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of the Supreme Court is followed, this right will be protected with some measure of diligence.

AIRPLANE NOISE ABATEMENT — COMMUNITY INITIATIVE AND THE CONSTITUTION

Airplane noise has constantly plagued persons residing on property situated near airports. Aircraft, when passing over these neighboring homes emit noise of high intensity.[1] The results are a frequent interference with domestic activity and, at times, injuries to both person and property.[2] Two new developments, moreover, will increase the discomfort already sustained. The first, a general increase in air activity, will in all probability be responsible for increased disturbances.[3] Secondly, the jets introduced by the commercial carriers will emit noise at a greater intensity than propeller driven aircraft and their flatter glide angles will spread the noise over a longer radius.[4]

In the past, these property owners have sought relief through actions for trespass and nuisance. When the defendant was a governmental body, relief was sought for an uncompensated taking of land.[5] The individual lawsuits, however, did not solve the noise problem. Rather, they were somewhat analogous to a doctor treating a patient's symptom while neglecting his disease. In the face of this probable increase in airplane noise, the question arises as to whether the community, rather than the individual landowners, should take the initiative in dealing with the problem. At least one community has realized the need for group action, and has attempted to control the problem through legislation. This attempt, however, was found to have exceeded constitutional limitations.[6] The purpose of this note, therefore, will be to

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[1] America, Jan. 21, 1961, p. 546.

[2] See, *e.g.*, United States v. Causby, 328 U.S. 256 (1946); Highland Park, Inc. v. United States, 161 F. Supp. 597 (Ct. Cl. 1958). As to the effect of continuous exposure to loud noise see Time, Jan. 2, 1961, p. 29.

[3] In 1950, the Federal Aviation Agency air towers reported that air carriers alone were responsible for approximately four million operations. By 1960, this figure was increased to approximately seven million. Aviation Week and Space Technology, May 1, 1961, p. 95.

[4] Weibel, *Problems of Federalism in the Air Age—Part I,* 24 J. AIR L. & COM. 127, 128 (1957). The glide angle is defined as the number of feet of horizontal movement necessary for each foot of ascent or descent. Harvey, *Landowners' Rights in the Air Age: The Airport Dilemma,* 56 MICH. L. REV. 1313, 1314 (1958).

[5] Note, 74 HARV. L. REV. 1581, 1582-84 (1961).

[6] Allegheny Airlines, Inc. v. Village of Cedarhurst, 132 F. Supp. 871 (E.D.N.Y. 1955), *aff'd,* 238 F.2d 812 (2d Cir. 1956).

examine the possibility of constitutionally controlling airplane noise through such local legislation.

The Obstacle: The Commerce Clause

Congress, pursuant to authority granted by the commerce clause, first attempted to control aviation through the Air Commerce Act of 1926.[7] This act, however, was subject to operational difficulties such that subsequent amendments failed to alleviate problems of administration and obolescence. The entire statutory scheme was re-examined in 1958 and completely revised and modernized by the Federal Aviation Act.[8] However, the authority pursuant to which congress acted in this area remained the same.[9] The commerce clause is the basis of federal control of interstate as well as intrastate aviation.[10] Herein lies the apparent objection to local legislation concerning airplane noise.

The commerce clause has had a long history of conflicting interpretations.[11] An early opinion gave the commerce clause a broad interpretation which appeared to give congress vast powers over interstate commerce.[12] Subsequently, a theory of concurrent powers evolved which permits a state to regulate an area of interstate commerce that does not require uniform rules.[13] The states, however, were not given unfettered power. They could not, for example, impose an undue burden on interstate commerce or economically discriminate against other states.[14]

The power of the states to regulate certain areas of interstate commerce is restricted when congress has legislated in the same areas. Should federal legislation exist in an area where congress is supreme, a conflicting state statute must fall.[15] Furthermore, when congress has expressed an intent to exclusively control

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[7] 44 Stat. 568 (1926).

[8] 52 Stat. 973 (1938); Note 57 MICH. L. REV. 1214, 1215-16 (1959). See also Lindsey, *The Legislative Development of Civil Aviation 1938-1958,* 28 J. AIR L. & COM. 18, 31 (1962).

[9] 72 Stat. 806 (1958), 49 U.S.C. § 1301 (1958).

[10] See, *e.g.,* Rosenhan v. United States, 131 F.2d 932, 935 (10th Cir.), *cert. denied,* 318 U.S. 790 (1942); United States v. Drumm, 55 F. Supp. 151, 155 (D. Nev. 1944); Note, 29 N.Y.U.L. REV. 169, 172-76 (1954).

[11] See generally Dowling, *Interstate Commerce and State Power,* 57 VA. L. REV. 1 (1940).

[12] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

[13] Southern Pac. Co. v. Arizona, 325 U.S. 761, 770 (1945); Cooley v. Board of Wardens, 53 U.S. (12 How.) 298, 319 (1851).

[14] Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959); Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951).

[15] U.S. CONST. art. VI (supremacy clause); Cloverleaf Butter Co. v. Patterson, 315 U.S. 148, 155-56 (1942).

or "pre-empt" an area, state legislation irrespective of conflict, is absolutely prohibited and thus invalid.[16]

Applying these principles to the problem of airplane noise, it is readily apparent that any local action will have to cover the entire range of commerce clause objections. First, since congress has occupied the aviation area, state legislation must not conflict with the Federal Aviation Act of 1958. Secondly, it must be established that congress did not intend to exclusively control the regulation of aviation and thereby preclude the states from exercising their police powers. The final obstacle to be overcome is that which prohibits a state from unduly burdening interstate commerce.

Alteration of Flight Altitudes

The Village of Cedarhurst lies directly beneath at least one of the principal approaches to New York International Airport. In 1952, the Village attempted to combat the results of airplane noise by enacting an ordinance prohibiting flights over its territory at an altitude of less than 1000 feet. If violated, a fine of $100 would be imposed, and the pilot would face a disorderly conduct charge.[17]

At the time of the Cedarhurst ordinance, the Civil Aeronautics Act of 1938, and the regulations promulgated under it, represented federal control of aviation.[18] The act, in addition to empowering the Civil Aeronautics Board to promote safety of flight by prescribing air traffic rules governing altitudes of flight,[19] granted to citizens the right of freedom of transit through the navigable airspace.[20] It defined navigable airspace as "air space above the minimum altitudes of flight prescribed by regulations. . . ."[21] The regulations, in turn, set the minimum altitudes at 1000 feet for congested areas and 500 feet for non-congested areas. One exception, however, necessarily allowed a lower altitude for take-offs and landings.[22]

Several airlines brought an action to enjoin the enforcement of the Cedarhurt ordinance on the ground that it violated the

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16 Campbell v. Hussey, 368 U.S. 297, 312-15 (1961) (dissenting opinion); California v. Zook, 336 U.S. 725 (1949); Pennsylvania R.R. v. Public Service Comm'n, 250 U.S. 566, 569 (1919).

17 N.Y. VILLAGE LAW § 90. For a discussion of the *Cedarhurst* case see Weibel, *Problems of Federalism in the Air Age—Part II*, 24 J. AIR L. & COM. 253, 262-63 (1957).

18 52 Stat. 973 (1938).

19 52 Stat. 1007 (1938).

20 52 Stat. 980 (1938).

21 52 Stat. 979 (1938).

22 14 C.F.R. § 60.17 (1962). The present regulation is substantially similar to that promulgated under the Civil Aeronautics Act. of 1938.

Constitution.[23] The plaintiffs contended that congress had pre-empted the area and thus the states and municipalities were prevented from regulating the permissible altitude of air traffic. Cedarhurst, on the other hand, argued that congress only regulated the navigable airspace above 1000 feet. The court, in rejecting the defendant's contention, determined that congress clearly intended to "empower the Board to make rules as to safe altitudes of flight at any elevation. . . ."[24] The court granted the injunction, holding that the federal regulations pre-empted the area below as well as above 1000 feet.[25] The decision thus foreclosed one approach to the local regulation of airplane noise.

Abatement of Noise

Another suburb of New York City, however, has recently proposed an ordinance which may be able to overcome the constitutional objections raised in *Cedarhurst.* The Town of Hempstead, acting in response to complaints from residents, has proposed an ordinance providing that it shall be a violation for airplane noise to exceed a prescribed maximum. The Town will construct highly technical and costly sound-measuring devices to detect such violations.[26] When violated, the penalties will presumably be similar to those provided for in the Cedarhurst ordinance, *i.e.,* a fine and possible conviction for disorderly conduct.

The provisions of the Hempstead ordinance should neither conflict directly with any of the provisions of the Federal Aviation Act of 1958 nor with the regulations issued by the Administrator. The Federal Aviation Act continues the policy of the Civil Aeronautics Act of 1938 by giving citizens the right of freedom of transit through the navigable airspace. It also defines navigable airspace similarly, with the express addition of including in the definition that airspace which is necessary for take-offs and landings.[27] The Administrator is authorized, *inter alia,* to prescribe regulations for navigation and the protection of aircraft and per-

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[23] Allegheny Airlines, Inc. v. Village of Cedarhurst, 238 F.2d 812, 815 (2d Cir. 1956).

[24] *Ibid.*

[25] The holding does not preclude residents from bringing their private causes of action. Griggs v. Allegheny County, 369 U.S. 84 (1962). The power of state courts to enjoin certain aviation activity, however, may be substantially affected. Note, 74 HARV. L. REV. 1581, 1589 (1961).

[26] For a general discussion of the ordinance, see N.Y. Times, Nov. 13, 1963, p. 43, col. 8. The report indicates, *inter alia,* that a portable unit containing $15,000 worth of highly sensitive acoustical measuring devices will be used to record data and to track down violators. Also, photographs are to be taken of offending aircraft.

[27] 72 Stat. 739 (1958), 49 U.S.C. § 1301(24) (1958).

sons and property on the ground.[28] However, neither the act nor the regulations provide for any control over airplane noise. Thus direct conflict would appear improbable.

However, the ordinance could still be invalidated if the federal government has pre-empted the entire area of air navigation. Certain decisions have indicated that pre-emption only occurs when congress clearly manifests an intention to exclude the states from an entire area.[29] Thus the mere fact that federal legislation is present in a specific area does not of itself warrant a conclusion of pre-emption. In fact, congress may intentionally control only part of an area, leaving the states free to pass additional legislation for local purposes.[30] Where, however, the federal statute has pervasively and broadly regulated an area, a court may conclude that congress intended pre-emption.[31] For example, in *Napier v. Atlantic Coast Line R.R.*,[32] Georgia and Wisconsin enacted legislation requiring railroads to utilize a certain type of equipment on their locomotives. Congress, on the other hand, had delegated to the Interstate Commerce Commission the power to regulate locomotive equipment in the smallest detail. The Court determined that the federal statute was so broad in its coverage as to indicate an intent on the part of congress to pre-empt the field and thereby preclude the states from legislating with regard to locomotive equipment.

Other decisions have held that the intent of congress to pre-empt an area is demonstrated only when "the act of Congress fairly interpreted is in actual conflict with the law of the State." [33] This test was applied in *Huron Portland Cement Co. v. City of Detroit*.[34] Detroit enacted a smoke abatement ordinance designed to eliminate the nuisance created by ships docked at its port. Congress, however, had broadly legislated on the requirements and inspection of ships' boilers, which were the direct cause of the nuisance. The Court, after discussing the broad coverage of the federal statute and considering the purpose of both the federal and local legislation concluded that no conflict existed. Thus, the Court held Detroit's ordinance valid as congress had not pre-empted the field.

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[28] 72 Stat. 50 (1958), 49 U.S.C. § 1348 (1958).

[29] See, *e.g.*, California v. Zook, 336 U.S. 725, 733 (1949); Maurer v. Hamilton, 309 U.S. 598, 614 (1940); H. P. Welch Co. v. New Hampshire, 306 U.S. 79, 85 (1939).

[30] Kelly v. Washington *ex rel.* Foss Co., 302 U.S. 1 (1937).

[31] For a discussion of the factors the Court considers in determining whether pre-emption has occurred, see Dunham, *Congress, The States and Commerce*, 8 J. PUB. L. 46, 59-64 (1959).

[32] 272 U.S. 605 (1926).

[33] Savage v. Jones, 225 U.S. 501, 533 (1912). See Reid v. Colorado, 187 U.S. 137, 148 (1902).

[34] 362 U.S. 440 (1960).

The Administrator, under the present aviation statute, is delegated the power to "prescribe air traffic rules and regulations governing the flight of aircraft, for the navigation, protection and identification of aircraft, *for the protection of persons and property on the ground.*" [35] The delegation appears sufficiently broad to allow the Administrator to prescribe rules concerning airplane noise.[36] This section, however, read as a whole, could readily be interpreted as merely authorizing measures to protect people and property on the ground from the risk of an accident.[37] Congress, in fact, may have interpreted the section in this latter respect since several legislators have recently introduced bills seeking to amend the Federal Aviation Act of 1958 in order to specifically provide for airplane noise.[38] Thus, the seemingly broad coverage of the federal statute is at least questionable. Therefore, applying the reasoning of *Napier,* any congressional intent to pre-empt the entire field of air navigation, especially regulations governing airplane noise, would seem somewhat doubtful.

As has been indicated, under the *Huron* test, the intent of congress to pre-empt an area is determined by the conflict resulting from the attempt to affect the purposes of the legislation involved. The Hempstead ordinance is directed at a nuisance disturbing the health and welfare of its citizens; the federal statute is concerned with safety of flight. At times, however, the pilots may be forced to breach safety regulations in order to obey the ordinance. Assume, for example, that under conditions of poor visibility the pilot is required to approach for a landing at an altitude which results in air noise above the maximum set by the ordinance. If the ordinance were obeyed, the safety regulation would of necessity, be breached.[39] It would appear, therefore, that at times the Hempstead ordinance could frustrate the application of the federal regulations. The ordinance would foster what the court, in *Villiage of Cedarhurst,* condemned.

Absent direct conflict and pre-emption, the final problem regarding the Hempstead ordinance would be whether it will unduly burden interstate commerce. This problem has two aspects. The ordinance may result in the enactment of similar local legislation throughout the country, thereby creating a serious lack

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[35] 72 Stat. 750 (1958), 49 U.S.C. § 1348(c) (1958). (Emphasis added.)
[36] Napier v. Atlantic Coast Line R.R., 272 U.S. 605, 613 (1926).
[37] Note, 57 MICH. L. REV. 1214, 1225 (1959).
[38] See, *e.g.,* H.R. 2067, 88th Cong., 1st Sess. (1963); H.R. 12254, 87th Cong., 2d Sess. (1962); S. 3138, 87th Cong., 2d Sess. (1962).
[39] Allegheny Airlines, Inc. v. Village of Cedarhurst, 132 F. Supp. 871, 875 (E.D.N.Y. 1955), *aff'd,* 238 F.2d 812 (2d Cir. 1956), wherein uncontradicted testimony showed that obedience to the statute would, at times, result in a breach of safety procedures.

of uniformity. Secondly, the airlines may not be able to meet the ordinance's requirements should substantial expenditures be involved.

A determination that a local regulation creates such an undue burden in an area where uniformity is necessary would be based on the factual situation of the particular case. A court will usually arrive at its decision by weighing the regulation's promotion of local interests against the extent to which it interferes with the free flow of interstate commerce.[40] In *Bibb v. Navajo Freight Lines, Inc.*,[41] Illinois, as a safety measure, enacted legislation regulating the type of mudguard used by trucks and trailers within its jurisdiction. The statute differed from those enacted in neighboring states. The Court weighed the burdensome effect of the statute on the efficiency of transportation against the advantage of the safety sought to be promoted. The statute was held unconstitutional as imposing an undue burden on interstate commerce.

The Hempstead ordinance will not, on enactment, create the conflict among local statutes which was present in *Bibb*. Until other local governments enact legislation conflicting with the Hempstead ordinance, the rationale of *Bibb* will not be applicable.[42] However, even absent such conflict, a court might determine that the area of aviation demands strict uniformity. Thus, though the only one of its kind, the ordinance may still be held unconstitutional.[43]

However, the ordinance when enacted, will apparently not place prohibitive requirements, either technical or financial, on air carriers, so as to amount to an undue burden on interstate commerce. Technically, airplane noise can be reduced by a combination of mufflers and flying technique.[44] Such practical measures were, in fact, recently suggested by the Administrator as an effective means of diminishing airplane noise without affecting safety.[45] There is no doubt that adapting mufflers to airplane engines will cause some additional expenditures.[46] But,

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[40] Morgan v. Virginia, 328 U.S. 373, 377-80 (1946); Southern Pac. Co. v. Arizona, 325 U.S. 761, 779-82 (1945).

[41] 359 U.S. 520 (1959).

[42] Huron Portland Cement Co. v. City of Detroit, *supra* note 34, at 446. See N.Y. Times, Nov. 13, 1963, p. 43, col. 8, wherein it is stated that the ordinance "will be the first of its kind in the nation."

[43] See Southern Pac. Co. v. Arizona, 325 U.S. 761 (1945).

[44] Science News Letter, Aug. 5, 1961, p. 91. See also Business Week, Dec. 21, 1957, p. 88.

[45] New York Herald Tribune, Sept. 29, 1963, p. 32, col. 3.

[46] Aviation Week and Space Technology, Sept. 19, 1960, p. 41 reports that the employment of noise suppressors is costing jet operators approximately 1.7 million dollars a month in additional operating costs.

the mere fact that a business is interstate in nature does not free it from paying its way.[47]

Conclusion

Local legislation designed to reduce airplane noise apparently faces powerful constitutional objections. The Town of Hempstead, however, has proposed a statute that may surmount these obstacles. The ordinance will not directly conflict with existing federal legislation. While there is certainly reason to believe that federal pre-emption of this area has occurred, an argument to the contrary can be made. Furthermore, consideration should be given to the fact that such an ordinance is in all probability the sole remaining practical means for the community itself to protect its inhabitants from the adverse effects of air noise. Invalidating it will either reduce the inhabitants to their grossly inadequate private causes of action, or compel them to await federal action along the same lines. Neither of these alternatives provides a present remedy for the existing community problem.

[47] See Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959).