial goes on to exhort the aviation industry to “start framing an effective noise policy immediately, to avoid having an unsuitable one shoved down its throat.” *Id.*

455. See WORKING GROUP REPORT, *supra* note 15, at 10; FAA, FLEET MODERNIZATION, *supra* note 33, at 22; see also Proctor, *supra* note 26, at 108 (reporting that airline industry concedes that such action is imminent).

456. WORKING GROUP REPORT, *supra* note 15, at 9-12.

457. *Id.* at 21-22.

458. See FAA, FLEET MODERNIZATION, *supra* note 33, at 14-20 (discussing investment tax credits, accelerated depreciation, loan guarantees, and federal funding of stage 2 retrofit development).

459. Although the federal government does not foresee any significant breakthroughs in aircraft noise abatement technology within the next two decades, FAA, FLEET MODERNIZATION, *supra* note 33, at 13, efforts to overcome this challenge should be encouraged. See *House Hearings*, *supra* note 18, at 56 (testimony of J. Donald Reilly, Executive Director, AOCI) (calling for additional efforts towards the development of Stage 4 aircraft); Rocken-

On the local level, aircraft operators and airport proprietors should seek means of factoring noise considerations into their decision-making with direct limitations on access employed only as a last resort. Here, the noise budget regulations employed at a handful of airports hold promise since they encourage the use of quieter aircraft without strictly limiting access.<sup>460</sup> To the extent that, or in places where aircraft noise is primarily an economic problem (i.e. it lowers property values or lack of funding for noise mitigation programs), economic approaches including noise-based landing fees and time limited easements should be considered.<sup>461</sup> Moreover, all local regulations should be the product of consultation between airport proprietors, airport users, impacted residents and the federal government. At the federal level, both the FAA and the EPA should be informed of forthcoming local regulations.<sup>462</sup> Both federal agencies would review the proposal and issue informal opinions as to the safety and environmental effects of the regulation. These opinions could be published periodically to foster an exchange of information. Complete authority for implementation remains with the airport proprietors. This informal consultation and notification process would promote cooperation and perhaps reduce litigation.<sup>463</sup>

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stein, *supra* note 32, at 3 (advocating the development of Stage 4 technology); *see also* Bernstein, *Sounding Out Electronic Silence*, *Newsday*, Dec. 7, 1987, Pt. III, at 3 (discussing new technology using reverse soundwaves to cancel noise); NOISE CANCELLATION TECHNOLOGIES, INC., *ELECTRONIC ATTENUATION OF NOISE AND VIBRATION* (1987) (explaining noise cancellation and noting present limitations on effectively eliminating the noise generated by jet engines).

460. *See supra* notes 335-49 and accompanying text (discussing Noise Allocation Plan at Long Island MacArthur Airport). *See also* Knack & Schwab, *supra* note 21, at 15 (noting noise budget at John Wayne Airport). Of course, these regulations work at only as many localities as the airlines can fit desired operations and available Stage 3 aircraft into. Additionally, any local regulation, while equitable to the interests of those impacted around that airport, imposes costs on the users of that airport and perhaps evens noise impacted citizens elsewhere. Recalling the equitable maxim, "equity seeks to do justice and that not in halves," underscores the complexity of striving to attain a fair resolution of the problem at hand.

461. *See* Bell & Bell, *supra* note 34, at 645-52 (noise-based landing fees); Nierenberg, *supra* note 395 (discussing noise charges); Baxter & Atree, *Legal Aspect Of Airport Noise*, 15 J.L. & ECON. 1 (1972) (discussing time limited easements); *see generally* Coase, *The Problem Of Social Cost*, 3 J.L. & ECON. 1 (1960) (discussing economic approaches to social problems).

462. *See* FAA Proposal, *supra* note 21; ATA Proposal, *supra* note 21; *supra* notes 141-48 and accompanying text (regarding possible EPA role).

463. There is no guarantee that this would reduce litigation, but vigorous consultation and negotiation can lead to acceptable compromises, especially if all parties factor in the litigation costs. *See supra* notes 403-10 and accompanying text (discussing a similar portion of the ATA Proposal); *supra* notes 335-49 and accompanying text (detailing the noise allocation plan at Long Island MacArthur Airport developed by the airport proprietor in conjunction



Finally, and perhaps most importantly, greater rather than less<sup>464</sup> public participation in airport policies must be encouraged. Public awareness campaigns like that proposed by the Working Group,<sup>465</sup> combined with the participation of responsible citizens with different perspectives, may prove an effective means of alleviating the problem in the longer term, especially in suburban communities fearful of uncontrolled growth.<sup>466</sup> Viewing noise as a challenge instead of a constraint and giving people a meaningful say in airport policy might make everyone more responsive to other aspects of the problem so that controlled, socially sound airport development can be provided where needed.

### VIII. CONCLUSION

As long as aircraft continue to generate noise within the vicinity of residential areas, aircraft noise will be a problem.<sup>467</sup> While the problem exists, noise-impacted communities will continue to pressure government entities and airport proprietors to alleviate the noise. Many actions to reduce noise will amount to regulations and restrictions with regard to airport access.<sup>468</sup> This means that a continued conflict may exist between such regulation and federal aviation policy,<sup>469</sup> which clearly seeks to promote air transportation through maintaining open access and expanding airport capacity.<sup>470</sup> More importantly, airport capacity will remain stagnant, thus exacerbating delays and perhaps even compromising air safety.<sup>471</sup>

with the FAA).

464. See Milch, *supra* note 44, at 104-09 (advocating less citizen participation).

465. WORKING GROUP REPORT, *supra* note 15, at 20.

466. One example is Long Island MacArthur Airport. See Bohemia Civic Ass'n interview, *supra* note 319. At MacArthur, citizens of a variety of perspectives are represented in the Part 150 and Master Plan processes. The town of Islip has, however, refused to commit itself to a permanent airport advisory committee. *Id.*; see also Knack & Schwab, *supra* note 21, at 15 (discussing John Wayne Airport). In this light, the problem shades into the political sphere where the task becomes attaining a balance between majority rule and minority rights. On one side are the many, directly or indirectly affected by air transportation, on the other are those are lesser in number confronted with a threat to their quality of life. See Sexton, *Living With Airport Noise In Islip Is No Tea Party*, Newsday, Apr. 22, 1984, Ideas at 8.

467. See Comment, *supra* note 47, at 526.

468. See FAA, AIRPORT NOISE CONTROL STRATEGIES, *supra* note 38.

469. This, of course, depends on the outcome of the FAA's present policy-making efforts, discussed *supra* notes 411-23 and accompanying text.

470. See *supra* notes 48-49 and accompanying text.

471. See *How Can We Get More Airport Capacity?*, Newsday, May 14, 1987, at 94 (editorial explaining the dire need for additional airport capacity and warning of the possibility of "unacceptably long, costly and dangerous flight delays," and quoting FAA administrator Engen, who stated that inadequate airport capacity is "the single greatest challenge facing the

Without a congressional mandate for strong FAA action against local regulations, or other action alleviating the need for local regulations, future federal policy will continue to concentrate on technological means of noise abatement,<sup>472</sup> on modifying aircraft operational methods at individual airports,<sup>473</sup> and on planning methods designed to minimize the impact of noise.<sup>474</sup> Consequently, the aircraft noise and airport access problem will persist.

There is, however, reason for optimism. For instance, the continuing introduction of greater numbers of quieter Stage 3 aircraft will eventually reduce the scope of the noise problem without any further action.<sup>475</sup> In addition, remedial planning efforts, and long term planning for airport improvement projects should stabilize and mitigate future noise impacts.<sup>476</sup> Moreover, adoption of any number of new policy initiatives, economic incentives, or structural changes, should reduce the noise over the aircraft noise/airport access controversy. In any event, the problem is serious enough to warrant further discussion.

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nation's aviation system."); INDUSTRY TASK FORCE REPORT, *supra* note 13; *see also supra* notes 56-69 and accompanying text (discussing capacity, delays, safety and economic concerns).

472. Ott, *supra* note 2; *see also* 14 C.F.R. § 36 (1987).

473. *See* Rockenstein, *supra* note 32.

474. Ott, *supra* note 2; *see also* 14 C.F.R. § 150 (1987).

475. FAA, FLEET MODERNIZATION, *supra* note 33, at 10-12 (estimating that the introduction of more Stage 3 aircraft will reduce the land area within the 65 Ldn contours by 32% by the year 2000 and 48% by the year 2005).

476. *See* Note, *supra* note 35; Bartolomei interview, *supra* note 308; Koppelman interview, *supra* note 309.

