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AIRPORT EXPANSIONS: THE NEED FOR A GREATER FEDERAL ROLE

I. INTRODUCTION

Air travel is a critical service in the United States. Millions of people depend on air transportation for business trips, visits with friends and relatives, and vacations.¹ The national economy depends on air travel for commerce, transportation of cargo between major cities, and employment.² State and local economies benefit greatly from major regional airports, and local civic leaders consider a vibrant airport to be a valuable resource.³ Demand for air travel is growing and will continue to grow.

However, at major airports, capacity constraints threaten the vitality of air travel.⁴ The economic appeal of an airport, coupled with

1. During 1995, major U.S. airlines transported 550 million passengers on 8.2 million flights. See Carole A. Shifrin, *Toward Safer Skies: Aviation Safety Takes Center Stage Worldwide*, AVIATION WK. & SPACE TECH., Nov. 4, 1996, at 46.

2. See *Civil Aviation Pumped \$522 Billion into U.S. Economy in 1987*, AVIATION DAILY, June 22, 1989 (noting that "aviation and associated businesses employed eight million people in 1987 with a payroll of \$155 billion").

3. For example, Los Angeles International Airport has been tied to nearly 393,000 jobs in Southern California. Although only 50,000 people work directly in the field, such as employees of airlines, cargo shippers, or airport businesses, many more jobs are created from global trade and associated manufacturing to which the airport provides access. See Dan Garcia, *Our ticket for the Global Future; Airport: A Balance Must Be Struck Between Community concerns and the Necessity of LAX to Expand*, L.A. TIMES, Mar. 26, 1996, at B7. An economic impact study by the Columbus, Ohio airport authority indicated that the Port Columbus airport generates an annual business income of nearly \$2 billion. See Kevin Mayhood, *Airport Generates \$2 Billion, Study Finds Economic Impact Hadn't Been Determined Before*, COLUMBUS DISPATCH, Jan. 3, 1996, at B1.

4. Airline officials have stated that major steps are required to prevent rapid growth of U.S. airlines in the next 12 years from outstripping existing airports and air traffic control systems. See Edward H. Phillips, *Airline Growth Seen Outpacing Airports*, AVIATION WK. & SPACE TECH., Mar. 10, 1997, at 44. David Hinson, the Administrator of the Federal Aviation

urban growth, has transformed nearby real estate into highly desirable land for development. Furthermore, residential communities have surrounded many U.S. airports, leaving the airports land-locked and unable to expand runway capacity to meet increased demand.⁵ Thus, flight delays and traffic congestion result at such airports and, through a ripple effect, at other airports throughout the nation.⁶ In short, major U.S. airports have become victims of their own success.

Efforts to expand airports to meet short- or long-term demand often face local opposition from residents concerned about excessive noise.⁷ As people who live near airports must tolerate frequent and undesirable aircraft noise, they do not want any increase in the frequency of flights associated with a new runway or the lengthening of an existing one. To some, noise is a mere annoyance, while others see it as a major obstacle to the enjoyment of their property.⁸ The potential for noise-induced medical problems and decreased learning in schools only exacerbates these concerns.⁹ Still more opposition

Administration, has said that "[t]he most serious potential problem in meeting the demands on aviation in the coming years will be inadequate capacity of our major airports." *FAA Administrator Pushes for Solution to Airport Capacity Problem*, AIRPORTS, Sept. 27, 1994, at 385. He believes that the capacity issue is ultimately more vital than air traffic control problems or financial problems in the airline industry. *See id.*

5. *See* Jeffrey Schoen, Comment, *Airport Noise: How State and Local Government Can Protect Airports from Urban Encroachment*, 1986 ARIZ. ST. L.J. 309, 310-11; *see also* Stewart Powell et al., *The Late, Late Show*, U.S. NEWS & WORLD REP., Dec. 22, 1986, at 14 ("[S]ooner or later, there will be no room in many cities for more runways and more concrete. Airports gobble up a lot of land, and acreage around the nation's big cities remains a shrinking resource."). Moreover, airports that cannot expand to meet demand for flights must restrict access. For instance, the FAA imposed the "High Density Rule" at four major airports in order to reduce delays. The flight restrictions, known to have detrimental competitive effects, are in effect at John F. Kennedy, LaGuardia, Washington National, and Chicago O'Hare International Airports. *See* Paul Mann, *Slot Machine*, AVIATION WK. & SPACE TECH., Mar. 6, 1995, at 17; James Ott, *Four Busy U.S. Airports Denied More Slots*, AVIATION WK. & SPACE TECH., June 26, 1995, at 31 (noting that at Washington National Airport, major airlines are allowed only 37 landings per hour).

6. *See* Carole A. Shifrin, *Officials Hope Capacity Crisis Will Spur Expansion of Airports*, AVIATION WK. & SPACE TECH., Nov. 9, 1987, at 83.

7. *See* James F. Gesualdi, *Gonna Fly Now: All the Noise About the Airport Access Problem*, 16 HOFSTRA L. REV. 213, 216 (1987) ("Though certainly not the only factor involved, the primary constraint on airport capacity is noise.").

8. Aircraft flights over private land are not a "taking" compensable under the Fifth Amendment, unless "they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land." *United States v. Causby*, 328 U.S. 256, 266 (1946).

9. Studies have indicated that children living near airports have higher blood-pressure

may arise among residents who are concerned about preserving their community. When an expansion project requires the acquisition of new land through the exercise of eminent domain,¹⁰ there is a much greater threat to a city's vitality than mere inconvenience from noise: such expansion may require the displacement of numerous homes, schools, and churches in a community in order to accommodate a new runway.¹¹

The ultimate goal in deciding whether and where to expand an airport should be to balance a community's need for air service against such service's detrimental impact. However, due to the large number of interested parties involved in making such decisions,¹² mutually agreeable solutions that meet the conflicting needs of these parties have yet to emerge. Because each group typically has its own unique needs and interpretation of the future, a group must constantly grapple with uncertain predictions of future airline passenger traffic, aircraft noise, aircraft operational procedures, costs, and

readings, resulting from higher-than-normal levels of the hormones that increase blood pressure, epinephrine and norepinephrine. See John J. Fried, *Say What? Americans Drowning In Own Noise*, THE ARIZONA REPUBLIC, Dec. 5, 1995, at A1. Additionally, Seattle residents who oppose expansion at Seattle-Tacoma International Airport have pointed to studies that noise can cause heart problems, birth defects, and insanity. See Christy Scattarella & Bob Ortega, *When Jets Fly Over Schools, Learning Can Nose-Dive*, SEATTLE TIMES, Mar. 15, 1992, at B4. Noise may also decrease learning in schools near airports. See *id.* School officials have said that noise affects both learning and teaching in the classroom. See Jerry Bergsman, *Taking Offensive on Airport Plan: Districts Fear Expansion Would Hurt Schools*, SEATTLE TIMES, May 4, 1992, at B3. It can also slow a preschooler's ability to learn language and speech. See *id.*

10. Eminent Domain is the power of government to force transfers of property from owners to itself. The Fifth Amendment to the U.S. Constitution is a tacit recognition of the power of government to appropriate land for public purposes. See *United States v. Carmack*, 329 U.S. 230, 241-42 (1946).

11. Many airport planners may not understand the direct detrimental effect that a proposed runway expansion has on residents' lives. For example, residents living near the St. Louis airport "who have lived very happily for 30 to 40 years in this area . . . are too old to be asked to pack their bags and move out." Margaret Gillerman, *Lambert Neighbors Decry Expansion*, ST. LOUIS POST-DISPATCH, May 21, 1989, at D11. More residence buyouts are also planned in Seattle. A new 8,500-ft. runway at Seattle-Tacoma International Airport will require that hundreds of homes and businesses that are in the expansion area be bought out. See Keith Seinfeld, *Third Runway Gets Go-Ahead: Project Opponents Prepare to File Lawsuit*, SEATTLE TIMES, Aug. 2, 1996, at B1.

12. Interested parties include the federal and state governments, local municipalities, the airlines, nearby residents and businesses, civic planners representing the larger metropolitan area, and the travelling public.

environmental impact.¹³ Litigation by local factions attempting to halt or delay airport expansion projects is caught at the intersection of two traditional legal precedents: local communities are charged with control of land use while the federal government is responsible for controlling aircraft operations. The determination of which precedent should dominate has fallen on the courts.

Court decisions ruling whether federal or local authority should take precedent in this context seem to turn on the necessity of additional land. Modifications to runways, taxiways, or air traffic control facilities on existing airport grounds fall under the category of "aircraft operations,"¹⁴ and, therefore, are the exclusive responsibility of the federal government.¹⁵ When a project is deemed to be an enhancement to flight safety, the view that "aircraft operations" predominate over land use is especially strong.¹⁶ However, when an expansion project requires additional land, courts are likely to hold that it falls under the category of "local land use."¹⁷

13. Diverse public and private sector objectives cause problems for long range airport decision-making. For example, air carriers are concerned about corporate profits, local governments benefit from tax revenues of increased development, and nearby residents are concerned about noise reduction. See Lyn Loyd Creswell, *Airport Policy in the United States: The Need for Accountability, Planning, and Leadership*, 19 TRANSP. L.J. 1, 8 (1990); see also *Communities, Inc. v. Busey*, 956 F.2d 619, 621 (6th Cir. 1992).

14. See 49 U.S.C. § 40123(a)(32) (1994) ("[O]peration of aircraft' mean[s] using aircraft for the purposes of air navigation, including—(A) the navigation of aircraft; and (B) causing or authorizing the operation of aircraft with or without the right of legal control of the aircraft.").

15. See *infra* note 90 and accompanying text.

16. Historically, local control of land use was closely guarded and would supersede conflicting federal control over aircraft operations. See Creswell, *supra* note 13, at 35. As a result, the state or local political process controlled, and the federal government was only marginally involved, in such conflicts.

One of the policies of the United States is to maintain the safe operation of airports. See 49 U.S.C. § 47101(a) (1994). Toward this end the U.S. Secretary of Transportation is statutorily directed to "cooperate with State and local officials in developing airport plans and programs that are based on overall transportation needs." *Id.* § 47101(g). But see Creswell, *supra* note 13, at 6. Mr. Creswell notes that the "national system of interconnecting, economically-beneficial airports is controlled almost exclusively by very independent units of local government." *Id.* Vigorous promotion of airport services is thus undermined by fragmented responsibility for decisions affecting airports. See *id.* at 8. While the federal government could step in, it is reluctant to do so because of the perception that airport matters are issues of "land use," which are historically under local control. See *id.* The resulting marginal involvement of the FAA ultimately leads to controversy. See *id.* at 9-10. The airports need land, but, without leadership, they are left "as a craft without a pilot: an ad hoc, leaderless association of governments, planes, land, and runways." *Id.* at 11; see also Gesualdi, *supra* note 7, at 213.

17. See *infra* Part III.C.2.

These two sources of controlling authority differ in the time required to implement various structural changes at United States airports. When projects are classified as "aircraft operations,"¹⁸ federal authority has been responsive to meet the needs of air travel.¹⁹ The Federal Aviation Administration (FAA) has allowed new runways and radar facilities when they may be accommodated by existing airport-owned land.²⁰ By contrast, state and local political authority have been slower to respond to such aviation industry needs.²¹ The decision making process is fragmented, slow, and often embroiled in local politics.²² Moreover, decisions at the local level are sometimes immersed in community and regional rivalries.²³ Often, delay in implementing changes is the result of a lack of clear decision making responsibility by any one governmental unit.²⁴

18. See *infra* Part IV.B.

19. The FAA has broad authority to act on issues of aircraft operations when it chooses to do so and is not hindered by local regulations or litigation. For instance, after the 1996 ValuJet crash in the Florida everglades, the FAA ordered smoke detectors installed in aircraft cargo compartments. See Steven R. Pounian, *A Redefinition of the FAA's Mission*, N.Y.L.J., June 24, 1996, at 3. Moreover, after a fatal crash of a USAir jet at New York's LaGuardia Airport due to ice on its wings, the FAA mandated specific deicing procedures. See *id.* Additionally, after two runway collision accidents, the FAA required the installation of radar equipment and special lighting to prevent future runway collisions. See *id.*

20. New runways or taxiways, are built more rapidly when they are on airport land than when they are not. For example, site preparations began within one year of the opening of the Denver International Airport for a new 16,000-foot runway intended to be used as a "safety valve" during bad weather periods. See William C. Scott, *Work To Start on DIA "Safety Valve" Runway*, AVIATION WK. & SPACE TECH., Dec. 4, 1995, at 75.

21. See Creswell, *supra* note 13, at 30-34. Creswell notes:

[A]viation impacts are almost universally felt across several local jurisdictional boundaries. Since these boundaries represent historic differences between neighborhoods and communities, it is not surprising that units of local government will disagree about the use of an airport Another consequence of fragmented local decision making is the opposition by one or more local governments to the airport development plans of another. The opposing government may have its own airport, which it desires to shield from competition, or it may want to curb the spillover effects which accompany increased aviation activity. This competitive atmosphere has become so fierce that the construction of new airports or airport expansion projects are a rarity in the United States.

Id.

22. See *id.* at 32.

23. See *supra* note 15.

24. See Creswell, *supra* note 13, at 37.

Some industry experts suggest that overseeing modifications to existing airports should be the province of federal authority, regardless of the nature of such modifications.²⁵ Under this approach, federal authorities might act as higher-level decision-makers when local rivalries cannot reach a solution. Consequently, federal authority could prevent local delays from burdening interstate commerce. People who live near airports, however, view this suggestion with alarm. They believe that local government must maintain control of airport land use and view attempts at federal control as a "power-grab" tactic.²⁶

This Note argues that growth policy at major airports is overly burdened by local politics. While decisions concerning airport growth should be made by local citizens, parochialism has made such decision-making very inefficient. Delays to vital airport expansion programs have hampered the national air transportation system to the point that in certain cases, the federal government must control decisions regarding whether the expansion of an airport is necessary and, if so, where and when such expansion should occur.

Part II of this Note discusses the history of airport growth and proposed solutions to noise and land use issues. Part III provides an

25. At a Department of Transportation hearing in 1989, United Airlines official James Guyette testified that "the federal government should have the power to require improvements and expansion projects at airports." *UAL Executive Says Federal Government Should Control Airport Expansion*, AIRPORTS, Aug. 22, 1989, at 400. Guyette compared the nation's aviation system to the "highways in the early 1950s, when the federal government took the lead in developing the interstate highway system." *Id.* He advocated a similar program for airports "to remove controversial decisions from the parochial politics." *Id.* According to Robert Crandall, president of American airlines, to cure the ills of aviation, "We've got to build a lot of new airports and runways." Jess Bravin, *FAA Chief Blasts Restrictions on Noise*, L.A. TIMES, Nov. 6, 1987, at 31. Furthermore, Crandall has stated that this effort "should be comparable to the construction of interstate highways in the 1950s." *Id.* John L. Baker, president of the Aircraft Owners and Pilots Association has said that airports "maintain a stronghold over the national air transportation system." *Local Transportation Funding Should Be Tied to Airport Growth*, May 27, 1988, available in LEXIS, NEXIS Library, PR NEWSWIRE File. He suggests that "[A]viation is, and must be, recognized as a national resource in which every citizen has a proprietary interest." *Id.* He maintains that a "National Aviation Policy . . . is the only meaningful flight plan for the future." *Id.*

26. The director of a citizens coalition concerned about a new runway at O'Hare has stated that "pre-emption of local zoning powers to nudge or force the people living near airports to move out, . . . instead of making an effort to reduce airport noise, . . . was a power-grab tactic that 'might never come to pass if community opposition remains solid.'" Neil H. Mehler, *Carol Stream Tones Down Attack on O'Hare Growth*, CHICAGO TRIB., July 12, 1990, at D1.

example of the failure of local politics to make timely decisions with respect to such issues. Part IV discusses federal case law and statutory preemption of local airport regarding airport expansions. Part V sets forth a proposal for congressional action to encourage local decision-making while still allowing courts to preempt local laws that delay airport expansion.

II. AIRPORT GROWTH AND PROPOSED SOLUTIONS

A. Traffic Growth and Obstacles to Expansion

Since airline industry deregulation in 1978, aviation has grown considerably in the United States, compelling airport facility growth. The competitive practices of the deregulated industry, along with a strong national economy, combined to double commercial air passenger activity during the decade following deregulation.²⁷ For instance, Washington Dulles International Airport, opened in 1962 and long considered something of “a white elephant” because of underuse, experienced rapid airline traffic growth. The passenger count at Dulles jumped 47 percent in 1985 to 5.2 million and another 74 percent in 1986 to 9.1 million, thus cramping the airport’s facilities.²⁸ Today, although traffic at Dulles and other airports is not growing as rapidly as in the mid-1980s, it is nonetheless still growing. Even at Miami International Airport, aviation officials expect traffic to grow from 30 million passengers in 1994 to 55 million in 2010.²⁹ Without a new runway, delays while waiting in line for takeoff at Miami International Airport are expected to reach 75 minutes.³⁰

However, communities have grown around airports and, as a result, are an obstacle to airport growth. When Dallas/Ft. Worth Airport opened in 1974, it was surrounded by large expanses of

27. See Creswell, *supra* note 13, at 6.

28. See Carole A. Shifrin, *Landmark Terminal Expanded at Dulles International Airport*, AVIATION WK. & SPACE TECH., Aug. 19, 1996, at 64.

29. See Ken Kaye, *Growth Plans Fuel Airport Expansion; Miami Expects 55 Million Travelers in 2010; Adding Runway, Rail Link*, SUN-SENTINEL (Ft. Lauderdale), Dec. 25, 1995, at B9.

30. See Ken Kaye, *To Hasten Lagging Jets, Miami Adding Runway*, SUN-SENTINEL (Ft. Lauderdale), Nov. 5, 1996, at D1.

Texas landscape, rolling fields, and groves of mesquite trees.³¹ Today, offices, hotels, and shopping centers line the roadway between Dallas and Ft. Worth. Homes, schools, and apartments have also developed in areas near the airport.³² Consequently, recent airport expansion plans at Dallas/Ft. Worth have been vigorously opposed.³³

Noise concerns present additional obstacles to airport growth. As the number of takeoffs and landings at the nation's airports continues to increase, noise related problems worsen.³⁴ Because claims of excessive aircraft noise have been legally sufficient to support a cause of action for more than fifty years,³⁵ recent litigation efforts to stop airport expansion have focused on exacerbated noise concerns caused by an increase in traffic volume and its close proximity to development.

The problem of airport capacity, noise, and land use is national in scope, and controversies over airport expansions have recently erupted in many U.S. cities. For example, the Port of Seattle wants to add a third parallel runway to the Seattle-Tacoma International Airport.³⁶ As a result, nearby communities launched vigorous public relations and court challenges to stop the expansion.³⁷ The Dallas/Ft. Worth airport, opened in 1974 as the largest airport in the world, recently added a new east-west runway that for years had been embroiled in a dispute over zoning control by local communities.³⁸

31. See Pamela B. Stein, *The Price of Success: Mitigation and Litigation in Airport Growth*, 57 J. AIRL. & COM. 513, 513 (1991).

32. See *id.*

33. See *infra* notes 145-52 and accompanying text.

34. See John J. Jenkins Jr., *The Airport Noise and Capacity Act of 1990: Has Congress Finally Solved the Aircraft Noise Problem?*, 59 J. AIRL. & COM. 1023 (1994).

35. In 1946, the Supreme Court in *United States v. Causby*, 328 U.S. 256 (1946), dealt with the subject of aircraft noise for the first time. In that case, low-level overhead flights frightened chickens causing them to fly into walls, killing themselves. See *id.* at 259. The Court held that the noise and lights from planes constituted a taking of property compensable under the Fifth Amendment. See *id.* at 266-67.

36. See Ron Judd et al., *Pro/Con-Should SEA-TAC Build a New Runway?—Third Runway's Essential to Region's Economic Health*, SEATTLE TIMES, Mar. 14, 1996 at B11.

37. See *ACC Files Lawsuit To Block Third Sea-Tac Runway*, AIRPORTS, Aug. 6, 1996, at 303; Keith Seinfeld, *Runway Foes Try to Deny Port Funding—Opponents Look to Tate to Keep Federal Money Out of Reach*, SEATTLE TIMES, Aug. 21, 1996, at B1; Seinfeld, *supra* note 11, at B1.

38. See *infra* notes 145-52 and accompanying text.

Lambert-St. Louis International Airport is currently developing an expansion plan that would add a parallel runway permitting the landing of two aircraft simultaneously in bad weather.³⁹ Construction of the runway at the airport's proposed site would require razing one-third of the nearby community of Bridgeton, which is fighting the plan.⁴⁰ Chicago is debating either building a third metropolitan airport or adding a new runway at O'Hare.⁴¹ Denver recently opened a new airport in 1995 amid continuing accusations that it was unnecessary and the costs unjustified.⁴² Airport expansion controversies have also recently occurred in Cleveland,⁴³ Albuquerque,⁴⁴ Louisville,⁴⁵ Los Angeles,⁴⁶ Palm Springs,⁴⁷ Ft. Lauderdale,⁴⁸ Minneapolis,⁴⁹ New Orleans,⁵⁰ Burbank,⁵¹ and San

39. See *infra* note 79 and accompanying text.

40. See Mark Schlinkmann, *Bridgeton Sues City Over Lambert, Says W-1W Plan Breaks State Law*, ST. LOUIS POST-DISPATCH, Apr. 26, 1996, at C6; *St. Louis Suburb Lawsuit Seeks Subdivision Assessment. Damages*, AIRPORTS, Sept. 13, 1994, at 366.

41. See Michelle Campbell & Fran Spielman, *Daley Casts Doubt on Midway Expansion Plans*, CHICAGO SUN-TIMES, Mar. 3, 1996, at 24; James Ott, *City, State Forces Wrangle Over Third Chicago Airport*, AVIATION WK. & SPACE TECH., Apr. 8, 1996, at 35; *Proposed AIP Amendment Would Limit O'Hare PFC Use Over Peotone Dispute*, AIRPORTS, June 4, 1996, at 218.

42. The Denver International Airport (DIA) opened in February 1995 and has already been plagued with noise complaints. See William B. Scott, *Noise Rules, Complaints Plague Denver Airport*, AVIATION WK. & SPACE TECH., Apr. 3, 1995, at 38. While, the new airport has been highly criticized, DIA appears to be an efficient airfield, and "public acceptance is high" according to DIA officials. William B. Scott, *Controversy Continues, But Users Like DIA*, AVIATION WK. & SPACE TECH., Jan. 6, 1997, at 38.

43. See *infra* notes 127-44 and accompanying text.

44. See *Airport Neighbors Alliance, Inc. v. United States*, 90 F.3d 426 (10th Cir. 1996) (upholding a runway upgrade at the Albuquerque International Airport).

45. See *Communities, Inc. v. Busey*, 956 F.2d 619 (6th Cir. 1992).

46. See Dan Garcia, *Our Ticket for the Global Future; Airport: A Balance Must be Struck Between Community Concerns and the Necessity of LAX to Expand*, L.A. TIMES, Mar. 26, 1996, at B7.

47. See *Palm Springs Voters Approve Airport Master Plan*, AIRPORTS, Nov. 14, 1995, at 444 (discussing the use of a general election ballot to approve a master plan for the Palm Springs Regional airport following an anti-noise group campaign).

48. The FAA conducted an 18-month environmental impact study on a proposed expansion necessary to meet growing air traffic demand at the Ft. Lauderdale-Hollywood International Airport. See Jody Benjamin, *Airport Neighbors Say Expansion Means Expanded Noise*, SUN-SENTINEL (Ft. Lauderdale), May 2, 1996, at B3. The Agency also sponsored a public information session to ascertain the sentiment of the community regarding an extension and widening of the airport's south runway. See *id.*

49. See *Airport Planning / The Two-Track Process Has Done Its Job*, STAR TRIBUNE (Minneapolis-St. Paul), Mar. 11, 1996, at A10 (noting that the politics of aircraft noise, rather

Diego.⁵²

B. Attempted Solutions

Currently, the federal statutory framework contains several provisions designed to reduce the severity of noise problems associated with airport expansions. Federal regulations require that by the year 2000, aircraft meet so-called "stage 3" noise standards.⁵³ As a result, manufacturers now produce jet engines incorporating improved technology, making them quieter than earlier designs.⁵⁴ Airlines have purchased new, less noisy aircraft or have applied "hush-kits" to quiet existing fleets.⁵⁵ Furthermore, the FAA has

than concern about capacity, was the impetus behind the plan to build a new Minneapolis-St. Paul International Airport).

50. See Sheila Grissett, *Runway Plans Taking Off*, NEW ORLEANS TIMES-PICAYUNE, Apr. 21, 1996, at A1 (discussing plans for two new runways at the New Orleans International Airport).

51. See Burbank-Glendale-Pasadena Airport Authority v. City of Burbank, No. CV-96-4125-KMW(SHX), 1996 U.S. Dist. LEXIS 11646, at *1 (S.D. Cal. 1996); Efrain Hernandez Jr., *Judge Asked to Thwart Action by Airport Foes*, L.A. TIMES, June 19, 1996, at B5 (discussing Burbank terminal expansion controversy); Steve Ryfle, *Berman Joins Critics of Airport Expansion*, L.A. TIMES, Jan. 11, 1996, at B1 (discussing proposed new terminal at the Burbank Airport to keep up with growing demand).

52. See Lynne Carrier, *Airport Study Finds Major Problems With Lindbergh Expansion*, SAN DIEGO DAILY-TRANSCRIPT, July 27, 1995, at A1 (stating that a proposed expansion would fall short of meeting traffic demands).

53. See 49 U.S.C. § 47522 (1994). "Stage 3" aircraft meet the stricter standard for noise emissions adopted by the FAA in 1977 for all aircraft certified after 1977. "Stage 2" aircraft meet only the 1969 FAA standards and are significantly noisier. See *id.*; see also 14 C.F.R. § 36.1 (defining aircraft stages). The U.S. airline industry expects to achieve a total Stage 3 aircraft fleet by Dec. 31, 1999. Currently, Stage 3 jets constitute more than 70% of the fleet, 5% more than had been projected for this time period. See Frances Fiorino, *Airline Outlook, Ahead of Schedule*, AVIATION WK. & SPACE TECH., Oct. 14, 1996, at 21.

54. The more advanced, quieter engines are a marketing point for engine and aircraft manufacturers. For instance, the MD-90 aircraft was equipped with two International Aero Engines V2500 turbofans which made it significantly more quiet than the MD-82 during takeoff. Additionally, Douglas had the MD-90 engine nacelles modified with a "15-inch inlet extension to provide for more front-end acoustic treatment," further reducing noise. Bruce A. Smith, *Quiet Operations Key to MD-90 Success, McDonnell Douglas Reduces Noise and Engine Emissions to Set the MD-90 Apart From Its Competitors*, AVIATION WK. & SPACE TECH., Mar. 22, 1993, at 42.

55. In 1993, Delta Airlines decided to install hush kit modifications on twelve of its 727s to reduce noise emissions from the Pratt & Whitney JT8D engines. The cost for installing the hush-kits was over \$1.5 million per plane. The kits brought the aircraft into compliance with Stage 3 noise standards. See James T. McKenna, *Delta Opts to Quiet 727s; Hush Kit Demand May Escalate*, AVIATION WK. & SPACE TECH., Sept. 14, 1992, at 41.

attempted to modify air traffic corridors, directing low altitude flight paths over less noise-sensitive neighborhoods.⁵⁶ Some airport proprietors have even imposed curfews on flight operations during the nighttime hours.⁵⁷ However, even though these steps toward noise reduction help lessen the burden on neighboring communities, none address the need for additional capacity.

To date, no proposed solution would provide more capacity without expansion of the nation's airports.⁵⁸ Theoretically, a community with a land-locked, overcrowded airport could build a totally new facility on the farthest edge of its suburbs, if there is available undeveloped land. Yet, while this may be a viable solution, new airports can be cost prohibitive⁵⁹ and may be located so far from

Later, in 1994, Northwest Airlines decided to install hush kits on its fleet of DC-9 jets to meet Stage 3 criteria instead of purchasing a new 100-seat aircraft. The kits relocate the CD-9's JT8 engines' inlet guide vanes and provide for the installation of an internal exhaust gas mixer in the tailpipe to reduce noise. The kit adds "333 lb. to the basic empty weight of each aircraft." Edward H. Phillips, *Northwest to Hushkit DC-9-30s in November*, AVIATION WK. & SPACE TECH., Aug. 15, 1994, at 29.

56. The FAA may re-route departure paths to control noise. For instance, complaints from angry homeowners after implementation of the East Coast Plan, an overhaul of navigation routes to reduce delay, caused the FAA to shift flight corridors away from certain communities. See Michael O. Lavitt & Edward H. Phillips, *FAA Close to Decision on Newark Rerouting*, AVIATION WK. & SPACE TECH., Oct. 31, 1994, at 66.

57. See Gesualdi, *supra* note 7, at 248 (citing *National Aviation v. City of Hayward*, 418 F Supp 417 (N.D. Cal. 1976)). Los Angeles International Airport, for example, has attempted a number of steps to reduce noise, including a more strict nighttime curfew. See James T. McKenna, *Cutting Noise at LAX*, AVIATION WK. & SPACE TECH., Feb. 1, 1993, at 17.

58. An FAA Administrator has portrayed the future of air travel without airport expansion as a "system that is highly efficient in the air, with satellite navigation and routing flexibility, but increasingly congested on the ground." *FAA Administrator Pushes For Solution*, *supra* note 4, at 385.

59. All new airports have extremely high associated costs. A study by the Minneapolis City Council determined that building a new airport would cost \$2.2 billion more than expanding Minneapolis's present airport site. See *Airport Planning*, *supra* note 49, at A10. In Chicago, estimates showed that \$4 billion to \$5 billion would be needed to construct a new airport at Peotone. See Gayle M. Franzen, *A Broader Scope Needed in Debate over Peotone*, CHICAGO SUN-TIMES, July 17, 1996, at 49. The new Denver International Airport cost about \$5 billion to develop. See Scott, *Controversy Continues*, *supra* note 42, at 38. The airport initially imposed a surcharge fee on each passenger ticket so that passengers using the new facility would absorb some of the cost. See *id.* However, the fees led to a traffic increase at Colorado Springs airport due to people avoiding Denver's airport. See *id.* Nevertheless, some believe that there are cost advantages to building an all new airport. Denver's aviation manager, James C. DeLong, contends that there is a 30% cost disadvantage to building at an existing airport as compared to constructing an all-new facility at a green-field site such as DIA. See *id.* On the other hand, Paul Schoellhamer, vice president of government affairs at Northwest Airlines,

a city center as to be inconvenient to much of the public. Furthermore, residents near a proposed remote new airport site, although fewer in number, may oppose it as much as residents near a present airport site oppose expansion. Accordingly, "wayports," or all new airports constructed in remote locations designed to serve exclusively as connecting centers, have been considered and largely rejected.⁶⁰ Another potential solution is the use of abandoned military airfields for civilian purposes. Unfortunately, most of these airfields are not near population centers requiring more air capacity.⁶¹ Additionally, air traffic congestion may be alleviated by eliminating the airline hub-and-spoke system. Major airports face their greatest capacity constraint during a connecting "wave" when 20 to 40 aircraft are scheduled to arrive or depart within a short time.⁶² Eliminating hubs theoretically could spread traffic more uniformly throughout the day, thus causing less strain on capacity. Unfortunately, however, any such potential efficiency gains are dubious,⁶³ and moreover, the airlines have shown no interest in

believes that "shutting an existing airport and creating another one is the most inefficient way—wasteful way—to create new capacity." Kirk Victor, *Hub Cap*, NAT'L JOURNAL, May 12, 1990, at 1144.

60. A system of four to six strategically located remote transfer airports had been recommended as a cheap and effective way to meet future capacity needs. See *Report to FAA Recommends Wayports as Best Way to Meet Long-Term Needs*, AVIATION DAILY, Feb. 20, 1992, at 303. However, consideration of the concept appears to have waned, and the FAA does not consider wayports to be a viable alternative. See *City of Grapevine v. Department of Transp.*, 17 F.3d 1502, 1506 (D.C. Cir. 1994).

61. It is the policy of the United States to place special emphasis on the conversion of former military air bases to civil use. See 49 U.S.C. § 47101(a)(10) (1994). Airport capacity problems may arguably be solved by increasing the use of underutilized airports having long runways and undeveloped acreage. See Creswell, *supra* note 13, at 45-48. However, many underutilized airports are in locations without a large traffic demand and typically require significant capital investment to return them to productive capacity. See *id.* In addition, the development of underutilized airports with growth potential may be opposed by sponsors of currently operating airports, including the airlines.

62. An airline hub allows for an increase in market share and the frequency of operation. See Creswell, *supra* note 13, at 19. The hub system, however, "has placed a great burden on the infrastructure of these major airports." *Id.* Airports experience "peak hour" pressures when many planes and passengers are in the hub terminals.

63. Hubs have been criticized as inefficient. However, "[w]hile a hub-and-spoke system is admittedly more expensive to operate than a comparably-sized system of point-to-point routes, the system's incremental costs are more than offset by its enormous revenue benefits." Paul Stephen Dempsey, *Airlines in Turbulence: Strategies for Survival*, 23 TRANSP. L.J. 15, 37-38 (1995). American Airlines estimates that "there are fewer than 500 city pair markets in the

eliminating the hub system. In sum, while the need for airport expansion may be alleviated, there is no complete solution.

III. AN EXAMPLE OF THE FAILURE OF LOCAL POLITICS TO MAKE A TIMELY DECISION REGARDING AIRPORT EXPANSION

Normally, when a community is forced to deal with a major issue such as determining airport location or size, there is a local public political debate and an exercise of a traditionally regional political process. Ideally, through its local political process, a community should have the option of locating its airport facility where it chooses and be free to limit airport size and air travel capacity.

A failure to render a decision through the local political process often results in airport traffic congestion as air travel continues to grow and there is a lack of capacity for expansion at existing airports or identification of viable alternative airports through which to channel traffic. St. Louis is a prime example of the delay that may result from local regulation of airport expansion planning. Local debate on the expansion or replacement of Lambert-St. Louis International Airport (Lambert Field) has gone on for more than twenty-five years.⁶⁴ The airport, at only 2,300 acres, is one of the smallest major airports in the United States.⁶⁵ City leaders recognized capacity limitations at the land-locked airport as early as 1968.⁶⁶ At that time, they proposed a new 18,000 acre replacement airport to be built on farm land southeast of St. Louis, near Waterloo, Illinois.⁶⁷ A public controversy raged through the mid-1970s over whether to expand Lambert Field or to build the new airport, with various local factions and public officials each having their own views of how best to manage future air traffic.⁶⁸ After much public debate, and a

United States big enough to adequately support point-to-point jet service." *Id.*

64. See *City of St. Louis v. City of Bridgeton*, 705 S.W.2d 524, 525 (Mo. Ct. App. 1985).

65. See *id.*

66. See *Missouri-St. Louis Metro. Airport Auth. v. Coleman*, 427 F. Supp. 1252, 1254 (D.D.C. 1977).

67. See Philip Sutin, *Charges City Drags Feet in Improving Lambert*, ST. LOUIS POST-DISPATCH, May 16, 1972, at A1, A11.

68. See Philip Sutin, *FAA Target on Airport at Hearing*, ST. LOUIS POST-DISPATCH, Aug. 1, 1972, at A3. The mayor of St. Louis, officials from the State of Illinois, and a metropolitan airport authority group favored the new facility, while the governor of Missouri, the St. Louis

referendum indicating overwhelming citizen support for keeping Lambert Field as the regional airport,⁶⁹ it appeared clear that Lambert Field would be the community's airport for the future.⁷⁰

Unfortunately, the St. Louis Lambert Field controversy soon resurfaced. By the mid-1980s, the long-anticipated need for additional runway capacity at Lambert called for an evaluation of many potential runway orientations and locations.⁷¹ As in the 1970s, public officials and municipalities in the 1980s were divided in what was termed "tug-of-war politics."⁷² By 1990, the airport owner, the City of St. Louis, had selected its favored runway configuration.⁷³ Neighboring municipalities strongly opposed that choice⁷⁴ and, as a result, construction never began.

The city again conducted a new runway configuration study by 1996 and chose a different runway orientation.⁷⁵ This new plan required the removal of nearly 1,900 residences in the nearby city of

Chamber of Commerce, and family farmers near the site opposed it. *See id.* Part of the debate in 1972 centered on the accuracy of traffic predictions for 1990, which ranged from 14.2 to 17.5 million emplanements for 1990. (Actual 1990 figures were approximately 20 million passengers.) *See id.*

69. *See City of St. Louis*, 705 S.W.2d at 524.

70. U.S. Transportation Secretary Brock Adams decided that "Lambert will be the area's airport for the future." Time Flach & Dick Goldkamp, *Illinois Role in Planning for Lambert is Criticized*, ST. LOUIS GLOBE-DEMOCRAT, Nov. 19, 1977, at A1.

71. A configuration study of 27 runway plans was evaluated. The city of St. Louis hired an aviation consulting firm to narrow the choices. The goal was to speed construction in an "aggressive action to cut aircraft delays at Lambert Field." Margaret Gillerman & Nordeka English, *Officials, Residents Hail Airport Plans*, ST. LOUIS POST-DISPATCH, Aug. 27, 1989, at D1.

72. Milton Svetanics, the chief of staff for the mayor of St. Louis, stated that "the area's elected officials—from the smallest municipalities to the congressional delegation—have been embroiled in the tug-of-war politics involving airport expansion." *Id.*

73. *See Finding Consensus on Expansion is Turbulent Task*, ST. LOUIS POST-DISPATCH, Aug. 11, 1991, at C1.

74. *See Margaret Gillerman, Finding Consensus on Expansion is Turbulent Task*, ST. LOUIS POST-DISPATCH, Aug. 11, 1991, at C1 (noting the Mayor of St. Louis's overwhelmingly negative sentiment toward the proposed runways).

75. The F-4 plan originally favored by the City of St. Louis was revised by a new mayoral administration and became a new plan including three runways instead of four. *See Mark Schlinkmann, Airport Plan Revision Drops A Runway; Proposal Still Takes Chunk of Bridgeton*, ST. LOUIS POST-DISPATCH, Dec. 28, 1993, at B1. Additionally, the administration re-evaluated options to build a runway to the north, northeast, south, and west of the airport. *See Carolyn Tuft, Airport to Pick Expansion Plan, Six Options Offered*, ST. LOUIS POST-DISPATCH, Apr. 9, 1995, at A1. Ultimately, the west plan was selected. *See id.*

Bridgeton.⁷⁶ Not surprisingly, this plan sparked a strong and vocal opposition from Bridgeton residents.⁷⁷ Now, nearly 20 years after the issue was supposedly settled, there have been renewed calls to construct an all new airport to replace Lambert Field at an unnamed site.⁷⁸ Moreover, legal action may further delay construction of a new runway in St. Louis.⁷⁹ Meanwhile, travelers regularly face traffic delays due to Lambert's lack of runway capacity. As a result, the nation's air commerce is affected, as delays at hub airports such as St. Louis have a ripple effect on airports throughout the country.

IV. AIRPORT EXPANSION AND FEDERAL PREEMPTION

A. Types of Preemption

In 1851, the U.S. Supreme Court announced a rule allowing the federal government to preempt state law when regulating commerce.⁸⁰ The Court stated that "whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan or regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress."⁸¹ Today, the doctrine of federal preemption of state law is based on the Supremacy Clause of the Constitution,⁸² and is triggered when there is: 1) an actual conflict with federal law, 2) a state law that would be an obstacle to effectuating the purposes of federal legislation, or 3) a federal law so comprehensive as to preempt the respective field.⁸³ If any of these

76. See Mei-Ling Hopgood, *1,400 Flock to Airport Hearing*, ST. LOUIS POST-DISPATCH, Oct. 29, 1996, at B1.

77. See *id.*

78. There have been suggestions to develop a new airport far west of St. Louis near Foristell, Missouri or to develop Scott Air Force Base, near O'Fallon, Illinois, as a replacement for Lambert Airport. See *Letters From The People*, ST. LOUIS POST-DISPATCH, July 22, 1996, at B6. One writer of a letter to the editor of the St. Louis Post-Dispatch wrote, "Let's develop the airport in Illinois before TWA and other major carriers move to Kansas City or Cincinnati, where world-class airports are already in place." *Id.*

79. See Schlinkmann, *Bridgeton Sues City Over Lambert*, *supra* note 44, at C6. Bridgeton argued that St. Louis had not obtained the necessary zoning approval needed for runways. See *id.*; see also Hopgood, *supra* note 76, at B1.

80. See *Cooley v. Board of Wardens*, 53 U.S. 299 (1851).

81. *Id.*

82. U.S. CONST. art. VI, cl. 2.

83. See *Pacific Gas & Electric Co. v. State Energy Comm'n*, 461 U.S. 190 (1983).

three preemption events is present, federal law takes supremacy over state or local law.⁸⁴

B. Federal Statutes

Federal governmental control and regulation in the field of aviation is comprehensive. The Federal Aviation Administration (FAA) within the Department of Transportation has primary responsibility for regulating the nation's air commerce.⁸⁵ The Federal Aviation Act,⁸⁶ the Noise Control Act,⁸⁷ and the Airport and Airway Improvement Act (AAIA)⁸⁸ constitute the primary legislative framework governing U.S. airports. Congress implemented these statutes both to facilitate the growth of air travel and to control such travel's associated noise.

The Federal Aviation Act provides that the United States shall possess exclusive jurisdiction over the airspace of the United States and charges the FAA with developing policy for the use of such airspace.⁸⁹ The Act also preempts state and local regulation affecting "aircraft operation."⁹⁰ The Noise Control Act authorizes the FAA, in conjunction with the Environmental Protection Agency, to control and abate aircraft noise.⁹¹ The AAIA provides federal funding for airport construction projects and is designed to increase the capacity of facilities to the maximum feasible extent so that air travel safety

Regarding the third prong, it has been noted that "occupation of the field does not mean that every blade of grass within it must be subject to express federal control; it means only that congressional intent demonstrates that the area is subject to exclusive federal control, whether potential or actual." *Harrison v. Schwartz*, 572 A.2d 528, 532 (Md. 1990).

84. *See id.*

85. *See* Federal Aviation Act, 49 U.S.C. §§ 40101-41901 (1994).

86. *See id.* The Act provides for the promotion, encouragement, and development of civil aeronautics and a viable, privately owned United States air transport industry.

87. 49 U.S.C. §§ 47521-47533 (1994). The Noise Control Act was designed to balance the interests of airlines and persons residing near airports. *See* 59 J. AIR L. & COM. 1023, 1038 (1994).

88. 49 U.S.C. §§ 47101-47533 (1994).

89. *See* 49 U.S.C. § 40104(a) ("The Administrator of the Federal Aviation Administration shall encourage the development of civil aeronautics and air commerce in and outside the United States.").

90. *See id.*

91. *See* 49 U.S.C. §§ 47521-47533.

and efficiency increase and delays decrease.⁹² Additionally, the statute is designed to foster cooperation between state and local governments in order to develop airport programs that are based on overall transportation needs.⁹³

C. Judicial Recognition of the Federal Government Role in Airports

Past aviation litigation attests to the fact that courts have long recognized the pervasiveness of federal control of air transportation. In 1944, the Supreme Court offered a broad interpretation of the federal role in aviation and stated:

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. The moment a ship taxis onto a runway it is caught up in an elaborate and detailed system of controls. [Its] privileges, rights, and protection [it] owes to the Federal Government alone and not to any state government.⁹⁴

Almost thirty years after that broad recognition, the Supreme Court found that federal regulation of airspace management, air navigation facilities, and air safety was pervasive. The preeminent authority question of federal preemption in the area of aviation stems from the Court's decision in *City of Burbank v. Lockheed Air Terminal, Inc.*⁹⁵ In that case, the Court struck down a city ordinance that made it unlawful for jet aircraft to take off between the hours of 11 p.m. and 7 a.m.⁹⁶ In striking down the ordinance, the Court held that local ordinances regulating aircraft noise were invalid because Congress, by its enactment of the Federal Aviation Act and the Noise Control Act, preempted state and local control.⁹⁷ In Justice Douglas'

92. See 49 U.S.C. §§ 47101-47533.

93. See *id.* § 47101(g).

94. *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292, 303 (1944).

95. 411 U.S. 624 (1973).

96. See *id.* at 625.

97. See *id.* at 633.

majority opinion,⁹⁸ the Court noted the great public interest in airports by adopting a quote from an FAA statement:

The network of airports throughout the United States and the constant availability of these airports are essential to the maintenance of a sound air transportation system. The continuing growth of public acceptance of aviation as a major force in passenger transportation and the increasingly significant role of commercial aviation in the nation's economy cannot be inhibited if the best interest of the public is to be served.⁹⁹

Moreover, the Court expressed concern over "fractionalized control" that could seriously limit the flexibility of FAA control of air traffic.¹⁰⁰ Such limitations could compound the "difficulties of scheduling flights to avoid congestion and the concomitant decrease in safety."¹⁰¹

D. Judicial Development Since the Burbank Decision

The *Burbank* decision made it clear that the Federal Government would preempt any attempts by local governments to use their police power in an effort to control noise or otherwise affect flights.¹⁰² However, it raised other questions regarding when federal preemption applies to aviation. Since *Burbank*, courts have attempted to distinguish the sovereign regulation of aircraft in flight from the

98. *See id.* The dissenting opinion, written by Justice Rehnquist, stated that Congress's language and the legislative history did not indicate an intent to "oust local governments from the enactment of regulations such as that of the city of Burbank." *Id.* at 652 (Rehnquist, J., dissenting). The dissent further stated, regarding an issue not directly addressed by the majority, that a local government could still use its police power to "prevent the establishment of a new airport or the expansion of an existing one within its territorial jurisdiction by declining to grant the necessary zoning for such a facility." *Id.* at 653.

99. *Id.* at 640.

100. *See id.* at 639.

101. *Id.*

102. *See Price v. Charter Township of Fenton*, 909 F. Supp. 498 (E.D. Mich. 1995) (preempting an ordinance limiting the frequency of flights); *United States v. City of Blue Ash*, 487 F. Supp. 135 (S.D. Ohio 1978) (preempting an ordinance requiring aircraft to make noise abatement turns); *Minnesota Pub. Lobby v. Metro. Airports Comm'n*, 520 N.W.2d 388 (Minn. 1994) (preempting noise standards set by a state pollution control agency).

regulation and designation of landing sites.¹⁰³ A city may not, “under the pretense of its zoning power, attempt to regulate those flight operations to quell airplane noise.”¹⁰⁴ However, a zoning ordinance that does not regulate aircraft noise emissions or the actual conduct of flight operations may be valid.¹⁰⁵ Consequently, zoning laws may be created to ensure “that airports are not placed snugly between hospitals, churches, schools, cemeteries, and the like.”¹⁰⁶

Even though courts have struck down zoning conditions that directly limit flights,¹⁰⁷ they have allowed zoning ordinances that indirectly limit flights. Courts have invalidated zoning regulations

103. In *Price v. Charter Township of Fenton*, 909 F. Supp. 498, a township ordinance prohibited any commercial enterprise from operating aircraft at the local airport if such use operation entailed more than four takeoffs and landings of a plane with a jet engine, or an engine with more than 299 horsepower, within a twenty-four-hour period. *See id.* at 503. The township attempted to distinguish *City of Burbank* and other preemption cases by ‘drawing a distinction between ordinances that regulate aircraft operation in flight . . . and ordinances that are ‘simple zoning,’ . . . regulating the type of activity permitted on land . . .’ *Id.* The court deemed that distinction misguided, however, and stated that “[i]t is difficult, if not impossible, to draw a distinction between regulation concerning the ‘flight’ of aircraft and regulation concerning the takeoff and landing of aircraft. Obviously, there cannot be one without the other two.” *Id.*

However, in *Gustafson v. City of Lake Angelus*, 76 F.3d 778 (6th Cir. 1996), the Sixth Circuit found that the regulation of aircraft in flight is “distinguishable from the regulation of the designation of plane landing sites.” *Id.* at 783. In that case, a seaplane pilot brought suit challenging city ordinances prohibiting the operation of seaplanes on the surface of Lake Angelus. *See id.* The pilot claimed that the ordinances were preempted by federal law. *See id.* The Sixth Circuit upheld the ordinances, reasoning that the designation of plane landing sites is subject to local control. *See id.* The concurring opinion expressed concern about federalism and the need for a strong national government. *See id.* at 792. The concurring judge opined that the “line between permissible local regulation, such as the zoning regulation . . . , and impermissible encroachments on federal power in the name of zoning or other traditional state police power functions, . . . is a thin line. *Id.* He noted that air traffic must be regulated at the national level, and he suggested that “local government ought to take care in regulating in areas that are subject to broad national control and consider the advantages of our national government before attempting to undermine its authority.” *Id.* at 792-93.

104. *Price*, 909 F. Supp. at 504.

105. *See Faux-Burhans v. Frederick County*, 674 F. Supp. 1172 (D. Md. 1987) (holding a county zoning ordinance that regulated intensity of use at a private airfield not preempted by federal law).

106. *Price*, 909 F. Supp. at 503.

107. *See, e.g., Burbank-Glendale-Pasadena Airport Authority v. City of Los Angeles*, 979 F.2d 1338, 1341 (9th Cir. 1992) (“Stated simply, a non-proprietor municipality may not exercise its police power to prohibit, delay, or otherwise condition the construction of runways and taxiways at a non-city-owned airport.”); *see Harrison v. Schwartz*, 572 A.2d 528 (Md. 1990) (finding that a conditional use zoning limitation requiring that take-offs from an airstrip be separated by fifteen-minute intervals is preempted by federal law).

that directly limit the frequency of take-offs at an airport as attempts to control noise, holding that they are not subject to state and local control.¹⁰⁸ However, recently courts have allowed cities to use zoning in order to indirectly limit the frequency of take-offs at an airport. As a result, courts facing expansion project cases have been influenced largely by two factors: whether safety is the motivation for the project and whether new land is required.

1. Airport Modifications Initiated Primarily to Improve Safety

A modification to an airport runway configuration on airport-owned land, when motivated by public safety, is regulated exclusively by federal law.¹⁰⁹ For example, in *Burbank-Glendale-Pasadena Airport Authority v. City of Los Angeles*,¹¹⁰ the Ninth Circuit Court of Appeals held that federal aviation law preempts a city ordinance when safety is an issue. In *Burbank-Glendale*, the Burbank airport wanted to lengthen a taxiway adjacent to an existing runway so that aircraft preparing for takeoff did not have to cross over an active runway, thereby providing a safety benefit.¹¹¹ The parcel of land was owned by the airport but was located within the jurisdiction of the City of Los Angeles. Although the project would not require any new land acquisition, the L.A. city council enacted an ordinance preventing the construction of the taxiway.¹¹² The court struck down the ordinance finding the regulation of runways and taxiways preempted by federal law.¹¹³ Specifically, the court noted that it is well-settled that a city may not interfere with aircraft

108. See *Harrison*, 572 A.2d at 375.

109. See 49 U.S.C. §§ 40101-41901 (1994).

110. 979 F.2d 1338.

111. See *id.* at 1339.

112. See *id.* at 1340. The ordinance required the airport to submit every proposed development project to the City Planning Commission for prior review and approval.

113. See *id.* at 1341. The court stated that

proper placement of taxiways and runways is critical to the safety of takeoffs and landing and essential to the efficient management of the surrounding airspace. The regulation of runways and taxiways is thus a direct interference with the movements and operations of aircraft, and is therefore preempted by federal law.

Id.

operations and safety.¹¹⁴

In spite of the *Burbank-Glendale* court's suggestion to the contrary, safety and capacity are directly related and intertwined.¹¹⁵ Even though the court in *Burbank-Glendale* focused on safety and the impact on aircraft operations, any expansion may also be viewed as a capacity enhancement. Assuming that a fixed capacity or constant number of planes utilize an airport, the addition of a new taxiway would provide a clear increase in safety by eliminating the need for many planes to cross an active runway. Alternatively, an expansion may also provide an increase in capacity. If one measures safety as a fixed minimum separation distance between aircraft on an active runway, a new taxiway would allow for a more efficient use of the runway while simultaneously allowing greater capacity at a constant level of safety.

Similarly, the addition or expansion of navigation facilities, when motivated by public safety, is regulated exclusively by federal law.¹¹⁶ In *United States v. City of Berkeley*,¹¹⁷ a federal district court held that a local regulation was preempted by federal law because it had obstructed the federal objective of improving facilities for safety purposes.¹¹⁸ In *City of Berkeley*, the FAA and officials of the Lambert-St. Louis International Airport wanted to construct a new radar facility on airport-owned land that was within the city limits of Berkeley.¹¹⁹ The radar facility was designed to improve detection of aircraft, particularly small planes, at greater distance.¹²⁰ After conducting environmental assessments that found no significant impact, the FAA determined that the Berkeley site was the best available location.¹²¹ The City of Berkeley, however, through its

114. *See id.* at 1340.

115. *See 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).

116. *See United States v. City of Berkeley*, 735 F. Supp. 937, 940 (E.D. Mo. 1990).

117. 735 F. Supp. 937.

118. *See id.* at 940.

119. *See id.*

120. The ASR-9 radar, a state-of-the-art radar system, was part of the National Airspace System Plan designed to enhance air safety for the travelling public. Besides detecting aircraft, the radar was designed to permit air traffic controllers to detect weather conditions and integrate this information into their direction of air traffic. *See id.* at 938.

121. *See id.*

zoning power, prohibited the construction of the new radar facility.¹²² In support of its holding, the court focused on the safety benefits of the new radar facility, noting that a delay in construction would deprive the public of enhanced air safety.¹²³ Consequently, the Berkeley zoning law was seen as an obstacle to the federal objective of establishing air navigation facilities for the public's safety.¹²⁴ As with *Burbank-Glendale*, the court in *City of Berkeley* was concerned with the project's safety enhancement and impact on aircraft operations.¹²⁵ However, underlying the court's action was a capacity issue, illustrated by its notation of the "crowded skies" above St. Louis.¹²⁶

2. Airport Modifications Initiated to Increase Capacity

Courts treat expansions onto new land much differently than expansions on existing airport land when safety is the principal motivation for expansion. Tending to believe that expansions onto new land are motivated by the desire to increase capacity, rather than safety, courts are reluctant to preempt local laws. For example, in *City of Cleveland v. City of Brook Park*,¹²⁷ the City of Cleveland, which owned the Cleveland Hopkins International Airport, wanted to lengthen an existing runway and construct a new runway to meet projected increases in traffic.¹²⁸ Land needed for much of the new runway was located in, and owned by, the adjacent city of Brook Park.¹²⁹ While Cleveland was attempting to acquire the needed

122. The land had been zoned for industrial development, and the city denied the FAA's request for a special use permit for the radar project. *See id.* at 939. Berkeley asserted that the site chosen for the radar was unacceptable because of its proximity to a high school and the proposed site of a recreational complex, Berkeley maintained that such proximity could pose a health or safety hazard. *See id.*

123. *See id.* at 940.

124. *See id.*

125. *See id.*

126. The court noted the strong interest in air safety given that twenty million passengers per year used the airport. *See id.* at 940-41.

127. 893 F. Supp. 742 (N.D. Ohio 1995).

128. The airport required modifications to correct several perceived deficiencies in order to meet projected increases in traffic. Aware of potential safety problems caused by the deficiencies, the City of Cleveland announced plans for the extension of an existing runway to 10,800 feet and construction of a new 8,500-foot runway. *See id.* at 745-46.

129. *See id.* at 746.

property from Brook Park, Brook Park enacted ordinances that required any landowner to obtain a conditional use permit for new airport construction.¹³⁰ The ordinances further required that landowners describe how the construction would comport with Brook Park's master zoning plan.¹³¹ Cleveland sought a declaratory judgment that the Brook Park ordinances were unconstitutional and preempted by federal law.

The Second Circuit Court of Appeals upheld the local land use ordinances.¹³² The court saw no conflict between Brook Park's desire to ensure consistency with Brook Park's land use goals and the federal purpose of improving airports.¹³³ The court found that although the Federal Airport and Airway Improvement Act¹³⁴ was intended to encourage airport development, Congress's broader purpose was to facilitate airport improvements in general.¹³⁵ Thus, the court reasoned that the failure of one particular proposal would not frustrate Congress's general purpose.¹³⁶

The *City of Cleveland* court also refused to find that Congress had preemptively occupied the regulatory field.¹³⁷ The court found that the Federal Aviation Act only preempts laws that affect "aircraft operations,"¹³⁸ and that runway placement has only a "tangential" effect on flight operations, rather than a substantial affect on the use of airspace.¹³⁹ Thus, the court expressly declined to follow the *Burbank-Glendale* court's reasoning that the placement of runways is critical to air safety and airspace management.¹⁴⁰ In support of its holding, the *City of Cleveland* Court reasoned that the words in the federal statute giving the FAA power to acquire, establish, and improve air navigation facilities, including landing areas, were not

130. *See id.*

131. *See id.*

132. *See id.* at 752.

133. The court noted that an additional purpose of the AAIA was to foster cooperation with state and local governments. *See id.* at 749.

134. 49 U.S.C. §§ 47101-47533 (1994).

135. *See City of Cleveland*, 893 F. Supp. at 749.

136. *See id.* at 749.

137. *See id.*

138. *See* 49 U.S.C. § 40102(a)(32).

139. *See City of Cleveland*, 893 F. Supp. at 751.

140. *See id.*

controlling because “not all landing areas are airports.”¹⁴¹

The *City of Cleveland* Court seemingly ignored the safety implications of the expansion, which would have qualified it as a federal interest subject to federal regulation. Although the proposed expansion was designed to eliminate safety problems associated with increased traffic,¹⁴² the court’s opinion was silent regarding safety. Arguably, few items have a more fundamental effect on pilots and regional aircraft operations than the placement and configuration of runways. However, the court classified these interests as “tangential” to flight operations.¹⁴³ In this regard, the court’s holding does not seem consistent with the aggregation approach to preemption jurisprudence first enunciated by the Supreme Court in *Wickard v. Filburn*.¹⁴⁴

Like *City of Cleveland*, other courts have distinguished between expansion projects having a flight safety motivation and those requiring additional land. In *Dallas/Fort Worth International Airport Board v. City of Irving*¹⁴⁵ a Texas state court ruled that federal aviation regulations preempt local law only in the specific areas set out by Congress, such as safety, airspace, and noise control.¹⁴⁶ In this case, an airport board sued three nearby cities challenging their requirement that the board follow local zoning ordinances.¹⁴⁷ The

141. *See id.* at 750 n.3. The court also noted that FAA policy statements referring to zoning power as being reserved to the states are indicative of the distinction between regulation of flight operations and land use. *See id.* at 751.

142. *See id.* at 746.

143. *See id.* Potentially dangerous runway conditions are present during inclement Cleveland weather, as demonstrated by near-accidents that occurred at Hopkins Airport less than two years after the *City of Cleveland* decision. *See News Breaks, AVIATION WK. & SPACE TECH.*, Nov. 18, 1996, at 19. Interestingly, two landing incidents occurred at Cleveland Hopkins International Airport during the same week, when an American MD-80 and a Delta MD-88 overran runways during snow squalls, even though the runways were rated as operational. *See id.*

144. *See* 317 U.S. 111, 127-28 (1942) (That the contribution of one “may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial.”).

145. 854 S.W.2d 161 (Tex. Ct. App. 1993). For a discussion of the Dallas/Ft. Worth controversy background, see Troy J. Cole, *Zoning Control of Airport Expansion by Host Cities and the Battle Over Dallas/Ft. Worth International Airport*, 59 J. AIR L. & COM. 193 (1993); Pamela B. Stein, *The Price of Success: Mitigation and Litigation in Airport Growth*, 57 J. AIR L. & COM. 513 (1991).

146. *See Dallas/Ft. Worth Int’l Airport Bd.*, 854 S.W.2d at 169.

147. In 1988, the Airport Board announced a redevelopment plan that included the

court ruled for the cities, holding that Congress had not intended to preempt all local control over construction and expansion at major public airports.¹⁴⁸ The court distinguished *Burbank-Glendale*, pointing out that in that case, the expansion was on land already owned by the airport and was needed for safety reasons.¹⁴⁹ The Dallas/Ft. Worth expansion, the court reasoned, involved land not currently owned by the airport and was motivated by a desire to increase traffic capacity.¹⁵⁰ In addition, the court stated that the FAA should not determine where to build and develop civilian airports, but rather should facilitate airport development.¹⁵¹ Nevertheless, even though the cities won their case, the runway was constructed and approved after the Texas legislature passed a law allowing expansion without zoning approval.¹⁵²

V. A PROPOSAL FOR A MORE APPROPRIATE FEDERAL ROLE AND LIMITED PREEMPTION

Like the interstate highway system, the nation's airports are critical to the nation's commerce and daily activities. As demand for

construction of two new runways, additional taxiways, aircraft holding areas, the extension of existing runways, and the construction of other airport facilities. *See id.* at 164. In 1992, the FAA formally approved and authorized funding for the construction of the new runway on the east side of the airport. *See id.* A joint board of Dallas and Ft. Worth sued Irving, Eules, and Grapevine after the cities amended their comprehensive zoning ordinances. *See id.* The ordinances required the airport Board to submit a site plan and environmental impact information in order to obtain the required special use permits. *See id.* The Board asserted that the ordinances were preempted by federal and state law, and that it was authorized to exercise eminent domain power to acquire land in the cities. *See id.* at 164-65.

148. *See id.* at 167.

149. *See id.* at 167-68.

150. The court acknowledged that local law is preempted where safety is the main issue. *See id.* at 168 n.7.

151. *See id.* at 169 (noting the FAA's Environmental Impact Statement quoted in *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 197 (D.C. Cir. 1991)).

152. *See Eules Seeks Settlement With Dallas/Fort Worth Over Zoning Lawsuit*, AIRPORTS, June 18, 1996, at 238; *National Issues Cited by Both Sides in DFW Zoning Case*, AIRPORTS, Feb. 2, 1993, at 46; G. Chambers Williams, *Court Grounds Airport Suit, D/FW Airport Can Build Runways Without Approval from Grapevine, Eules and Irving, the Texas Supreme Court Rules*, FT. WORTH STAR TELEGRAM, Apr. 18, 1996, at 1. However, the issue became moot when the Texas legislature allowed the airport to build without zoning clearances. *See id.*; *see also City of Irving, Texas v. Dallas/Fort Worth Int'l Airport Bd.*, 894 S.W.2d 467 (Tex. Ct. App. 1995); *City of Grapevine v. Department of Transp.*, 17 F.3d 1502 (D.C. Cir. 1994).

air travel continues to grow, capacity expansion is crucial.¹⁵³ Yet, local opposition often delays airport expansion projects. Additionally, these projects are caught at the intersection of two conflicting legal precedents: The federal government controls aircraft operations, but local government controls land use. Ultimately, any decision effecting airport expansion necessitates a balancing between the air travel needs of the nation and metropolitan areas and the necessary detriment to the property rights of nearby residents.

The local political process is the best decision making body regarding whether and where to build a new airport. The local political process is also the best source of authority on decisions to expand on existing airport. Local authorities are familiar with the affected neighborhoods and the potential economic benefits and noise detriments of a given airport. Accordingly, metropolitan-area-wide referenda would be useful in deciding airport issues.

The federal government may take a variety of steps to encourage the relevant parties to reach a locally-derived solution.¹⁵⁴ Ideally, Congress should pass legislation that facilitates rapid solutions to airport expansion issues. Such legislation could impose upon local

153. Long before the present state of congested air traffic, Chief Judge Cardozo expressed the public importance of municipal airports:

Aviation is today an established method of transportation. The future, even the near future, will make it still more general. The city that is without the foresight to build the ports for the new traffic may soon be left behind in the race of competition. Chalcedon was called the city of the blind, because its founders rejected the nobler site of Byzantium lying at their feet. The need for vision of the future in the governance of cities has not lessened with the years. The dweller within the gates, even more than the stranger from afar, will pay the price of blindness.

In the Matter of the County of Monroe's Compliance with Certain Zoning and Permit Requirements, 530 N.E.2d 202, 205 (1988) (quoting *Hesse v. Rath*, 164 N.E. 342 (1928)).

154. Mr. Creswell stresses the need for bold leadership in airport policy in the United States. He recommends that Congress should amend statutes to (1) prevent the FAA from giving undue deference to airport proprietors, (2) spread legal liability for aircraft noise injuries among both public and private sector interests, and (3) increase participation and accountability of local governments and aircraft operators in national air transportation system planning. See Creswell, *supra* note 13, at 98. He further recommends that the Department of Transportation should (1) develop procedures for a national airport system plan, (2) establish a real property acquisition program for airports, (3) adopt procedures and incentives to reduce incompatible development in the vicinity of airports, (4) ensure that FAA manpower is adequate to participate with airport proprietors in negotiating noise and capacity agreements, and (5) evaluate the FAA's need for more professionals with skills in community relations, real estate, and urban planning. See *id.* at 98-99.

politicians rigid decision-making deadlines. Furthermore, it is imperative that all affected groups are part of the decision-making process in order to foster dialogue, public support, and to avoid litigation.¹⁵⁵ Improved zoning regulations addressing the needs of airports must be proposed and structured to avoid legal claims of regulatory taking.¹⁵⁶ While creative solutions have been reached in some cities by land exchanges,¹⁵⁷ that may not always be an option. Passenger facility charges¹⁵⁸ could finance packages that “sweeten the deal” by compensating uprooted residents and businesses with above-market prices for their losses.

However, if local governments debating a major commercial airport cannot agree among themselves after a reasonable period of time, federal preemptive authority must be exercised in order to protect the vitality of the nation’s air commerce. A higher-level decision maker is required when the local political process gets bogged down in bickering between myriad political subdivisions¹⁵⁹ or when local zoning power is used as a pretense for regulating airplane noise.¹⁶⁰ Accordingly, local zoning regulations should be barred

155. See Gesualdi, *supra* note 7, at 281 (discussing results of an industry “Working Group on Aircraft Noise/Airport Capacity” and noting the need for a massive cooperative effort from all of those involved in the aircraft noise/airport access problem to meet the challenges presented).

156. See Steven H. Magee, *Protecting Land Around Airports; Avoiding Regulatory Taking Claims by comprehensive Planning and Zoning*, 62 J. AIR L. & COM. 243 (1996).

157. While land swaps do not offer a solution to residents who do not want to move, they may offer a solution for municipalities who want to maintain the size or tax base of their community. See Robert Green, *Supervisors Give preliminary Approval to Courthouse-Airport Land Swap*, METROPOLITAN NEWS-ENTERPRISE (Los Angeles), May 8, 1996, at 3 (tentative agreement to exchange land slated for a new courthouse for land designated for the expansion of the Los Angeles International Airport); Robert J. Vickers & Alison Grant, *Cleveland, Brook Park Reach Pact on Airport, Agreement Clears Major Obstacle to Hopkins Expansion*, CLEVELAND PLAIN DEALER, Aug. 1, 1996, at A1.

158. Passenger facility charges are fees of one to three dollars that are charged to departing passengers to fund airport projects. See 49 U.S.C. § 40117 (1994); see also Jon McKenna, *Trends in the Region: PFC-Backed Airport Debt: A Bigger Blip on the Radar Screen*, THE BOND BUYER, Sept. 5, 1996, at 29 (reporting the use of passenger facility charges to secure airport debt in many cities).

159. See Creswell, *supra* note 13, at 35 (“What is needed is the intervention of a higher level of government to orchestrate a successful resolution of these local interjurisdictional conflicts. But the states and federal government have refused to assume such a role because the problem is perceived as ‘land use,’ which is an almost sacrosanct local prerogative.”).

160. See *Price v. Charter Township of Fenton*, 909 F. Supp. 498, 504 (E.D. Mich. 1995) (finding an ordinance restricting takeoffs and landings pursuant to the zoning power to be a

under the preemption doctrine when:

- (1) there is a demonstrated need to expand for either safety or capacity reasons;
- (2) the local regulation will halt or delay an expansion that has received approval from the FAA;
- (3) the airport at issue has a substantial effect on national air traffic (*i.e.* it has many scheduled commercial flights); and
- (4) the region has, through its local political process, either: (a) rendered a public decision that the airport will be its facility for the future, with no explicit limitations on capacity or (b) debated potential alternatives for a reasonable period of time (perhaps one or two years), but has not rendered a decision.

Under this test, citizens would be able to influence decisions primarily through the local political authority, but would also have a voice, through the FAA, if the region could not reach a decision. The FAA, in its approval process, evaluates all reasonable alternatives and seeks out public comment. Knowledge of potential federal action would also hasten local negotiation and compromise between interested parties before federal preemption.

VI. CONCLUSION

Courts must look carefully at the particular facts of each airport expansion case. Local governments should ideally make all decisions regarding whether to build airports, the initial site of new airports, and whether to intentionally limit capacity by declining to expand an airport. But the local political process must function in a reasonable time, and local decisions must be followed without dilatory litigation. Once a metropolitan area has selected its airport for future traffic, local parochialism should not constrain the airport and cause nationwide air traffic delays. In furtherance of this objective, Congress and the courts should take action in accordance with this Note's proposed

pretense regulating flight operations to quell airplane noise); *Northeast Phoenix Homeowners' Ass'n v. Scottsdale Mun. Airport*, 636 P.2d 1269, 1276 (Ariz. Ct. App. 1981) (finding that the plaintiffs' complaint concerning extending an existing runway was motivated by a desire to limit noise levels); *Village of Bensenville v. City of Chicago*, 306 N.E.2d 562, 564 (Ill. App. Ct. 1973).

preemption framework to permit increases in airport capacity and, thus, preserve the vitality of air travel in the United States.

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RECENT DEVELOPMENTS

