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## AIRPORT RESTRICTIONS: A DILEMMA OF FEDERAL PREEMPTION AND PROPRIETARY CONTROL

WILLIAM PENNINGTON

Federal control is intensive and exclusive. Planes do not wander about 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.<sup>1</sup>

**F**EDERAL CONTROL OVER air travel is extensive, and traditional police powers are not available as a means for local control.<sup>2</sup> Federal control, however, does not extend to every aspect of air travel. If it did, whenever an airport proprietor imposed a restriction on the users of a facility, no matter how insignificant the effect, the measure would invade the federal government's domain. It is not so simple. Although congressional regulation of airports currently governs most aspects otherwise left to local or proprietary control, the regulatory blanket Congress has placed over air facilities is one with holes intentionally left in it. While the areas left for control by airport proprietors are small, the statutes governing the proprietors' actions create a virtual minefield for the op-

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<sup>1</sup> *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292, 303 (1944) (Jackson, J., concurring).

<sup>2</sup> *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633 (1973) (finding that the pervasive nature of federal regulation left no room for state control).

erators to traverse. One wrong step results in preemption; careful study ensures valid regulation.

This comment will demonstrate the extent to which airport proprietors may regulate their facilities in the face of federal statutes. The first section will discuss the principal statutes concerned with federal preemption of airport regulation. The second section will discuss the development of proprietary control beginning with the recognition that noise regulation is a legitimate area of proprietary interest. The third section will discuss the reasonable and nondiscriminatory limitations imposed on any airport restrictions. The final section of the comment will discuss the application of these limitations on proprietary restrictions.

It is important to note that while the case law and academic writings in this area are sparse, the opinions of the courts in the few cases available are complex. The opinions involve numerous issues, and the courts often engage in a separate analysis of each issue. As a result, key cases are used repeatedly throughout the comment in support of different points. As litigation increases over the ability of airport proprietors to set restrictions at their facilities, more guidance will be available for determining how federal standards should be applied.

## I. FEDERAL CONTROL

The key to understanding the federal preemption of airport regulation lies in understanding the three main statutes governing airport proprietors, and how each of these statutes serves a separate function. Two statutes require charges or restrictions imposed by an airport operator to be reasonable and nondiscriminatory. The third statute preempts local police powers that would otherwise be available to states or cities for control of airport nuisances.

### A. *Reasonable and Nondiscriminatory Requirement*

The first federal statute that affects airport proprietors

is section 2210 of the Airport and Airway Improvement Act of 1982.<sup>3</sup> This legislation requires any airport receiving federal subsidies to make its facilities available on "fair and reasonable terms and without unjust discrimination."<sup>4</sup> Any regulatory statute implicitly asks the question of who can enforce it. Section 2210 does not provide a private right of action.

In *Cort v. Ash*,<sup>5</sup> the Supreme Court set out four questions used to determine when a federal statute creates a private right of action. First, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent to create such a remedy? Third, is it consistent with the underlying purposes of the legislative scheme to imply a remedy for the plaintiff? And fourth, is the cause of action one traditionally relegated to state law so that it would be inappropriate to infer a right based solely on federal law?<sup>6</sup> When this test is applied to section 2210 no private right of action is found under the statute.<sup>7</sup>

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<sup>3</sup> 49 U.S.C. app. § 2210(a)(1) (1988). The statute reads in part:

(a) Sponsorship

As a condition precedent to approval of an airport development project contained in a project grant application submitted under this chapter, the Secretary shall receive assurances, in writing, satisfactory to the Secretary, that—

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

*Id.*

<sup>4</sup> *Id.* For a discussion of two forms of federal intervention in airport user fees, see Note, *Airline Deregulation and Airport Regulation*, 93 YALE L.J. 319 (1983). The two forms of intervention discussed in the Note are: (1) agreement by airports to not discriminate in providing access to their facilities and (2) agreement by airports to keep user fees at a reasonable level. *Id.* at 319.

<sup>5</sup> 422 U.S. 66 (1975).

<sup>6</sup> *Id.* at 78.

<sup>7</sup> *Interface Group Inc. v. Massachusetts Port Auth.*, 816 F.2d 9, 15 (1st Cir. 1987). While the statute's language does support that it was enacted for the benefit of air carriers, that language also suggests that Congress envisioned an alternate enforcement scheme by the federal government inconsistent with a private

Although there is no private right of action under section 2210, airport proprietors still find that section 2210 severely limits their ability to impose landing and user fees on tenants. Section 2210 places two restrictions on proprietors imposing fees: it requires that those fees accurately reflect the cost of operating the facility<sup>8</sup> and it requires proprietors to expend their revenues for necessary operational activities.<sup>9</sup> An airport operator can satisfy the requirements of section 2210 by ensuring its regulations are both reasonable and nondiscriminatory. These same limits will play an important role in determining whether a proprietor's restrictions are valid under other legislation as well.<sup>10</sup>

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right of action. Also, the legislative history of the statute refers only to a right of air carriers to "consult" with the Secretary of Transportation and does not indicate a private right of action was intended. *Id.*; see also *Arrow Airways, Inc. v. Dade County*, 749 F.2d 1489 (11th Cir. 1985) (finding that airport tenants could not bring a private action under section 2210 against Miami International Airport even though new fees had caused a 632% increase in the airport's net income over a five year period); *Western Air Lines, Inc. v. Port Auth. of N.Y. & N.J.*, 658 F. Supp. 952 (S.D.N.Y. 1986) (finding that section 2210 merely imposes obligations on airport proprietors and does not provide plaintiffs with a private right of action), *aff'd*, 817 F.2d 222 (2d Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988).

Enforcement of section 2210 falls exclusively to the Secretary of Transportation. *New England Legal Found. v. Massachusetts Port Auth.*, 883 F.2d 157, 169 (1st Cir. 1989). Also, the review of the Secretary's decisions under this statute is based on the most deferential standard of review available: abuse of discretion. *Id.*

<sup>8</sup> 49 U.S.C. app. § 2210(a)(9) (1988). The statute reads in part:

(a)(9) the airport operator or owner will maintain a fee and rental structure for the facilities and services being provided the airport users which will make the airport as self-sustaining as possible under the circumstances existing at that particular airport, taking into account such factors as the volume of traffic and economy of collection  
 . . . .

*Id.*

<sup>9</sup> *Id.* § 2210(a)(12). The statute reads in part:

(a)(12) all revenues generated by the airport, if it is a public airport, . . . will be expended for the capital or operating costs of the airport . . . the local airport system, or other local facilities which are owned or operated by the owner or operator of the airport and directly and substantially related to the actual air transportation of passengers or property . . . .

*Id.*

<sup>10</sup> For a discussion of how reasonableness and nondiscrimination determine if a proprietary restriction is valid, see *infra* notes 71-173 and accompanying text.

## B. Prohibitions on Head Taxes

In 1972, the Supreme Court, in *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.*,<sup>11</sup> was faced with the question of whether a state or municipality could impose a charge on each enplaning passenger at a local airport. The Court found that this "head" tax was constitutional so long as it did not discriminate against interstate commerce and travel,<sup>12</sup> reflected a fair approximation of the use of facilities for whose benefit they were imposed,<sup>13</sup> and was not excessive in relation to the costs incurred by the authorities imposing the tax.<sup>14</sup> The taxes imposed by the municipalities in this case met those standards.<sup>15</sup>

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<sup>11</sup> 405 U.S. 707 (1972). This case involved taxes imposed by two separate municipalities on commercial airline passengers for the purpose of defraying costs of airport construction and maintenance. *Id.* at 709. At Dress Memorial Airport in Evansville, Indiana, a service charge of one dollar was assessed on each enplaning passenger. *Id.* New Hampshire required its airports to charge each enplaning passenger either fifty cents or one dollar depending on the gross weight of the aircraft they were boarding. *Id.* at 710.

<sup>12</sup> *Id.* at 717. In this case, the requirement of nondiscrimination was satisfied by the fact that, while more travelers using the airport were engaged in interstate flights rather than intrastate ones, the same tax was imposed on all of them. *Id.*

<sup>13</sup> *Id.* at 717-18. The Court found the charges to reflect a "fair, if imperfect, approximation of the use of facilities for whose benefit they are imposed." *Id.* at 717. Although the taxes in question were imposed only on commercial airline customers and not on other airport users such as general aviation passengers and non-passenger airport users, the Court found such exceptions to be reasonable since most airport users not directly taxed were taxed indirectly in one way or another. These indirect taxes were chiefly in the form of rent paid by shops, restaurants, and parking concessions that were passed on, at least in part, to patrons. Also, passengers could be distinguished as a class because the boarding of flights required the use of runway and navigational facilities not used by nonflight activities. *Id.* at 717-18.

<sup>14</sup> *Id.* at 719-20. The Court found that the fees imposed were not shown to be excessive in relation to the costs incurred by the taxing authorities. In fact, no evidence was offered to show that the revenues would not be used solely to cover existing debt obligations. It was assumed the taxes imposed would be used by the authorities to meet deficits in capital improvements at the airport. The Court noted, however, that nothing in its opinion required that the funds from the tax be earmarked for airport use so long as the funds received by airport authorities did not exceed operational costs. *Id.*

<sup>15</sup> *Id.* at 717. The Court also pointed out that "while state or local tolls must reflect a 'uniform, fair and practical standard' relating to public expenditures, it is the amount of the tax, not its formula, that is of central concern." (emphasis supplied) *Id.* at 716.

Congress reacted with hostility toward the decision, and legislators felt that safeguards were needed to prevent excessive or discriminatory taxation.<sup>16</sup> In response, Congress passed the Federal Anti-Head Tax Act prohibiting states from taxing persons traveling in air commerce.<sup>17</sup> Additionally, Congress granted a private right of action for passengers and airlines to challenge proscribed taxes.<sup>18</sup>

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<sup>16</sup> S. REP. NO. 12, 93d Cong., 1st Sess. 12 (1973), *reprinted in* 1973 U.S. CODE CONG. & ADMIN. NEWS 1434, 1446. Part of the report reads:

The provision is in response to a situation which has been brought about by [Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.], upholding passenger head taxes enacted by New Hampshire and by Evansville, Indiana, for "aviation-related purposes." While this decision has invited state and local governments to enact head taxes or fees on air travelers, the Court decision does not provide adequate safeguards to prevent undue or discriminatory taxation.

*Id.* Two newspaper accounts were included to show the chaos and confusion the collection of head taxes caused. One discussed the reaction to a two dollar tax imposed on both arriving and departing passengers:

"That means at \$4 each time, I'll be paying almost \$40 to Philadelphia every year," he said. "They don't give me anything for it."

City Council adopted a new levy by a 15-0 vote May 25, [1972]. Because of Mayor Rizzo's campaign promise not to raise taxes, city officials have billed the new tax a "user charge" instead of a tax.

"Whatever they call it, I think it stinks," said Robert Maler, a ticket agent for American Airlines.

*Id.* at 1448 (citing the Philadelphia Evening Bulletin, July 1, 1972).

<sup>17</sup> 49 U.S.C. app. § 1513 (1988). The statute reads in part:

(a) No State . . . shall levy or collect a tax, fee, head charge or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom

....

(b) Except as provided in subsection (d) of this section, nothing in this section shall prohibit a State . . . from the levy or collection of taxes other than those enumerated in subsection (a) of this section, including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services; and nothing in this subsection shall prohibit a State . . . owning or operating an airport from levying or collecting reasonable rental charges, landing fees, and other service charges from airport operators for the use of airport facilities.

*Id.*

<sup>18</sup> The private right of action granted by section 1513 is implied and not express. For a discussion of the tests for inferring a private right of action, see *supra* notes 5-7 and accompanying text. The four tests for inferring a private right of

The primary motive behind the Anti-Head Tax Act is to prohibit states from directly or indirectly taxing passengers engaged in air travel.<sup>19</sup> At the same time, the act allows a state to continue collecting normal property and sales taxes.<sup>20</sup> Further, the Act expressly provides that states or their political subdivisions operating airports may levy and collect rental charges and landing fees.<sup>21</sup> But Congress has not imposed a total prohibition on user fees. Instead, it specifically exempted "reasonable" user fees.<sup>22</sup>

The requirements of reasonableness and nondiscrimination found in section 2210 and in the Anti-Head Tax Act create limits on an airport proprietor's ability to set restrictions on air travel. The requirements of the Anti-Head Tax Act, however, affect only fees and do not affect non-monetary restrictions, such as airport access or landing rights.<sup>23</sup>

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action are satisfied with respect to the statute. First, while the primary beneficiaries of the statute are obviously air passengers, given the close relationship between air traveler and air carrier, it is reasonable to assume a special benefit attaches to carriers as well. Second, legislative intent suggests anticipation of private actions. Air carriers are logical plaintiffs in an action under the statute since they, and not the lone traveler, have the financial incentive to challenge state taxes. Third, private enforcement furthers the purpose of the act. Finally, since the statute forbids state action, it is states that will be defendants. This prohibition of state action makes the area regulated by the statute especially suited for federal action. *Interface Group*, 816 F.2d at 16.

<sup>19</sup> See 49 U.S.C. app. § 1513(a).

<sup>20</sup> 49 U.S.C. app. § 1513(b). The extent to which a state may go in the levying of sales taxes is questionable. For example, the State of Hawaii, acting under its state powers and not its proprietary powers, imposed a tax on gross receipts of airlines operating inside the state. The Supreme Court struck down the tax as a violation of section 1513. *Aloha Airlines, Inc. v. Director of Taxation of Haw.*, 464 U.S. 7 (1983).

<sup>21</sup> 49 U.S.C. app. § 1513(b); see *Rocky Mountain Airways, Inc. v. County of Pitkin*, 674 F. Supp. 312, 320 (D. Colo. 1987) (granting a motion to dismiss based on section 1513 preempting local regulation). Section 1513 provides that "[n]othing in this section shall prohibit a State . . . from . . . collecting reasonable rental charges, landing fees, and other service charges from aircraft operators for the use of airport facilities." 49 U.S.C. app. § 1513(b).

<sup>22</sup> *Rocky Mountain Airways*, 674 F. Supp. at 320. For a short discussion of the legislative history of section 1513 and its function in aiding the flow of interstate commerce, see Note, *supra* note 4, at 322 n.23.

<sup>23</sup> See 49 U.S.C. app. § 1513(a). The Anti-Head Tax Act only prohibits a state from collecting charges and does not mention any other limitation. *Id.*



Currently, congressional hostility toward head taxes may be decreasing. Since 1970, an airport trust fund financed by a federal surcharge on passenger airline tickets has been theoretically available to airports to finance facility improvement projects.<sup>24</sup> This trust fund, however, is largely off limits for such projects because its \$7.6 billion size helps disguise the federal deficit.<sup>25</sup> Recognizing that airports need a new source of funds for improvement projects, Congress is considering legislation that would allow medium and large airports to levy a "passenger facility charge" on tickets. In some cases, the new charge could boost air fares by \$12 for a round trip ticket.<sup>26</sup> Funds from the charges would be available to all airports.<sup>27</sup>

The ticket charge plan has passed the House of Representatives and, although the Senate has not acted on it, eventual congressional approval seems inevitable. The plan provides new revenue for airport improvement projects while still paying homage to the Bush administration's now defunct pledge to not raise taxes. The fare increases would technically be "user fees" or "tolls."<sup>28</sup> In any event, the new surcharge would be for the limited purpose of financing facility improvements, and the surcharge would be overseen by the Secretary of Transportation.<sup>29</sup> Other fees imposed by airport proprietors would still have to meet the "reasonableness" requirement of the Anti-Head Tax Act.

### C. *Proprietary Powers Versus Police Powers*

Analysis of the final statute concerning federal preemption emphasizes the distinction between proprietary powers and police powers. Police powers enable the

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<sup>24</sup> Mills, *House OKs Passenger Fees to Boost Airport Funding*, CONG. Q. WEEKLY REP., Aug. 4, 1990, at 2510.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*; see also H.R. 5170, 101st Cong., 2d Sess. (1990).

<sup>27</sup> Mills, *supra* note 24, at 2510.

<sup>28</sup> *Id.* at 2511.

<sup>29</sup> *Id.* at 2510.

government to legislate in broad areas of scope including economics, the environment, morality, law and order, and peace and quiet.<sup>30</sup> The importance of this distinction between proprietary and police powers arises in those numerous instances where a state or municipality is also the proprietor of an airport. Four criteria determine whether an airport is actually run by state or municipality or is merely located within a political subdivision's borders: ownership, operation, promotion, and the ability to acquire necessary approach easements.<sup>31</sup> When a state or municipality exceeds its inherent rights to control an enterprise located within its jurisdiction and meets the requirements for proprietorship, it no longer relies solely on its own police powers to regulate the enterprise. Historically, the Supreme Court has held the police powers of a state in high regard and supercedes those powers only when Congress exhibits a clear and manifest purpose to do so.<sup>32</sup>

Section 1305 of the Federal Aviation Act of 1958<sup>33</sup>

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<sup>30</sup> Blackman & Freeman, *The Environmental Consequences of Municipal Airports: A Subject of Federal Mandate?*, 53 J. AIR L. & COM. 375, 385-86 (1987).

<sup>31</sup> San Diego Unified Port Dist. v. Gianturco, 651 F.2d 1306, 1317 (9th Cir. 1981). In this case, the court was faced with the legality of a curfew imposed by a state statute on aircraft flights. *Id.* at 1308. The court found that the state was not the airport proprietor since it had granted a specific port district power to acquire air easements, operate an air terminal, levy taxes, and make contracts. The port district, and not the state, therefore, was the true proprietor. *Id.* at 1317.

<sup>32</sup> See, e.g., City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 633 (1973).

<sup>33</sup> 49 U.S.C. app. § 1305 (1988). The statute reads in part:

(a) Preemption

(1) Except as provided in paragraph (2) of this subsection, no State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under subchapter IV of this chapter to provide air transportation.

(b) Proprietary powers and rights

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

speaks directly to the problem of conflicting federal regulation and state police power limitations. The statute allows a municipality to act as a proprietor of an airport. The same legislation, however, implicitly denies the right of a municipality to exert its police powers over an airport.<sup>34</sup> Therefore, the authority of a state or municipality as a landlord is not necessarily identical to its police power.<sup>35</sup>

While section 1305 allows local authorities to operate airports as proprietors, the grant is limited. Furthermore, it is subject to restrictions if the local government invades the area reserved for federal interest.<sup>36</sup> Proprietary powers do not exceed the federal government's grant of power if the Federal Aviation Administration (FAA)<sup>37</sup> deems the restriction "reasonable."<sup>38</sup> Reasonableness, therefore, is the central inquiry under section 1305.

*Id.*

<sup>34</sup> *City of Burbank*, 411 U.S. at 635 n.14. The case involved the legality of a nighttime ban on jet aircraft takeoffs at Hollywood-Burbank Airport. No jet aircraft could take off between 11 p.m. and 7 a.m. *Id.* at 625. The regulation affected only one scheduled flight, an intrastate flight to Oakland departing every Sunday at 11:30 p.m. *Id.* at 626. The court found state police powers insufficient to uphold the ordinance. *Id.* at 640.

<sup>35</sup> *Id.* at 636 n.14.

<sup>36</sup> *New England Legal Found.*, 883 F.2d at 173. Speaking more to the point, the court said, "In reducing federal economic regulation of the field to allow the forces of free competition to rule the marketplace, Congress obviously did not intend to leave a vacuum to be filled by the Balkanizing forces of state and local regulations." *Id.*

<sup>37</sup> Section 1305 creates no private right of action; enforcement of the statute is left to the FAA. *Western Air Lines, Inc. v. Port Auth. of N.Y. & N.J.*, 817 F.2d 222, 225 (2d Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988). The court affirmed a lower court dismissal of an action by the airline challenging a perimeter rule enacted at LaGuardia airport. *Id.* at 223. The airline attempted to bring a Supremacy Clause challenge to the perimeter rule by alleging that the rule was preempted by section 1305(a)(1). *Id.* at 225. The courts have allowed private enforcement of section 1305 by circumventing the absence of a private right through the use of the Supremacy Clause. "A claim under the Supremacy Clause that a federal law preempts a state regulation is distinct from a claim for enforcement of that federal law." *Id.* A claim under the Supremacy Clause asserts that a federal statute has preempted local power to regulate an activity, whereas a private action is a means of enforcing the substantive provisions of a federal law. *Id.* at 225-26.

<sup>38</sup> *New England Legal Found.*, 883 F.2d at 173. The court found that the landing fees imposed by the authority were unreasonable because of an improper cost

Therefore, reasonableness and nondiscrimination form the standards for measuring the ability of airport proprietors to set regulations.

## II. PROPRIETARY CONTROL

### A. *Early Concessions: Noise Control*

Section 1305 exempts proprietary powers and rights from federal preemption.<sup>39</sup> Although the full extent of this exception has not yet been established by either the courts or Congress,<sup>40</sup> the Supreme Court recognizes that noise control is a necessary area excluded from federal jurisdiction and left to local authorities. In *City of Burbank v. Lockheed Air Terminal, Inc.*,<sup>41</sup> the Court struck down a municipal ordinance which imposed a curfew on jet aircraft at a local airport. Although the Court refused to allow the municipality to use its police powers to control airport noise, it left open the question of whether a municipality acting as an airport proprietor could impose noise regulations.<sup>42</sup> In reaching its decision, the Court noted both the legislative history of section 1305 and a letter from the Secretary of Transportation stating that airport owners could "deny the use of their airports to aircraft on the basis of noise considerations so long as such exclusion is nondiscriminatory."<sup>43</sup> Therefore, congressional intent and administrative decisions were both reasons that noise control was not believed to be preempted by federal statutes.

The most important factor in recognizing noise control

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methodology. *Id.* For a discussion of the cost methodology used by the authority, see *infra* notes 79-85 and accompanying text.

<sup>39</sup> For a discussion of section 1305 and its application to local restrictions, see *supra* notes 33-38 and accompanying text.

<sup>40</sup> *Western Air Lines, Inc. v. Port Auth. of N.Y. & N.J.*, 658 F. Supp. 952, 956 (S.D.N.Y. 1986), *aff'd*, 817 F.2d 222 (2d Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988). The court traced legislative history and Supreme Court analysis on the subject. For a discussion of the case, see *infra* notes 169-173 and accompanying text.

<sup>41</sup> 411 U.S. 624 (1973).

<sup>42</sup> *Id.* at 635 n.14.

<sup>43</sup> *Id.* For a discussion of the facts of the case, see *supra* note 34.

as a proprietary power, however, was the fact that public entities had an obligation to compensate property owners who lost land through inverse condemnation.<sup>44</sup> Property owners had their property "taken" when excessive airport noise prevented "the peaceful use and occupancy of [their] residential land."<sup>45</sup> Courts therefore reserved for the proprietor the right to protect itself from such liability for damages caused by airport noise.<sup>46</sup>

The limits on the proprietor's ability to impose these restrictions are that the restrictions be justified by the need to respond to a noise problem affecting the airport and that the restrictions not be unreasonable, arbitrary, discriminatory, or a burden on interstate commerce.<sup>47</sup> Noise control, therefore, has been a long recognized exception to federal preemption under the reservation of proprietary powers. The question still remains, though, whether areas other than noise control fall under proprietary control.

### B. *Other Recognized Areas of Proprietary Control*

Early recognition that noise regulations were not federally preempted did not aid proprietors in establishing other areas of proprietary control. In fact, the cases were a hindrance. The early rulings gave proprietors protection from noise abatement suits with one hand while taking away additional proprietary powers with the other hand.

When airport owners introduced controls to prevent

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<sup>44</sup> Note, *Airport Use and Access*, 4 NORTHROP U. L. J. 159, 161 (1983). The Note discusses proprietary control of airport noise levels and the effect of federal limitations on those controls. For a discussion of nondiscrimination and its importance in creating valid proprietary restrictions, see *infra* notes 148-173 and accompanying text.

<sup>45</sup> *Id.*

<sup>46</sup> Ellett, *The National Air Transportation System: Design by City Hall?*, 53 J. AIR L. & COM. 1, 6-7 (1987) (discussing the difficult friction created by an air travel system that is growing but constrained by local and federal limitations on airports and aircraft).

<sup>47</sup> *Id.* at 7. An additional requirement is that the restrictions may not create an exclusive right for any airport tenant. *Id.*

congestion or meet expenses of operation, airlines seized on the language in the noise abatement suits and argued that noise control was the sole proprietary power.<sup>48</sup> Indeed, the airlines appeared to have case law authority on their side. Courts had decided the noise abatement cases narrowly, stating that the proper domain of the airport proprietor was to establish permissible regulations regarding noise level and concluding that proprietors otherwise had an "extremely limited role" in the system of airport regulation.<sup>49</sup> The legislative history that the courts often relied on in fashioning the noise control exception also supported the airlines' position since it explicitly mentioned only one proprietary power: noise control.<sup>50</sup> Airport proprietors, however, continued attempts to regulate their facilities.

When faced with the question of whether new restrictions were permissible under proprietary powers, the courts eventually embraced an extension of the doctrine. The question of whether an airport could deny landing rights to airlines because of congestion problems prompted one court to state that Congress did not intend for its preemptive regulations to interfere with "long recognized powers of . . . [proprietors] to deal with noise and other environmental problems at the local level."<sup>51</sup> Commenting on past noise abatement suits, another court stated

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<sup>48</sup> See *Western Air Lines*, 658 F. Supp. at 956. Judge Cannella's opinion expanding the domain of proprietary powers was called "well-reasoned" by the appeals court, suggesting that, beyond agreeing with the outcome of the case, they would have decided it on identical grounds. *Western Air Lines, Inc. v. Port Auth. of N.Y. & N.J.*, 817 F.2d 222, 226 (2d Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988).

Two excellent examples of cases narrowly holding that noise abatement is the sole area of proprietary control are found in a pair of decisions involving the Port Authority of New York and New Jersey and proposed Concorde flights. *British Airways Bd. v. Port Auth. of N.Y. & N.J.*, 558 F.2d 75, 84 (2d Cir. 1977) [hereinafter *Concorde I*]; *British Airways Bd. v. Port Auth. of N.Y. & N.J.*, 564 F.2d 1002, 1010-11 (2d Cir. 1977) [hereinafter *Concorde II*].

<sup>49</sup> *Concorde II*, 564 F.2d at 1010.

<sup>50</sup> For a discussion of the various legislative documents relied on by the court, see *Western Air Lines*, 658 F. Supp. at 956. None of these documents mentioned any proprietary power except the control of noise. *Id.*

<sup>51</sup> *Midway Airlines, Inc. v. County of Westchester*, 584 F. Supp. 436, 440 n.18 (S.D.N.Y. 1984)(emphasis supplied).

that cases do not reject the existence of proprietary powers outside noise control, but merely seek to insure that proprietors do not regulate beyond an interest once it is recognized.<sup>52</sup> Using the same reasoning, another court went on to hold that proprietors could issue reasonable rules pertaining to noise level or other danger caused by airport users.<sup>53</sup> It was also found that, while noise regulation suits were the most prevalent civil actions, courts had accepted other proprietor-imposed regulations as valid exercises of power.<sup>54</sup> Other areas besides noise abatement were, therefore, available for proprietary control. The two most likely areas for expanded proprietary control were reducing airport congestion and imposing fees to cover operating expenses of the facility.

### 1. *Airport Congestion*

While noise control may be the most litigated area of proprietor restrictions, airport congestion is, perhaps, the purest example of an exercise of proprietary power not preempted by the federal government. One court found that a proprietor's interest in regulating congestion was a core function of the role of an airport manager.<sup>55</sup> The two principal methods that have been upheld to relieve

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<sup>52</sup> *Western Air Lines*, 658 F. Supp. at 956-57.

<sup>53</sup> *Midway Airlines*, 584 F. Supp. at 441. The other dangers to which the court referred are unclear, but the court did go on to uphold an airport's restriction of additional flights pending a study on congestion problems at the facility. *Id.* at 441.

<sup>54</sup> *Western Air Lines*, 658 F. Supp. at 957. The main regulation mentioned by the court was control of ground congestion. *Id.*

<sup>55</sup> *Id.* at 957. The court stated:

[A]lthough questions of permissible noise regulation predominate in the courts, other proprietor-imposed regulations are "presently accepted as valid exercises of proprietary powers." A proprietor's interest in regulating ground congestion at its airports would appear to be at the core of the proprietor's function as airport manager, perhaps more so than the regulation of noise; and the ability of a proprietor . . . to allocate air traffic . . . is important to the advancement of this interest.

*Id.*

airport congestion are perimeter rules<sup>56</sup> and peak-period landing fees.<sup>57</sup> Perimeter rules seek to relieve congestion at an airport by restricting incoming and outgoing flights to destinations within a certain distance of the facility.<sup>58</sup> One writer called this type of restriction an effective method of controlling congestion because the perimeter rules shorten delays, ease overcapacity, and relieve the strain on restricted physical facilities.<sup>59</sup> Indeed, the courts have concluded that perimeter restrictions, in the absence of FAA regulations, are an effective and legitimate method of controlling congestion.<sup>60</sup>

Peak-period landing fees are the second method used by airport proprietors to control congestion at their facilities. Peak-period landing fees seek to relieve congestion during the time of the day when airlines are most likely to schedule flights by making the times when the airport is operating at a lower capacity more financially attractive.<sup>61</sup> This method is a "reasonable, if not ideal, method of effecting the most efficient utilization of the air space and

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<sup>56</sup> *Western Air Lines*, 817 F.2d at 222 (affirming a lower court decision in favor of a 1500 mile perimeter rule imposed at New York's LaGuardia airport).

<sup>57</sup> *Aircraft Owners & Pilots Ass'n v. Port Auth. of N.Y. & N.J.*, 305 F. Supp. 93 (E.D.N.Y. 1969) (upholding the imposition of a twenty-five dollar take-off fee during peak hours at New York's three major airports).

<sup>58</sup> See *Western Air Lines*, 658 F. Supp. at 953. In this case, the Port Authority of New York and New Jersey imposed a 1500 mile perimeter rule at the smallest of its three airports: LaGuardia. The stated purpose of the rule was to reduce ground congestion and maintain LaGuardia as a short and medium haul airport by diverting long distance air traffic to Newark and Kennedy airports. *Id.*; see also Comment, *The Wright Amendment: The Constitutionality and Propriety of the Restrictions on Dallas Love Field*, 55 J. AIR L. & COM. 1011 (1990) (authored by Eric A. Allen).

<sup>59</sup> Cross, *Airport Perimeter Rules*, 17 TRANSP. L.J. 101, 115 (1988) (discussing perimeter rules at three major airports: National, Love Field, and LaGuardia).

<sup>60</sup> *Western Air Lines*, 658 F. Supp. at 958. The court concluded: "[I]n the absence of conflict with FAA regulations, a perimeter rule, as imposed by the Port Authority to manage congestion in a multi-airport system, serves an equally legitimate local need and fits comfortably within that limited role, which Congress has reserved to the local proprietor." *Id.*

<sup>61</sup> Levine, *Landing Fees and the Airport Congestion Problem*, 12 LAW & ECON. 79, 91 (1969). Since an airline experiences only the average, rather than the marginal, delay when conducting flights at peak hours, there is no economic incentive not to maximize the number of flights during these times unless the proprietor imposes a fee. *Id.*



air time involved,"<sup>62</sup> and its use has not been limited to the United States.<sup>63</sup>

Courts will uphold perimeter rules and peak-period fees as long as the restrictions are reasonable, nonarbitrary, and nondiscriminatory rules that advance the local interest.<sup>64</sup> Aside from these constraints, an airport proprietor is free to impose any system to control congestion that it feels is necessary under the circumstances.

## 2. *Operating Expenses*

As a simple matter of economics, few owners would operate an airport if they were unable to recapture most, if not all, of their operating expenses. Thus, Congress provided that airport operators could maintain a fee and rental structure that made the airport as self-sustaining as possible.<sup>65</sup> In interpreting Congress' provisions, courts liberally construe what constitute "expenses" in provid-

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<sup>62</sup> R. ECKERT, AIR AND CONGESTION 56 (1972).

<sup>63</sup> See *Landing Fees*, AV. WEEK & SPACE TECH., Mar. 11, 1985, at 20. The article discusses the recent decision by Heathrow Airport to impose peak-hour fees on users and grant discounts for small aircraft during off-peak periods. *Id.*

<sup>64</sup> *Concorde II*, 564 F.2d at 1011. This decision actually dealt with a noise restriction imposed by the Port Authority of New York and New Jersey that effectively prohibited the landing of supersonic Concorde at any of the airports in the port authority's jurisdiction. *Id.* at 1005. A lower court, however, adopted the language concerning noise control as an appropriate test for any regulation. *Western Air Lines*, 658 F. Supp. at 958. The actual test of the original decision reads:

The maintenance of a fair and efficient system of air commerce, of course, mandates that each airport operator be circumscribed to the issuance of reasonable, nonarbitrary and nondiscriminatory rules. . . . We must carefully scrutinize all exercise of local power under this rubric to insure that impermissible parochial considerations do not unconstitutionally burden interstate commerce or inhibit the accomplishment of legitimate or national goals. . . . And, of course, our task of monitoring the proprietor's observance of the strict statutory obligation to make his facility available for public use on fair and reasonable terms, and without unjust discrimination . . . is especially critical. . . .

*Concorde II*, 564 F.2d at 1011.

<sup>65</sup> 49 U.S.C. app. § 2210(a)(9) (1988). The statute provides that airport operators will maintain rental and fee structures that will make their facilities as self-sustaining as possible considering the volume of traffic and the economy of collecting revenues. *Id.*

ing facilities and services to airport users.<sup>66</sup>

A problem arises, however, when the courts allow a proprietor to liberally use its powers to cover expenses through the imposition of fees. Because airports are natural monopolies<sup>67</sup> they obviously have the power to impose monopoly prices in an unrestricted market. In order to ensure that airports charge the price for their services that would prevail in a competitive market, the power of airports to charge for their services must be restricted.<sup>68</sup> Courts may allow airports to operate on at least a "break-even" level, but the courts face the danger of granting the airports too much latitude in the imposition of charges. With no direct federal mandates other than section 2210, section 1305, and the Federal Anti-Head Tax Act,<sup>69</sup> the courts have seized on the language in those statutes and declared proprietor rental and service charges allowable so long as such charges are "reasonable."<sup>70</sup> Reasonableness, therefore, is again the standard by which airport proprietor restrictions are measured.

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<sup>66</sup> See *Alamo Rent-a-Car, Inc. v. Sarasota-Manatee Airport Auth.*, 825 F.2d 367 (11th Cir. 1987) (allowing off-site agencies to be charged a user fee based on customers attributable to the airport); *Arrow Airways, Inc. v. Dade County*, 749 F.2d 1489 (11th Cir. 1985) (allowing proprietary increases in rent, fees, and charges to cover reserves and debt requirements); *American Airlines, Inc. v. Massachusetts Port Auth.*, 560 F.2d 1036 (1st Cir. 1977) (allowing increased landing fees to cover abandoned expansion projects and civic commitments).

<sup>67</sup> For a discussion of natural monopolies, see J. HIRSHLEIFER, *PRICE THEORY AND APPLICATIONS* 334-48 (1980). Briefly, natural monopolies are those businesses that can continually reduce their costs with each unit produced so that one firm could supply the entire market at less cost than could two or more. *Id.* Airports are natural monopolies since the construction of an airport facility involves large unrecoverable costs. *Id.* The natural monopoly character of an airport probably is present only in the actual runway and taxiway facilities and not for terminals. Note, *supra* note 4, at 322 n.20.

<sup>68</sup> See Note, *supra* note 4, at 322.

<sup>69</sup> 49 U.S.C. app. §§ 2210, 1305, 1513 (1988). For a discussion of these statutes, see *supra* notes 3-38 and accompanying text.

<sup>70</sup> *Rocky Mountain Airways, Inc. v. County of Pitkin*, 674 F. Supp. 312, 315 (D. Colo. 1987) (stating that airports may impose rental charges, service charges, and landing fees so long as those charges are reasonable).

### III. REQUIREMENTS OF AIRPORT RESTRICTIONS

When the federal statutes<sup>71</sup> and the recognized areas not preempted from proprietary control<sup>72</sup> are examined, two recurring requirements become apparent. First, the restriction, whether it be a denial of airport access or a fee imposed in the form of rent, service charge, or landing cost, must be reasonable. Second, the restriction must be nondiscriminatory in nature. Analysis of prior case law interpreting these standards helps determine the extent to which an airport proprietor may impose restrictions or fees in light of these requirements.

#### A. Reasonableness

##### 1. Costs Related to Expenses

The federal courts have addressed the question of whether proprietary restrictions met the reasonableness requirement in several important cases. The most recent decision regarding the reasonableness of proprietor restrictions occurred in late 1989 in *New England Legal Foundation v. Massachusetts Port Authority*.<sup>73</sup> In that case, the Massachusetts Port Authority (Massport), which owns and operates Logan Airport in Boston, wanted to maximize the efficient use of its facilities. It adopted a phased plan<sup>74</sup> which began with a landing fee structure consisting of two elements. The first element was a standard landing fee.<sup>75</sup>

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<sup>71</sup> For a discussion of three federal statutes restricting the power of airport proprietors to impose regulations at their facilities, see *supra* notes 3-38 and accompanying text.

<sup>72</sup> For a discussion of areas left open by federal statutes for proprietary control, see *supra* notes 39-70 and accompanying text.

<sup>73</sup> 883 F.2d 157 (1st Cir. 1989). The case is complicated and complex. The court relies on numerous federal statutes, and the decision is based on the judgments of both judicial and administrative judges. The number of plaintiffs involved exceeds that which the most sadistic Civil Procedure professor would include on a law school exam. The Court of Appeals itself said "this jurisdictional dichotomy has created a confused class of circumforaneous litigants, wandering perplexedly from forum to forum in search of remediation." *Id.* at 158-59.

<sup>74</sup> *Id.* at 159. The plan was known as the "Program for Airport Capacity Efficiency" (PACE) and was to go into effect July 1, 1988. *Id.* at 158-59.

<sup>75</sup> *Id.* The landing fee was \$91.78 for each aircraft. *Id.*

The second element was an additional charge based on aircraft weight.<sup>76</sup> Since the prior system had been based on weight alone, the effect of this phase of the plan was to increase drastically the cost per landing of small aircraft while decreasing that of large aircraft.<sup>77</sup> The resulting formula departed from the traditional method of calculating landing fees, and several groups consisting of small aircraft users brought a legal challenge against the fee structure.<sup>78</sup>

The First Circuit Court of Appeals, following both judicial and administrative hearings, decided the case against Massport. The court determined that a "reasonable" fee or charge was one which fairly and rationally reflects the cost to comparably situated users<sup>79</sup> and reasoned that a

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<sup>76</sup> *Id.* The second charge was \$0.5417 per 1000 pounds of aircraft weight. There was, however, an exception for aircraft operations meeting the criteria of an "essential air service hub operation." These users were exempted from payment of the standard fee portion of the new landing fee and were merely required to pay the pre-PACE charge of \$25.00 per landing. *Id.* at 159 n.3.

<sup>77</sup> *Id.* Massport's own estimates showed the landing fee of a typical small aircraft would increase from \$25.00 to \$101.47; a 306% increase, while a typical large aircraft would decrease from \$823.99 to \$450.31; a 45% reduction. *Id.* There is, of course, the possibility that Massport attempted to "low-ball" its figures of the increases small commuter aircraft and regional airlines would incur, but it appears the estimates by the authority were close to accurate. The results of a study by the Regional Airline Association (one of the plaintiffs in the litigation) estimated only a 239% increase for those same aircraft. Hughes, *RAA Estimates 239% Increase in Fees for Small Carriers Under Massport Plan*, AV. WEEK & SPACE TECH., Mar. 7, 1988, at 62.

<sup>78</sup> *New England Legal Found.*, 883 F.2d at 164. Logan's fee structure assigned 63% of the operation costs to items relating to landing operations which are fixed and do not depend on the weight of the aircraft. The remaining 37% was attributed to cost categories related to aircraft weight. Traditional cost allocations, however, allocate between 83% and 90% of the landing cost to aircraft weight with the balance (between 10% and 17%) being attributed to landing operations. *Id.*

<sup>79</sup> *Id.* at 169. The court drew on the language of section 2210 of the Airport and Airway Improvement Act of 1982, 49 U.S.C. app. § 2210 (1988). For a discussion of this act, see *supra* notes 3-10 and accompanying text. The court stated:

The Secretary is required by this statute to see that the project for which federal grant funds are expended "will be available for public use on fair and reasonable terms and without unjust discrimination." Although the statute does not define this terminology, [the act] refers to "substantially comparable rates, fees . . . and other charges with respect to facilities directly and substantially related to providing air transportation." This provision also speaks of "substantially

methodology having a nonarbitrary basis was essential.<sup>80</sup> The court believed that Massport's fee structure was unreasonable because its methodology for allocating costs was "not scientifically derived."<sup>81</sup> Both the purpose and effect of Massport's new fee structure was to move general aviation aircraft away from Logan Airport. By failing to accurately allocate both fixed and weight-related costs and by allocating small aircraft a disproportionate share of those costs, Massport violated its federal grant assurances and imposed an unreasonable method of recovering costs.<sup>82</sup> The fee structure was not a sound methodology but a system that went in search of an economic theory to justify its existence.<sup>83</sup> Moreover, the plan was revenue neutral, so it appeared to be an attempt to modify conduct rather than recover operational costs.<sup>84</sup> The court found the fee structure unreasonable, discriminatory, and impermissible under the exception for propri-

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comparable rules, regulations and conditions as are applicable to all such airports and which utilize similar facilities . . . ." This appears to us to establish as "reasonable" any fee or charge by the airport proprietor which fairly and rationally reflects the cost to users that are comparably situated.

*New England Legal Found.*, 833 F.2d at 169.

<sup>80</sup> *New England Legal Found.*, 833 F.2d at 169.

<sup>81</sup> *Id.* at 170. An administrative law judge reviewed Massport's fee structure and determined it was based both on aircraft weight and on fixed operational costs. It was not, however, scientifically derived because there was no basis for the allocations made by Massport. *Id.* at 165-66.

<sup>82</sup> *Id.* at 164. The court discussed an opinion by the Secretary of Transportation:

By "unfairly and unreasonably" penalizing the smaller aircraft "by allocating to them a disproportionate amount of airport costs," the Secretary concluded that Massport "goes beyond a fair and reasonable action to effect the legitimate recovery of costs, and clearly crosses into an area which is inconsistent with [its] federal grant assurances."

*Id.* at 166.

<sup>83</sup> *Id.* at 164. The administrative law judge who made this conclusion felt it was "difficult to walk away from the record of this case without inferring that the Massport PACE Plan was conceived, orchestrated and implemented with the principal objective of ridding Logan of small aircraft or severely curtailing their operations." *Id.* at 164.

<sup>84</sup> *Id.*

etary rights and powers in federal preemption statutes.<sup>85</sup>

Although *New England Legal Foundation* demonstrates there are limits on proprietary power to recover costs when the fee structures used have no basis, the decision may be narrow. Massport attempted to impose a monumental change in its fee structure for the sole purpose of shifting general aviation away from its facilities without introducing any evidence that the shift was necessary.<sup>86</sup> Instead, Massport based its motives entirely on its power to operate as a self-sustaining entity, and the court struck down its new fee structure on the basis of the plan's lack of scientific formulation.<sup>87</sup> The court suggested that a scientific formulation is one which employs traditional and appropriate methods of cost allocation.<sup>88</sup>

Massport's recent landing fee structure is not the first to be struck down for lack of reasonableness. For instance, in *Indianapolis Airport Authority v. American Airlines, Inc.*,<sup>89</sup> several airlines successfully defended their nonpayment of a newly imposed fee schedule in a suit brought by an airport proprietor.<sup>90</sup> The authority had allocated its annual costs among the different classes of airport users

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<sup>85</sup> *Id.* at 170.

<sup>86</sup> Perhaps Massport's true motives can best be shown by the fact that only Phase I of its new plan was involved here. Phase II, which had not come into effect, would have set priority take-offs for large aircraft during peak hours. Hughes, *supra* note 77, at 62. Massport's impetus, therefore, was not just in recovering fees but in either reducing or eliminating small aircraft traffic.

Even more important to understanding the decision in this case, however, is the fact that the Department of Transportation had political reasons for keeping airport authorities from adopting radical landing fee structures. Weiner, *Massport Suspends Logan's Higher Fees*, FLYING, Mar. 1989, at 12. The more cynical might agree with Massport's director that "the Reagan Administration decided to put its muscle behind a small group of private plane owners who are concerned solely with their own convenience." *Id.* at 13. No one could argue with the results, however. During the time the fee structure was in effect, general aviation decreased 29% while seating capacity increased 10%. Also, on-time rates increased from 69.5% to 86.4% and Logan's on-time rating among the busiest national airports improved in rank from 21 to 12. *Id.*

<sup>87</sup> *New England Legal Found.*, 883 F.2d at 170.

<sup>88</sup> *Id.*

<sup>89</sup> 733 F.2d 1262 (7th Cir. 1984).

<sup>90</sup> *Id.* at 1264-65.

based on how much space each used.<sup>91</sup> Concessionaires, such as car rental agencies and the parking lot operator, used much less space than the airlines, so the authority attributed only a modest fraction of the airport's costs to them. At the same time, the concessionaires paid rent far in excess of the costs they imposed on the facility.<sup>92</sup> This fee system yielded the airport a total income greater than its costs.<sup>93</sup> The Seventh Circuit found that even though excess income was being extracted from the concession customers, the airlines were ultimately paying for that differential through lower ticket prices needed to attract customers to the airport.<sup>94</sup> The resulting fee structure was unreasonable since it did not fairly allocate the costs of providing service to airport tenants.<sup>95</sup>

The fact that the authority might use excess funds for airport development did not alter the court's reasoning.<sup>96</sup> The airport might also use the funds for unnecessary "gold-plating" improvements, resulting in a higher quality of airport services at a higher price than airline users wanted.<sup>97</sup> Therefore, the principal reason for the court's finding of an unreasonable fee structure was that the cost for airport services imposed on airlines and passengers

<sup>91</sup> *Id.* at 1265. The classes of airport users were commercial aviation, general aviation, and concessionaires. *Id.*

<sup>92</sup> *Id.* The airport authority attributed costs of \$100,000 to the car rental agencies and \$900,000 to the parking lot operator. Costs of \$3,000,000 were attributed to the airlines. The airlines were required to pay landing fees and other charges in amounts calculated to cover the costs allocated to them. *Id.*

<sup>93</sup> *Id.* The airport received rental income from the car agencies and parking lot totalling \$3,500,000 but the costs they imposed on the facility were only \$1,000,000. Since the airport was charging the airlines enough to cover any costs imposed by the carriers, the airport was receiving a windfall of \$2,500,000. *Id.* at 1268.

<sup>94</sup> *Id.* The court also concluded that since the concessionaires recovered the expense of high rent through increased prices to consumers, these customers also paid the excess \$2,500,000 received by the authority. *Id.*

<sup>95</sup> *Id.* The court stated, "[T]he result is an exaction that is wholly disproportionate to the costs to the airport of serving the airlines and their passengers, and is therefore unreasonable under the state and federal statutes." *Id.*

<sup>96</sup> *Id.* The court felt that the fee structure would be unreasonable even if all of the income of the authority was put back into airport development. *Id.*

<sup>97</sup> *Id.* The court came to this conclusion in discussing the possibility the authority might use its excess revenues for the benefit of general aviation users. *Id.*

greatly exceeded the costs those parties imposed on the airport.<sup>98</sup> "Reasonableness" of landing fees, therefore, is based on two independent tests: whether the airport proprietor attempted to accurately reflect the amount of costs attributable to the users on which they fall and whether the fees are close approximations of the true cost of maintaining the airport.

*Island Aviation, Inc. v. Guam Airport Authority*,<sup>99</sup> best illustrates this two part test of "reasonableness." It also shows that airport proprietors are capable of imposing a fee structure that meets reasonableness requirements. In this case, the Guam airport levied fees indirectly on passengers for the purposes of airport development.<sup>100</sup> The fees consisted of two parts. First, the airport imposed a service charge on aircraft operators to cover the costs of maintaining a Sterile Room Holding Area. The airport based this fee on the number of passengers processed. Second, the airport imposed an Arrival Facility Service Charge on aircraft operators. This charge covered the costs of providing arrival facilities based on the number of

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<sup>98</sup> *Id.* at 1271. In a concurring opinion, Judge Flaum stated, "[T]he allocation of costs among users is a component of reasonableness." *Id.* at 1274 n.5 (Flaum, J., concurring). Judge Flaum's opinion, however, suggests that while this holding is correct, its reasoning should rest on other grounds. He felt that the federal statutes in question only applied to aircraft users and not to fees charged to concessionaires. *Id.* at 1274. Moreover, "the federal statute merely restricts the airport's overall profit, while not imposing any restrictions on those from whom costs may be recovered." *Id.* at 1274 n.5. This would give support to the powers of proprietors exercised in *Alamo Rent-a-Car, Inc. v. Sarasota-Manatee Airport Auth.*, 825 F.2d 367 (11th Cir. 1987). For a discussion of this case, see *infra* notes 115-122 and accompanying text.

<sup>99</sup> 562 F. Supp. 951 (D. Guam 1982). The airport imposed the fees through the airlines and not directly on passengers. *Id.* at 953.

<sup>100</sup> *Id.* at 957. Guam is under the authority of section 2210, section 1305, and the Federal Anti-Head Tax Act, 49 U.S.C. app. §§ 2210, 1305, 1513 (1988). For a discussion of these statutes, see *supra* notes 3-38 and accompanying text. Guam is therefore subject to the prohibition of "head taxes" on passengers traveling in interstate commerce. The court, however, did not find these airport charges preempted. The court reasoned that, since Congress did not include airport terminal buildings and facilities in appropriations passed concurrently with the head-tax ban, the legislature did not intend to deprive airports of assessing and collecting the necessary funds to finance such terminals. Since the charges in question here were for that very purpose, the court concluded that they were not preempted. *Island Aviation*, 562 F. Supp. at 957.



arriving passengers.<sup>101</sup>

In determining whether these fees were reasonable, the District Court of Guam concluded that a reasonable fee reflects the actual costs of facilities and makes the airport as self-sustaining as possible.<sup>102</sup> The Guam authority's formula, based on the number of passengers using its services, met this test. On the other hand, the formulas used by the Massachusetts and Indianapolis authorities made those airports self-sustaining, but the fees imposed by the authorities did not reflect the actual cost of maintaining the airport facilities. Instead, some airport users were favored over others. Therefore, the cost-allocation formulas imposed at Logan and Indianapolis did not pass the reasonableness test required by the federal statutes.

The idea that proprietor-imposed fees are only reasonable when they accurately reflect the cost of maintaining the airport is also the basis of *American Airlines, Inc. v. Massachusetts Port Authority*.<sup>103</sup> In that case, the First Circuit upheld a landing fee structure which radically changed the existing fee system.<sup>104</sup> Massport imposed new landing fees on airlines that constituted a 52% increase over the existing fee structure, resulting in a \$4.2 million increase in revenue.<sup>105</sup> Of that increase, over half covered the financing of three costly airport undertakings.<sup>106</sup> One was a runway extension project abandoned because of environmental difficulties, another was the filling of a tidal area to be used for future development, and the third was an agreement to pay a local hospital one million dollars over a period of ten years in exchange for disaster assistance.<sup>107</sup> After noting these facts, the court turned to an

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<sup>101</sup> *Island Aviation*, 562 F. Supp. at 957.

<sup>102</sup> *Id.* at 959.

<sup>103</sup> 560 F.2d 1036 (1st Cir. 1977).

<sup>104</sup> *Id.* at 1038.

<sup>105</sup> *Id.* at 1037.

<sup>106</sup> *Id.* The airlines felt the projects, totalling \$46 million, were of little or no use to them. *Id.*

<sup>107</sup> *Id.* at 1037-38. The runway extension project was halted because of state environmental litigation and converted into "extended runway safety areas." The tidal area development was initiated at the request of the airlines for the purpose

analysis of whether the new fees were reasonable.

In order to determine if the fees imposed by Massport were reasonable, the court looked to the three part reasonableness test enunciated by the United States Supreme Court in *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.*<sup>108</sup> The first question is whether the fee discriminates against interstate commerce or travel.<sup>109</sup> The second question is whether the fee fairly reflects the approximate value that users of airport facilities receive in relation to each other.<sup>110</sup> The final question is whether the fee is excessive in relation to the actual cost borne by the taxing body.<sup>111</sup> The court determined that Massport's fees satisfied all of these tests and were, therefore, reasonable.<sup>112</sup> While the court was careful to limit its holding, it agreed that airport proprietors could impose fees on users for expenses resulting in dubious benefits so long as the airport incurred the expenses while undertaking relevant airport operations and so long as the fees were fairly consonant with costs.<sup>113</sup> This rule is best characterized as a requirement of fair allocation of costs.<sup>114</sup>

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of constructing cargo storage and other support facilities. The disaster assistance proceeds were paid to East Boston Neighborhood Health Center. *Id.*

<sup>108</sup> 405 U.S. 707 (1972) (holding that a tax of one dollar per airline passenger does not violate the federal Constitution). The Evansville test is limited to determining the reasonableness of burdens on interstate commerce and is not controlling outside this area. *American Airlines*, 560 F.2d at 1038.

<sup>109</sup> *Evansville*, 405 U.S. at 717.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 719.

<sup>112</sup> *American Airlines*, 560 F.2d at 1038. The plaintiffs agreed that the Massport landing fees passed the first two tests of not discriminating against interstate commerce (as distinguished from intrastate commerce) and of being formulated fairly (based on aircraft weight). The court further rejected the airlines' contention that the landing fee was excessive in relation to the benefit conferred because the benefit was determined based on the cost of the construction of facilities versus the amount of the tax, and not on the utility of the project to the individual user. *Id.*

<sup>113</sup> *Id.* at 1039. The court stated, "This is not to say that states can run wild and tax users for all extravagances. The facilities must be relevant to the operation of the airport." *Id.*

<sup>114</sup> See *Indianapolis Airport*, 733 F.2d at 1277 (Flaum, J., concurring). Although in *Indianapolis Airport* the fair allocation of costs involved allocating expenses between distinct airport tenants, it is appropriate to assume a fair allocation of costs involving airport development projects would make fees imposed to recover those expenditures reasonable.

Landing fees are not the only method an airport proprietor may use to meet operating expenses. Proprietors may also impose fees on businesses whose customers can be traced to the airport. These fees can still be imposed even if the business is not located on the airport premises. *Alamo Rent-a-Car, Inc. v. Sarasota-Manatee Airport Authority*<sup>115</sup> addresses this very issue. In *Alamo*, the airport authority sought to meet its operating expenses and other costs through a schedule of user fees.<sup>116</sup> As part of its fee structure, the airport levied a monthly fee on hotel courtesy vehicles.<sup>117</sup> The airport also imposed a fee on courtesy vehicles of car rental companies not located on airport property equalling ten percent of all gross business receipts from the rental of cars by passengers picked up at the airport.<sup>118</sup> *Alamo*, an off-site rental agency, opposed the fee.

The Court of Appeals for the Eleventh Circuit judged the ability of the airport to impose the fee on a highly deferential standard: the fee was reasonable if rationally related to a legitimate state interest.<sup>119</sup> The airport authority offered two justifications for its fees.<sup>120</sup> First, since the authority received no concession fee when a customer of a rental agency rented a car off-site as it did when a car was rented on-site, the authority sought to restore that lost revenue by assessing the user fee. Second, the authority sought to maximize its revenues by imposing the fee on off-site rental agencies.<sup>121</sup> The court held

<sup>115</sup> 825 F.2d 367 (11th Cir. 1987).

<sup>116</sup> *Id.* at 369. The authority imposed fees on many activities conducted at the airport's facilities, including parking fees, landing fees, rent from restaurants and gift shops, and fees paid by taxis and limousines servicing the airport. *Id.*

<sup>117</sup> *Id.* The fees imposed were a monthly courtesy vehicle fee of \$50 or \$100 depending on the vehicle's size, or a yearly fee of \$800 per vehicle. *Id.*

<sup>118</sup> *Id.* One feature of the resulting fee was that the user fee for many of the rental agencies greatly exceeded the flat fee applicable to hotels and motels. *Id.*

<sup>119</sup> *Id.* at 370.

<sup>120</sup> *Id.* at 373. The interest of the airport authority in raising revenue is a legitimate and substantial government objective and was especially strong in this case because state law required airports to meet all their expenses not covered by government grants through the collection of user fees. *Id.*

<sup>121</sup> *Id.* Off-site car rental agencies were only required to pay ten percent of pro-

the fees were valid. Since all car rental companies received benefits from the presence of the airport, the decision to establish a fee for off-airport companies was not unreasonable, particularly because the fee only applied to customers who could be attributed to the airport.<sup>122</sup>

The key idea underlying the result in *Alamo* was the airport authority's purpose to become a self-sustaining airport. The authority did not seek to gain revenue surpluses as the Indianapolis airport had attempted to do in *Indianapolis Airport*.<sup>123</sup> The fact that the court upheld as reasonable the imposition of user fees on businesses not even located on airport property is testimony that the important inquiry with regard to reasonableness is whether the fees are an accurate reflection of costs incurred by the proprietor. Fees that do not accurately reflect proprietary costs are unreasonable and therefore are preempted by federal statutes.

## 2. *Restricted Areas*

The final aspect in determining reasonableness relates to the ability of proprietors to entirely restrict access to their facilities. While such a restriction may not be permanent, it is possible for an airport proprietor to completely deny a class of users access for a temporary period. In *Midway Airlines, Inc. v. County of Westchester*,<sup>124</sup> Midway sought access to Westchester County Airport so that it could conduct flights to Chicago.<sup>125</sup> The county usually approved such requests in a two step process. First, there was a technical review to assure that arrangements for ground services, coordination of air schedules, and satis-

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ceeds collected from customers arriving from the airport. In contrast, on-site rental agencies were required to pay the ten percent charge on all customers. *Id.*

<sup>122</sup> *Id.* at 374. The court held that, "Although this fee may harm off-airport competition in general and *Alamo's* profitability in particular, the fee schedule withstands constitutional scrutiny." *Id.*

<sup>123</sup> 733 F.2d at 1262. For a discussion of *Indianapolis Airport*, see *supra* notes 89-98 and accompanying text.

<sup>124</sup> 584 F. Supp. 436 (S.D.N.Y. 1984).

<sup>125</sup> *Id.* at 437. Midway proposed three departures from Westchester to Chicago and three arrivals from Chicago each weekend. *Id.* at 438 n.9.

factory noise limitations were all satisfied. Second, there was a final approval by the county board.<sup>126</sup> Realizing that the airport already operated at a capacity beyond its means,<sup>127</sup> the county suspended the processing of all access applications and, thus, temporarily denied Midway's access request.<sup>128</sup>

The response of the district court was conciliatory. It first pointed out that the county had not denied Midway's application but merely deferred it and that such deferral was motivated by concerns for the safety of passengers in the overcrowded terminal.<sup>129</sup> Although the airport was under federal mandate to make its facilities available on reasonable terms and without discrimination, no federal law prohibited the county from temporarily refusing to grant access to its terminal.<sup>130</sup> The court held that a reasonable period of time should be allowed for the county to study the problem and develop rational and nondiscriminatory rules for allocating scarce space.<sup>131</sup> The court, however, stressed that the deferral was limited to a reasonable period of time and could not be extended indefinitely.<sup>132</sup>

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<sup>126</sup> *Id.* at 438. Midway applied for access in late 1983, although at the time it had no arrangements for passenger service, ticketing, ground control, or overnight parking of its aircraft. *Id.* at 438-39.

<sup>127</sup> *Id.* at 439. The court related the following:

[T]here is only one small terminal equipped to handle flights by Part 121 air carriers; during peak hours of 7:00 a.m. to 9:00 a.m. and 5:00 p.m. to 7:00 p.m. on week nights "so many passengers are currently booked on departing flights that it is often impossible to even enter the building"; at such times there are "lines extending from ticket counters out into the street"; and the situation is even worse in holiday periods. At least one of Midway's proposed scheduled flights, if approved, would depart during peak hours.

*Id.*

<sup>128</sup> *Id.* This response was motivated by a need for new information relating to increased demand for the use of the county airport. *Id.*

<sup>129</sup> *Id.* at 440. The court recognized that the airport had an obligation to protect the health, welfare, and safety of the county residents. *Id.* at 437.

<sup>130</sup> *Id.* at 440. The court believed the time should be used to develop nondiscriminatory rules for allocating landing and takeoff slots, consistent with environmental and safety needs. *Id.*

<sup>131</sup> *Id.* at 441.

<sup>132</sup> *Id.* The court, perhaps unwilling to leave to a later decision the meaning of

The allowance of time to study access requests appears to be a reasonable denial of access. In at least one other instance, a court has granted an airport proprietor a reasonable period of time to study a proposed access request. The grant came as part of a pair of rulings delivered by the Second Circuit Court of Appeals in 1977. The first case, *British Airways Board v. Port Authority of New York and New Jersey [Concorde I]*,<sup>133</sup> concerned a decision by the authority to temporarily ban Concorde flights at John F. Kennedy International Airport. Prior to the application for Concorde landing rights, the authority had noise restrictions in place.<sup>134</sup> The Concorde, a joint venture by the British and French, was at first believed to create noise levels in excess of the maximum allowed by the authority.<sup>135</sup> Before commencing flights, the operators of the airplane applied to the FAA for permission to land at American airports, and the Secretary of Transportation agreed to allow flights for sixteen months for the purpose of determining the noise impact.<sup>136</sup> Although the Secretary had the power to require Dulles Airport, operated by the FAA, to allow the Concorde to land, he could not preempt the New York and New Jersey Port Authority from excluding the airplane pursuant to a reasonable and non-discriminatory noise regulation.<sup>137</sup> The authority re-

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"reasonable," allowed thirty days for completion of the usage study and another twenty days for rules to be promulgated. *Id.*

<sup>133</sup> 558 F.2d 75 (2d Cir. 1977).

<sup>134</sup> *Id.* at 79. Beginning in 1955, the port authority had determined a specific level of maximum noise allowable for airplanes using its facilities. Careful study had set the level at 112 PNdB (perceived noise in decibels). *Id.*

<sup>135</sup> *Id.* The developers of the Concorde were actually well aware of how important minimizing noise was. Although the Concorde required enormous thrust to propel the craft at speeds in excess of the speed of sound, the technicians hoped to keep the engine noise below that of the noisiest subsonic aircraft. Over \$100 million was spent just to moderate the noise of the Concorde. *Id.*

<sup>136</sup> *Id.* at 79-80. The landing rights of the Concorde could be revoked immediately in the event of an emergency. Also, the airplane had to observe a curfew from 10 p.m. to 7 a.m. and abide by noise abatement procedures prescribed by the FAA. *Id.* at 80.

<sup>137</sup> *Id.* at 81. The Secretary stated:

The situation with respect to JFK may be complicated by the fact that under federal policy that has hitherto prevailed a local airport

sponded to the Secretary's decision by banning the Concorde from Kennedy for six months while noise levels were studied at Dulles Airport.<sup>138</sup>

The issue before the court was whether the Secretary's decision to allow a testing period for the Concorde preempted the authority's power to ban the airplane.<sup>139</sup> Although the appeals court held against the federal preemption, it remanded the case to determine if the delay by the authority in studying the noise problem was unreasonable.<sup>140</sup> If the delay was found to be unreasonable, the court instructed the authority to promulgate new noise restrictions with dispatch.<sup>141</sup>

Three months later, the issue was again before the court of appeals in *British Airways Board v. Port Authority of New York and New Jersey [Concorde II]*.<sup>142</sup> The court enjoined further prohibition of Concorde operations at Kennedy until the port authority could develop a reasonable, nonarbitrary, and nondiscriminatory noise regulation equally applicable to all aircraft.<sup>143</sup> In its ruling, the court noted that the Concorde had proven it could meet the old noise limitations that Kennedy had kept in place since 1955, but the craft had not been given the opportunity to

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proprietor has had authority under certain circumstances to refuse landing rights. If for any legitimate and legally binding reason it should turn out that the JFK part of the demonstration could not go forward . . . that would obviously be extremely unfortunate and would greatly diminish, but in my opinion it would not destroy, the validity of the demonstration.

*Id.*

<sup>138</sup> *Id.* The authority also indicated it would study noise level reports at Charles DeGaulle and Heathrow airports in Europe. *Id.*

<sup>139</sup> *Id.* While there was no preemption, the court did discuss why noise regulation was left to a single airport authority and not to the local municipalities near the airport. The court said, "The likelihood of multiple, inconsistent rules would be a dagger pointed at the heart of commerce—and the rule applied might come literally to depend on which way the wind was blowing." *Id.* at 83.

<sup>140</sup> *Id.* at 86. The central inquiry was into the reasonableness of the 13-month delay that had already occurred. *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> 564 F.2d 1002 (2d Cir. 1977).

<sup>143</sup> *Id.* at 1005.

demonstrate this to the authority.<sup>144</sup> Instead, following the court's order to promulgate a noise-level rule with dispatch, the authority had voted to extend indefinitely the temporary ban it had earlier imposed on Concorde flights.<sup>145</sup> While there was no standard for an inquiry into whether reasonable dispatch was being attempted, the court felt it should be able to examine the process the authority was following to determine if it was likely to achieve results in the foreseeable future.<sup>146</sup> The court then chastised the authority for abusing the leeway it had been granted and issued a ruling in favor of Concorde flights.<sup>147</sup>

The decisions that have been discussed demonstrate the dilemma an airport proprietor faces when it attempts to exercise control over an airport facility but must comply with the federal requirement that any restrictions be reasonable. When a proprietor imposes fees on airport users, fees that do not accurately reflect costs incurred by the proprietor or those that are not fairly allocated among airport users are unreasonable, and therefore they are

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<sup>144</sup> *Id.* at 1006. The Concorde could consistently meet a 109 PNdB standard. In fact, it was shown to be less annoying than a Boeing 707. Also, further testing in January of 1976 showed that fewer individuals than originally believed would be adversely affected by the introduction of the Concorde at JFK. *Id.*

<sup>145</sup> *Id.* at 1009. The authority had no more basis for its decision than the evidence known for years, that the Concorde had "unique characteristics." *Id.*

<sup>146</sup> *Id.* at 1012. The court stated:

While there are no absolute standards by which it may be determined that an inquiry is not being conducted with reasonable dispatch, a court will closely scrutinize the nature and character of the problems before the agency to assess whether the path it has chosen to pursue will resolve those issues in the reasonably foreseeable future.

*Id.* The court also said, "Our holding, however, does not deny the Port Authority the power to adopt a new, uniform and reasonable noise standard in the future." *Id.* at 1013.

<sup>147</sup> *Id.* at 1010. The court said:

If ever there was a case in which a major technological advance was in imminent danger of being studied into obsolescence, this is it. There comes a time when relegating the solution of an issue to the indefinite future can so sap petitioners of hope and resources that a failure to resolve the issue within a reasonable period is tantamount to refusing to address it at all.

*Id.*



federally preempted. When a proprietor denies access to his facility, he may do so temporarily, but the length of the denial period is also subject to a reasonableness test. Therefore, reasonableness is an important component in the determination of whether an airport proprietor's restrictions are valid.

### B. Nondiscrimination

While reasonableness is a quintessential inquiry when determining whether a restriction is valid or not, a restriction must also be nondiscriminatory in nature. Discrimination can occur either in the form of a burden on interstate commerce in favor of intrastate travel or in the form of giving a preference to commercial aviation over general aviation. Sometimes nondiscrimination is inseparable from reasonableness. One case which demonstrates how courts apply the requirement for nondiscrimination is *Indianapolis Airport Authority v. American Airlines, Inc.*<sup>148</sup> Here, the Seventh Circuit determined that an airport fee system was both unreasonable and discriminatory. The airport authority forced commercial aviation and airport concessionaires to pay rental and user fees to cover the costs those tenants imposed on the airport. General aviation users paid for their share through a flowage fee on aviation fuel sold at the airport.<sup>149</sup> The court recognized the fact that even though the imposition of a landing fee on general aviation would not be cost effective, the system the authority used was discriminatory.<sup>150</sup>

While general aviation had been assessed a cost of

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<sup>148</sup> 733 F.2d 1262 (7th Cir. 1984).

<sup>149</sup> *Id.* at 1271. General aviation is defined as "civil aviation that does not involve transportation for hire of passengers or cargo nor the ferrying of aircraft." Therefore, the use of small private airplanes for personal or recreational use is included by the term. *New England Legal Found.*, 883 F.2d at 163 n.17.

<sup>150</sup> *Indianapolis Airport*, 733 F.2d at 1271. The court noted that if general aviation paid its costs through a landing fee rather than a flowage fee, the costs associated with collecting the revenue would be as high as one half of the proceeds collected. *Id.*

\$400,000 for its use of the airport, the flowage fee yielded only \$250,000 in revenues.<sup>151</sup> This result meant that while commercial aviation was paying more than its share of costs to the facility, general aviation was paying about half the costs it imposed. Since private airplanes were more likely than commercial aircraft to travel intrastate, the effect of the flowage fee system was to shift intrastate costs to interstate users.<sup>152</sup> The court felt that Congress intended to prevent discrimination against interstate commerce in favor of intrastate travelers.<sup>153</sup> Therefore, the airport proprietor could not continue to impose its existing fee system.

While a flowage fee may be perfectly valid if effectively allocated,<sup>154</sup> a fee structured like that in *Indianapolis* is void because of its discriminatory effect. Most issues of discrimination are not as clear-cut as in *Indianapolis*, however, and few courts base their holdings on the sole fact that a particular airport regulation is discriminatory in nature. Furthermore, not all discriminatory statutes involve discrimination between interstate and intrastate travel.<sup>155</sup>

The issues of discrimination and reasonableness are

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<sup>151</sup> *Id.* While the landing fees for airlines at the airport had nearly doubled, the authority left the flowage fee paid by general aviation unchanged. That fee had been in effect for nine years. *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* The court had no objection to substituting a flowage fee for a landing fee to economize the costs of collection, but it believed the flowage fee had to yield revenues equivalent to the costs allocated to general aviation's use of the airport. The *Indianapolis* fee did not do this. *Id.*

<sup>155</sup> Indeed, if the entire question of discrimination turned on whether intrastate commerce was being favored at the expense of interstate commerce, there would have been no need to pass federal statutes proscribing such discrimination. In the absence of a significant need for the exercise of state police powers, the dormant commerce clause would be authoritative. See *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981) (invalidating an Iowa law restricting the length of trucks capable of using highways within the state because of its marginal increase in safety); *Southern Pac. Co. v. Arizona*, 325 U.S. 761 (1945) (invalidating an Arizona law regulating train lengths because of the law's marginal increase in safety). See also U.S. CONST. art. I, § 8, cl. 3 (giving Congress the authority to regulate interstate commerce). Discrimination, therefore, must also encompass other aspects; the most likely being a proscription of favoring one airport user over another.

frequently interconnected. In *Arrow Air, Inc. v. Port Authority of New York and New Jersey*,<sup>156</sup> Arrow took issue with local noise control regulations that prevented it from operating DC-8 aircraft at John F. Kennedy International Airport.<sup>157</sup> The authority, however, granted Icelandair an exemption from those same noise requirements, enabling that airline to operate noncomplying BAC 111, B 737, and DC-9 aircraft at all of the port authority's facilities.<sup>158</sup> In order to determine whether the authority's rule discriminated on its face between Arrow and Icelandair, the court adopted a test for discrimination encompassing elements of "reasonableness" and the presumption that the restriction was valid so long as it was rationally related to a legitimate state interest.<sup>159</sup> The establishment of "reasonable" procedures by the authority to determine the acceptable level of aircraft noise satisfied the court's inquiry into both reasonableness and nondiscrimination.<sup>160</sup> Since the airport authority had satisfied those requirements,<sup>161</sup> the court

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<sup>156</sup> 602 F. Supp. 314 (S.D.N.Y. 1985) (upholding noise restrictions imposed by the Authority).

<sup>157</sup> *Id.* at 319. The DC-8 (60 series) is referred to as a State 1 aircraft. The port authority imposed noise level restrictions, effective January 1, 1985, that required the use of muted State 2 or 3 aircraft. *Id.* at 316.

<sup>158</sup> *Id.* at 320. For a discussion of the procedure required to receive an exemption to the noise level restrictions in place at the airport, see *infra* note 161.

<sup>159</sup> *Id.* at 319-21. This test is applied to local economic regulations. *Id.* at 320.

<sup>160</sup> *Id.* at 321.

<sup>161</sup> *Id.* Additional factors weighed in favor of the airport authority. First, Icelandair had been granted the only exception to the noise regulations set in place by the authority, and that occurred at the specific request of the United States Department of State because of "international policy considerations." *Id.* at 320. Those policy considerations included the strategic significance of maintaining the only direct service between the United States and Iceland where important military and equipment installations are located. *Id.* The regulations promulgated by the airport authority and met by Icelandair were that: (1) the carrier must provide the sole scheduled passenger service between New York and a foreign country with New York being the primary service to the United States; (2) the FAA must have exempted the carrier from federal noise regulations; (3) the United States government must request the port authority to grant an exemption based on "foreign relations and national security" grounds; and, (4) the carrier must enter into an agreement with the port authority providing that it will obtain and utilize any conforming aircraft in its fleet at JFK to the extent such aircraft can reasonably be used for such service. *Id.*

The second factor in the authority's favor was expert testimony showing that,

determined that the discrimination was interrelated with reasonableness.

Even more demonstrative examples of the limited non-discrimination requirement and its interdependence on reasonableness occurred in *City of Houston v. FAA*<sup>162</sup> and *Western Air Lines, Inc. v. Port Authority of New York and New Jersey*.<sup>163</sup> In *City of Houston*,<sup>164</sup> the Fifth Circuit reviewed a perimeter rule imposed by the FAA which prohibited air carriers from operating nonstop flights between Washington National and any airport more than 1000 miles away.<sup>165</sup> The FAA, acting as the proprietor of National, imposed the rule as a means of controlling the increasing air traffic at National and diverting it to Dulles International Airport.<sup>166</sup> The court held that an airport proprietor may make reasonable regulations concerning the efficient use of navigable airspace, and National's perimeter rule constituted an acceptable means of promoting

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although Icelandair's aircraft were outside the noise control regulation standards, its aircraft were quieter than those Arrow desired to utilize. *Id.* at 320-21.

<sup>162</sup> 679 F.2d 1183 (5th Cir. 1982).

<sup>163</sup> 658 F. Supp. 952 (S.D.N.Y. 1986), *aff'd*, 817 F.2d 222 (2d Cir. 1987), *cert. denied*, 458 U.S. 1006 (1988).

<sup>164</sup> *City of Houston* is also an excellent example of the creativity federal judges and their clerks can show. The text sections are divided into amusing titles like "One If By Land, Two If By Sea, and Three If By Air," "Scope of Review-We're the Administrative Agency, Doing What We Do Best," "Authority, Authority, Who's Got the Authority?," and "Have Perimeter Rule, Will Travel." The parties to the case are listed on "the passenger manifest." *Id.* at 1186. The opinion also describes Washington D.C. as:

Nestled in the green hills of the Mid-Atlantic region, snug and smug along the banks of the beautiful Potomac River, this celebrated town of "Northern charm and Southern efficiency" offers visitors a pot-pourri of museums, art galleries, monuments, historic sites, parks, Panda bears, politicians, and a climate that is charitably described as ghastly.

*Id.*

<sup>165</sup> *Id.* at 1187. The traveler living beyond 1000 miles had two choices of air transportation to Washington: changing planes in a city less than 1000 miles from National or flying directly to Dulles International or Baltimore-Washington Airport. Dulles, however, is a thirty-mile taxi ride from the city. *Id.*

<sup>166</sup> *Id.* at 1188. No operational or safety considerations were cited in the rule. Three reasons were cited by the FAA: (1) to assure the full utilization of Dulles, (2) to preserve National's status as a short- and medium-haul airport, and (3) to eliminate the inequity of a prior 650-mile rule that contained exceptions for certain cities. *Id.*

that efficiency.<sup>167</sup> Additionally, any discrimination between travelers located within the perimeter and travelers located outside it was merely incidental and not a basis for declaring the rule unconstitutional.<sup>168</sup> Thus, so long as National's perimeter rule was reasonable, the court would not find it invalid because of its discriminatory effects.

*Western Air Lines* involved a perimeter rule similar to the one in *City of Houston*. In *Western Air Lines* the port authority had imposed a ban on all flights arriving at LaGuardia Airport from more than 1500 miles away in an attempt to relieve congestion at LaGuardia by diverting traffic to the larger Kennedy and Newark airports. An airline alleged it was being unfairly burdened by the rule.<sup>169</sup> In reaching its decision, the district court placed much weight on the fact that long-distance air traffic was not prohibited from entering New York area airports but was only diverted from one airport to another.<sup>170</sup> It also noted the similarity between the FAA's use of a perimeter rule to divert air traffic to Dulles in *City of Houston* and the New York and New Jersey Port Authority's rule diverting traffic away from LaGuardia.<sup>171</sup> The court noted that while all regula-

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<sup>167</sup> *Id.* at 1196.

<sup>168</sup> *Id.* at 1198. The court said:

The accident of geography, not any deliberate discrimination against the western states, underlies the FAA's rule. The perimeter does not discriminate against a named state or states. It does not declare that Texans may not fly nonstop to National. Rather, it sets a limit of 1000 miles on nonstop flights. Some states, e.g. Louisiana, straddle the line. Some Louisiana airports meet the requirement, others do not. Just as the Rocky Mountain states possess beautiful scenery, Texas its reservoirs of oil and natural gas, and California its sandy beaches, so the accident of geography places some states within 1000 miles of National and others beyond. The perimeter rule, which for geographic reasons has an incidental effect on air travel from certain states, does not thereby violate the Constitution.

*Id.* But see Comment, *supra* note 58 (suggesting that the perimeter rule imposed on Love Field is unconstitutional).

<sup>169</sup> *Western Air Lines*, 658 F. Supp. at 953. LaGuardia occupies 662 acres, Newark 2300 acres, and Kennedy 4930 acres. Neither Newark nor Kennedy has a perimeter restriction. *Id.*

<sup>170</sup> *Id.* at 957-58.

<sup>171</sup> *Id.* The court said, "This Court sees no real distinction between the FAA's interest, as proprietor of an airport system, to manage its congestion problems by

tions tend to discriminate in some way, the important inquiry is whether the discrimination is reasonable in light of the legitimate objectives the proprietor seeks to achieve.<sup>172</sup> After noting that the control of ground congestion is a legitimate proprietary function, the court agreed with the authority's belief that the perimeter rule would keep LaGuardia from experiencing delays and congestion.<sup>173</sup>

*Western Air Lines* and *City of Houston* demonstrate that the requirements of reasonableness and nondiscrimination are interrelated. The cases also demonstrate that it is possible for airport proprietors to comply with federal statutes in promulgating regulations. So long as an airport proprietor can show legitimate objectives, especially through empirical studies, neither limits of reasonableness nor discrimination will stand in the way of proprietary regulations.

#### IV. APPLICATIONS OF REASONABLENESS AND NONDISCRIMINATION

Cases describing the validity of proprietor restrictions are of little use to airport operators without a synthesis of suggested limits. The meaning of reasonableness and nondiscrimination must, therefore, be studied to provide guidelines for airport proprietors to follow. First, proprietors must understand what areas they may not regulate because of exclusive control by the federal government. Next, proprietors must understand the allowable methods of exerting proprietary control. Finally, they must know the limits of those methods.

As noted earlier, the areas available for proprietary control include noise control, congestion, and recovery of op-

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use of a perimeter rule, and the interest of the Port Authority, as proprietor of LaGuardia, Kennedy, and Newark, to do the same." *Id.*

<sup>172</sup> *Id.* at 959. The court cited an alternative analysis as, "whether that discrimination is unjust." *Id.*

<sup>173</sup> *Id.* The court cited studies showing LaGuardia was operating near or above its capacity levels and delays were occurring because of that congestion. *Id.*

erating costs.<sup>174</sup> The essential determination of what areas a proprietor may control, especially where the proprietor is also a state governmental entity, turns on whether the restrictions and fees adopted are promulgated under proprietary powers or under police powers.<sup>175</sup> Where police powers are being exercised, the court will consider restrictions enacted pursuant to those police powers void and preempted by federal regulations.<sup>176</sup> On the other hand, where an airport operator is functioning under proprietary powers, courts will allow restrictions and fee impositions to stand, provided those regulations have been enacted by proper means.<sup>177</sup>

The proper method of promulgating proprietor-imposed restrictions and fees is important to their validity. Courts will not allow restrictions that have been carelessly considered and formulated.<sup>178</sup> But, where a legitimate method of formulation or promulgation has been utilized, the court will allow the proprietor's decisions to stand.<sup>179</sup> Such discretion means that in the area of costs, an airport operator who has allocated expenses fairly between potential airport users will be allowed to extract those costs even from users who have no facilities located at the air-

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<sup>174</sup> For a discussion of proprietary power to relieve airport congestion and recover operational expenses, see *supra* notes 55-70 and accompanying text.

<sup>175</sup> See *United States v. County of Westchester*, 571 F. Supp. 786, 797 (S.D.N.Y. 1983) (discussing the fact that a curfew imposed by an airport was an unlawful exercise of police powers); see also *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 635 n.14 (1973) (discussing the fact that an inquiry into proprietary powers was not equivalent to an inquiry into an exercise of police powers).

<sup>176</sup> See *County of Westchester*, 571 F. Supp. at 797-98.

<sup>177</sup> See *Western Air Lines, Inc. v. Port Auth. of N.Y. & N.J.*, 658 F. Supp. 952, 956 (discussing the fact that proprietary power exists for airport operators to impose some restrictions and upholding a perimeter rule enacted by the proprietors of LaGuardia airport), *aff'd*, 817 F.2d 222 (2d Cir. 1987), *cert. denied*, 458 U.S. 1006 (1988).

<sup>178</sup> See *New England Legal Found. v. Massachusetts Port Auth.*, 883 F.2d 157, 169-70 (1st Cir. 1989) (invalidating a landing fee scheme that was not scientifically derived).

<sup>179</sup> See *Aircraft Owners & Pilots Ass'n. v. Port Auth. of N.Y. & N.J.*, 305 F. Supp. 93 (E.D.N.Y. 1969) (upholding a \$25 landing fee during peak periods). Peak period landing fees are often discussed as a means of efficiently utilizing scarce facilities. See R. EKERT, *supra* note 62, at 47-58.

port.<sup>180</sup> A proprietor who has not allocated expenses fairly will not be able to impose those unfair costs, even upon the tenants of his facility.<sup>181</sup>

The discretion given proprietors in the area of congestion resembles the discretion they are given in recovering costs. Landing fees calculated by a nontraditional method of allocating costs between fixed costs and those varying by weight of the airplane have been held invalid.<sup>182</sup> Landing fees based on legitimate allocations, however, have been upheld even though they might favor commercial aviation over general aviation<sup>183</sup> and otherwise appear discriminatory. Thus, the method of determining restrictions by an airport proprietor provides the basis of determining whether or not those restrictions are allowable.

The question still remains: what are the limits on restrictions that are neither preempted nor determined by improper methods? In this area reasonableness and non-discrimination play key roles. As the Supreme Court has indicated, one test of reasonableness is whether the costs imposed on the user are related to the benefit conferred.<sup>184</sup> Once this requirement is satisfied, whether the benefits are of dubious utility to the users who pay for them is irrelevant so long as the airport proprietor expends funds in a way that is not frivolous or unreasonable.<sup>185</sup> The requirement of nondiscrimination is satisfied

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<sup>180</sup> See *Alamo Rent-A-Car, Inc. v. Sarasota-Manatee Airport Auth.*, 825 F.2d 367 (11th Cir. 1987). For a discussion of a valid fee structure imposed on facilities located off airport premises, see *supra* notes 115-123 and accompanying text.

<sup>181</sup> See *Indianapolis Airport Auth. v. American Airlines, Inc.*, 733 F.2d 1262 (7th Cir. 1984). For a discussion of an invalid fee structure imposed on airport tenants, see *supra* notes 89-98 and accompanying text.

<sup>182</sup> See *New England Legal Found.*, 833 F.2d at 157. For a discussion of an invalid fee scheme based on a nontraditional method of rates, see *supra* notes 73-88 and accompanying text.

<sup>183</sup> See *Aircraft Owners & Pilots Ass'n*, 305 F. Supp. at 93.

<sup>184</sup> *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707, 719 (1972). This is the third prong of a three-prong test. The other two prongs (whether there is discrimination against interstate commerce or travel and whether there is a fair approximation for the benefit conferred) are not really applicable when preemption by a federal statute is at issue. *Id.* at 717.

<sup>185</sup> *American Airlines, Inc. v. Massachusetts Port Auth.*, 560 F.2d 1036 (1st Cir.



if there is no bias in favor of commercial aviation over general aviation or if the rules causing such a bias are neither arbitrary nor based on nontraditional procedures.<sup>186</sup> Where proprietor-imposed restrictions are not preempted and are based on accepted methodology, then the fact that they are neither discriminatory nor unreasonable is sufficient evidence to convince courts to uphold them.

## V. CONCLUSION

As Justice Jackson noted, there is little aviation law that has not been preempted by the federal government.<sup>187</sup> The area left open to airport proprietors in setting restrictions and fees is no exception to that preemption. The airport system today faces problems affecting the environment and the public. The system must also deal with decreasing availability of funds from the federal government. Proprietors must utilize what freedom they do have in controlling the use of their facilities to further the interests of everyone involved. While air traffic and the demand for facilities increase daily, airport operators confront local economies that may not be capable of generating enough airport revenue to support those facilities. If these two factors surface at any single airport, its operators must impose restrictions on access and utilize alternative methods of raising funds. Here lies the dilemma.

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1977) (upholding fees covering expenditures advanced for legitimate airport objectives).

<sup>186</sup> Compare *New England Legal Found.*, 833 F.2d at 157 with *Aircraft Owners & Pilots Ass'n*, 305 F. Supp. at 93. In both cases there was a bias in favor of commercial aviation over general aviation, but the court found the system used in *New England Legal Found.* invalid because it was not scientifically derived. The system in *Aircraft Owners & Pilots Ass'n*, however, was valid because it merely imposed a flat landing fee during peak periods. Since Massport's fee scheme was held void because it was not based on scientifically derived information and New York's fee scheme was held valid *in spite of* the fact it was meant to discriminate against smaller aircraft, perhaps the basis of the formulation is the central issue in determining reasonableness.

<sup>187</sup> *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292, 303 (Jackson, J., concurring). For Justice Jackson's comments on the pervasiveness of federal regulation, see *supra* note 1 and accompanying text.

As public servants, the operators are obligated to consider, not only the measures they will implement to achieve their goals, but also the effect of those measures and whether they remain in the jurisdiction of proprietary control. With reflection and care, a proprietor can impose restrictions that do not conflict with federal preemption, that are based on established methodologies, and that are not void due to unreasonableness or discrimination. When this objective is accomplished, the country will be better able to maintain an efficient and equitable air transportation system.

