Quasi-Regulation of a Deregulated Industry by a Safety Agency

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I. INTRODUCTION AND FRAMEWORK

THE TITLE of this article presents its hypothesis — the existence of an anomaly with respect to airline deregulation. The purpose of this article is to explore that hypothesis, describe some of the various issues related to it, and perhaps provoke further debate and discussion of these issues.

The Federal Aviation Agency (FAA) was created by Congress as an independent federal regulatory agency in 1958.1 The catalyst behind the creation of the FAA was the mid-air collision between two air carriers over the Grand Canyon in June 1956. This disaster focused attention on aviation safety issues at the beginning of the jet age, especially the need for comprehensive federal regulation to effect the consolidation of air traffic control and the need for unified management of the navigable airspace.2

Twenty years after the the Civil Aeronautics Act of 1938, Congress passed the Federal Aviation Act of 1958 and created the FAA. The two decades between 1938 and 1958 were generally marked by a diffusion of federal au-

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authority, uncertain governmental roles, and repeated major organizational changes. Two specific points surrounding the passage of the 1958 Act are noteworthy. First, when Congress enacted the Federal Aviation Act of 1958, it left the 1938 Civil Aeronautics Act virtually unchanged in all aspects of air carrier economic regulation. This deliberate action by Congress made clear its intention to make no change in the law with respect to air carrier economic regulation.

Second, with the passage of the 1958 Act, Congress clarified the responsibilities and functions of the governmental agencies involved. Prior to enactment of the Airline Deregulation Act in 1978, the Civil Aeronautics Board (CAB) regulated economic issues, specifically air carrier rates and routes, while the FAA regulated air safety issues. The primary focus of the 1958 Act was to eliminate the then existing confusion and uncertainty.

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* See S. REP. No. 1811, supra note 2; H.R. REP. No. 2360, supra note 2.

caused by the diffusion of federal authority, and to create a structure within which the respective roles of the involved governmental agencies were clearly delineated. The areas of responsibility vested in the FAA were clearly focused on air safety. First, air traffic regulation and management of the use of the navigable airspace became primary responsibilities of the newly created FAA under the 1958 Act. Second, Congress vested the authority for establishing regulatory standards to effect aviation safety, previously the responsibility of the Air Safety Board, in the FAA.

The focus on aviation safety remains central to and the essential raison d'être of the FAA. When the Airline Deregulation Act was signed into law on October 24, 1978, it constituted the first change in the economic regulation of aviation in the four decades since the enactment of the

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7 Both Senate Report No. 1811 and House Report No. 2360 make this point emphatically. See supra note 2. With respect to air traffic control and use of the navigable airspace, Senate Report No. 1811 states that the objective of the legislation is to place "unquestionable authority for all aspects of airspace management in the Administrator" by vesting in him "plenary authority in the matter of air traffic rules." S. Rep. No. 1811, supra note 2, at 14-15. Page two of House Report No. 2360 uses the same term, describing the effect of the legislation as placing in the newly created FAA "plenary authority to . . . allocate airspace and control its use." H.R. Rep. No. 2360, supra note 2, at 2.

8 Title VI was essentially a reenactment of the provisions in the 1938 Act. See supra notes 3-5 and accompanying text. The 1938 Act placed safety regulatory authority in the Civil Aeronautics Authority, which had subsequently been diffused by the 1940 Reorganization Plans; see supra note 3 for a discussion of diffusion of authority effected by the 1940 Reorganization Plans.

1938 Civil Aeronautics Act. The objective of deregulation was to increase competition by encouraging the entry of new carriers into the market place and the development of innovative services to provide the traveling public with a greater variety of improved aeronautical services and reduced fares. The changes in commercial aviation in the decade since the enactment of the Deregulation Act have been both substantial and dramatic.

In the past decade, the number of air carriers has almost doubled from thirty-six prior to deregulation in 1978, to sixty-nine in 1988. During this same time period there have been over sixty mergers and acquisitions involving air carriers. Furthermore, the growth in the volume and variety of aviation services has been explosive. Not only has there been a substantial increase in the number of persons traveling by air, but overnight small package delivery services have developed and regional air carrier commuter services have also grown in the past ten years.

In contrast to the action taken in conjunction with the 1958 Act which simply left Title IV from the 1938 Act intact, the 1978 Airline Deregulation Act focuses exclusively on revising Title IV. In fact, the 1978 Act is virtually a converse parallel of the 1958 Act since in 1978 the subject areas of air traffic control, airspace management, and air safety were unaffected while the entire economic structure established by Title IV was changed. The 1978 Act explicitly asserts that the maintenance of safety is the high-

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12 See generally Federal Aviation Admin., U.S. Dept. of Transp., Nat'l. Airspace System Plan (1987) (discussing demand on the airspace system, the ATC systems, ground-to-air systems, interfacility communications, and maintenance and operations support systems); see infra notes 26-38 and accompanying text.
est priority and any deterioration in aviation safety is to be prevented.13

The premise underlying deregulation is that eliminating the constraints of governmental economic regulatory judgments and protection in order to remove artificial or bureaucratic restrictions and limitations on the exercise of imaginative and effective business judgments, will enable competitive market forces to work more efficiently and effectively.14 One latent assumption behind this premise is that aeronautical capacity will grow and expand to meet and satisfy demand. If, however, demand increases and substantial growth occurs without a similar increase in capacity to meet that demand, the result will be congestion and delay.15

The source of many of the current issues facing aviation can be traced to the success of deregulation in providing an expanded volume and variety of aeronautical services to the public. This success also demonstrated the validity of the cliche that the national air transportation system is finite; it has limited capacity, and when that capacity is approached, delays increase. The need for expanded capacity to meet the current and future demands on the national air transportation system gives rise to issues of how to allocate the available capacity resources and who is to allocate them.

The Airline Deregulation Act of 197816 did more than


15 Public Law 100-223, enacted on December 30, 1987, recognizes the need to expand capacity in a number of ways. As a matter of policy, projects which increase the capacity of facilities to accommodate passenger and cargo traffic are to be given priority treatment. 49 U.S.C. app. § 2201(a)(11) (1987). In addition, the statute establishes that not less than 75% of discretionary grant-in-aid funds are to be applied to capacity enhancing projects. 49 U.S.C. app. § 2206(c)(2), (3) (1987).

revise Title IV of the Federal Aviation Act to eliminate federal economic regulation of commercial aviation. The 1978 Act also expressly provided that no state, political state agency, interstate agency, or political subdivision of a state could interfere with the federal regulation of commercial aviation.\textsuperscript{17} However, as stated earlier, the pervasive authority of the FAA to regulate the use of the navigable airspace providing for the public's safe and efficient use, remains intact, viable, and unaffected.\textsuperscript{18} The FAA is also responsible for administering\textsuperscript{19} other statutory provisions which clearly involve aeronautical economic issues.\textsuperscript{20} These provisions are generally set out in the airport grant-in-aid authorization statutes.\textsuperscript{21} The result is to place the FAA, an agency whose expertise and raison d'etre is air safety, in the middle of various aeronautical economic issues.

II. NATURE OF THE AIR TRANSPORTATION SYSTEM

The air transportation system of the United States is unique not only in terms of its size and diversity, but more fundamentally, in terms of its inherent structure. It is a tripartite system with a wide range of components. The skeletal framework of the system is created and then maintained by two very different governmental entities.

The federal government, acting through the FAA, cre-

\textsuperscript{17} 49 U.S.C. app. § 1305(a) (1982). Section 1305(a) states that "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 . . . relating to rates, routes, or services of any air carrier . . . ." Id.; see also Hughes Air Corp. v. Public Util. Comm'n, 644 F.2d 1334, 1337 (9th Cir. 1981) (prohibiting state regulation of rates, routes, or services for those carriers within the scope of the Deregulation Act).

\textsuperscript{18} See supra notes 6-7 and 9 and accompanying text.


\textsuperscript{20} Id.

ated the air traffic control system, and now operates and maintains it. This system consists essentially of ground-based air navigation facilities of various types located throughout the United States. The FAA designs, operates, and maintains these facilities.\(^2\) Airports, on the other hand, are primarily a product of decisions by the various state and local governmental entities that create, design, operate, and maintain them.\(^3\) However, airports are not solely the product of a local decision. The federal government, acting through the FAA, provides substantial financial support for airport development throughout the country.\(^4\) The basis for this federal economic grant program is the congressional finding that the development of airports is important to meet the needs of interstate and foreign commerce.\(^5\)

\(^2\) These facilities cover the full spectrum of aids in air navigation: from VORs, VORTACs, and the related federal airway structure, to air traffic control towers with their computer enhanced radar systems and flight service stations, as well as the thousands of highly skilled personnel who design, operate, and maintain this equipment. See 49 U.S.C. app. §§ 1348(b)-2205 (1982). The other key air safety functions of the FAA are the licensing of airmen, the certification of aircraft, and the regulation of aeronautical operational activities. 49 U.S.C. app. §§ 1421-1427 (1982).

\(^3\) Over ten thousand public use airports exist in the United States. Approximately 700 airports are certificated for and receive air carrier service, and 399 airports in the United States have an FAA air traffic control tower. Airports in the United States encompass a spectrum ranging from a general aviation facility with a single 3500 foot runway, to the many various city and county airparks, extending to and including the multi-airport structure and multi-runway complexes of major international airport facilities. Large international airports include LaGuardia, John F. Kennedy and Newark International (operated by the Port Authority of New York and New Jersey), Chicago O'Hare, Atlanta Hartsfield, Dallas-Ft. Worth, Los Angeles International, Miami International, Seattle-Tacoma International, Boston-Logan International, Denver International, and Washington International.


While the skeletal framework of the air transportation system is provided by federal and local governmental entities, the users of the system are very broad and diverse. Users range from student pilots in small single engine propeller driven airplanes to national and international air carrier service provided by aircraft which can accommodate over 350 passengers and tons of cargo. The real users of the national air transportation system are those persons who travel, whether for business or pleasure, as well as those who use and rely on the system to transport products.

In 1970 there were approximately 725,000 licensed pilots in the United States flying 133,800 airplanes. By 1980 the number of pilots increased to 814,700 and the number of aircraft grew to 210,300. The commercial aircraft fleet increased to 3,807 airplanes, 2,394 of which were operated by air carriers and 1,413 were operated by commuters. They cumulatively enplaned 287,900,000 and 13,900,000 persons respectively in the United States.

The actual use of the navigable airspace reached a total of 66,200,000 operations at FAA-towered airports by 1980. By 1992 the demand is expected to increase to 69,400,000 operations. The air carrier fleet is expected to increase to approximately 3,800 airplanes by 1990, while the commuter fleet will grow to roughly 1,800 airplanes. Air carrier operations are expected to increase from 10,100,000 in 1980 to 14,400,000 by 1990, with a more dramatic growth pattern forecast for commuters —

\[26\text{ Id. at 147, Table 14.}\]
\[27\text{ Id. at 141, Table 8.}\]
\[28\text{ Id. at 146, Table 13.}\]
\[29\text{ Id. at 138, Table 5.}\]
\[30\text{ Id. at 145, Table 12.}\]
\[31\text{ Id. at 153, Table 20.}\]
\[32\text{ Id.}\]
\[33\text{ Id. at 141, Table 8.}\]
\[34\text{ Id. at 146, Table 13.}\]
8,500,000 operations in 1990, up from 4,600,000 in 1980. Domestic air carrier passenger enplanements are forecast to grow to 471,800,000 in 1990 with commuter passenger enplanements reaching 33,300,000.

Statistics, whether historical, current, or forecast, do not provide a complete picture. The tripartite national air transportation system is more than numbers, and more than merely an amalgamation of very different parts. It is a very robust and dynamic entity. While the different constituent elements which comprise the system are basically independent and autonomous, they are also simultaneously mutually interdependent. Essentially, the efficient and effective operational functioning of the system is dependent on the extent and level of cooperation between and among each of the constituent elements, with discord between the elements adversely impacting the operational functioning of the system. Justice Jackson, in an often quoted statement in a concurring opinion, described this interrelationship in the context of the operation of the federal air traffic control system:

Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission ... 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.

Before an aircraft taxis onto a runway and before a pilot operates in the navigable airspace according to the FAA’s elaborate and detailed system of controls, the very existence of that runway is the product of decisions by the local governmental body which owns and operates the airport. Albeit in another context, Justice Douglas, speak-

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36 Id. at 154, Table 21.
37 Id. at 139, Table 6.
38 Id. at 145, Table 12.
39 Northwest Airlines v. Minnesota, 322 U.S. 292, 303 (1944) (holding that the personal property tax assessed by Minnesota on the corporation’s entire fleet of airplanes did not violate the federal constitution).
Respondent [Allegheny County, the owner and operator of the Greater Pittsburgh Airport] decided, subject to the approval of the C.A.A., where the airport would be built, what runways it would need, their direction and length, and what land and navigation easements would be needed. The Federal Government takes nothing; it is the local authority which decides to build an airport *vel non*, and where it is to be located.\(^{40}\)

Since the national air transportation system is interdependent, a significant decision or course of action by one segment of the system can substantially affect and impact the system as a whole. The passage of the 1978 Airline Deregulation Act\(^{41}\) resulted in just such an impact on the system. One product of deregulation has been an increased emphasis on separate, autonomous, and independent decision-making by each of the system's constituent elements.\(^{42}\) While the national air transportation system is not so fragile that it is likely to disintegrate at the first signs of stress or discord, neither is it immune from such problems.

The abolition of economic regulatory authority significantly increased the level and intensity of competition among air carriers and commuters. Air carriers now must make individual business decisions in the context of this new intense competition without the "protection" provided by economic regulation of rates, routes, and services.\(^{43}\) In modifying the economic structure of civil aviation, the 1978 Deregulation Act also acted as a cata-

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\(^{10}\) Griggs v. Allegheny County, 369 U.S. 84, 89 (1962) (ordering county to pay just compensation for taking air easement over petitioner's property).

\(^{11}\) *See supra* note 16-17 and accompanying text.

\(^{12}\) The 1978 Airline Deregulation Act placed responsibility for air transportation service decisions in the hands of each air carrier. Carriers decide where to operate, how they will operate, when they will operate in terms of the timing and the frequency of their operations, and which equipment will comprise the composition of their fleet. *See infra* note 53.

\(^{13}\) A. Lopuszynski, Perspectives On Airline Hubbing In the U.S. (Summer 1986) (unpublished manuscript by FAA summer intern).
lyst, effecting substantial operational changes by air carriers which have affected the system as a whole. One change is the growth of a method of operation called "hubbing," which is now being applied by virtually every air carrier.

Application of the hubbing concept provides an air carrier with an efficient means to expand service to new locations and increase service to existing locations, without substantially increasing the size of its aircraft fleet or incurring the capital investment costs associated with a fleet expansion. By scheduling banks of flights into and out of a specific location, a carrier can connect more locations together, providing a wider range of services to the traveling public. Hubbing not only makes it possible to increase flight frequency to many locations, but a hub and spoke structure also permits carriers to maintain high load factors while transporting passengers from origin to destination points. The growth and effect of hubbing can be seen in the changes which have occurred at a number of airports. Only a few hubs existed before deregulation, but since deregulation new hubs which generally serve a single air carrier have developed. It is argued that hubbing results in anticompetitive practices with concomitant excessive market domination and monopoly power. However, it can also be argued that hubbing merely reflects an application of competitive market forces in the form of an expanded development of a demonstrably more efficient and economical air transportation system. In this system, carriers compete with each other in a new way by using their respective hubs.

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11 Id.
13 Id.; Coggin, Hub and Spoke Scheduling Versus Direct Flights, 13 ANNUAL FAA AVIATION FORECAST CONFERENCE PROCEEDINGS 32 (Feb. 1988).
16 A. Lupuszynaki, supra note 43 at 6-7. Hubs existing prior to deregulation included Chicago O'Hare, Atlanta, Dallas-Ft. Worth, and Denver. Id.
17 Id. at 11. After deregulation, new hubs developed at Newark, Baltimore, Charlotte, Raleigh-Durham, Nashville, Memphis, Cincinnati, Salt Lake City, Washington-Dulles, and Kansas City. Id. at 11, 17.
18 Compare 49 U.S.C. app. § 1302(a)(7) (1982) (discussing the duty to consider the "prevention of unfair, deceptive, predatory, or anticompetitive practices")
Since deregulation, the services provided by regional air carriers, or commuters, have changed significantly. Not only do commuters provide service to locations which a major air carrier has left for profitability reasons, but more significantly, air carriers have increasingly begun to provide support services to commuters. For example, many commuters now share the name and reservation computer code of their affiliated major carrier. They also frequently receive substantial support from the major carrier, including: shared airport terminal space, ticketing, baggage handling and flight scheduling which meshes with the hubbing flight banks of the major carrier, marketing, and the designation and marking of equipment to be used by the commuter. In effect, major air carriers use commuters in concert with the hubbing concept to expand the scope of their market by reaching smaller communities than they would otherwise serve. Commuters use major air carriers to reduce their costs and provide expanded service to smaller communities.

These specific changes in both services and competition in commercial aviation, while perhaps unforeseen when airline deregulation was being considered, are consistent with the basic objectives of the Deregulation Act. However, these functional and operational changes also create problems, particularly problems related to delays involving airport and airspace capacity, since the banks of arriving and departing hubbed flight operations are scheduled to occur within limited time periods. More significantly, by fundamentally changing commercial aviation in the United States, the Deregulation Act substantially affected the legal relationships between the tripartite entities which comprise the national air transportation system.

with § 1302(a)(3), (4) (1982) (addressing the importance of the “availability of a variety of adequate, economic, efficient, and low price services,” and “placement of maximum reliance on competitive market forces,” respectively). While this debate remains unresolved, and may be unresolvable as a matter of law, it is certainly lively. During the 100th Congress there were a number of oversight hearings on the subject of air carrier service generally, with some focus on the relationship of hubbing to fares and service.
This change in turn affected the level of cooperation among those entities. The changed legal relationships and related legal concepts are key to understanding the emerging civil aviation structure. In this context, it is appropriate to analyze the parameters of the new system in terms of each party's authority, role, and responsibility, and to describe some of the limitations and constraints on that authority.

III. Authority To Regulate

Although direct economic regulatory authority has been abolished, not all authority which can and does impact aviation economic issues has disappeared. In effecting the deregulation of airline rates, routes, and services, Congress not only abolished the Civil Aeronautics Board, the agency which had the responsibility for this activity, but Congress went further to legislatively preclude economic regulation from reappearing in another form.
A. Regulation of Air Traffic and Airspace Management

Deregulation did not revoke, amend, or modify the authority vested in the FAA to regulate air traffic or to manage the use of the navigable airspace. Sections 307(a) and (b) of the Federal Aviation Act of 1958, have remained unchanged since their enactment. The legislative history clearly indicates that the authority to regulate air traffic and the use of the navigable airspace is at the heart of


The apparent objective sought to be achieved by section 105(b) is to protect the proprietary authority exception described in the then existing case law from otherwise pervasive federal preemption. See generally City of Burbank v. Lockheed Air Terminal, 411 U.S. 624, 635 n.14 (1973) (“Airport owners acting as proprietors can presently deny the use of their airports to aircraft on the basis of noise considerations so long as such exclusion is nondiscriminatory.”); British Airways Bd. v. Port Auth., 564 F.2d 1002, 1005 (2d Cir. 1977) (enjoining prohibition of Concorde operations at the airport “until the Port Authority promulgates a reasonable, nonarbitrary and nondiscriminatory noise regulation that all aircraft are afforded an equal opportunity to meet.”). However, some recent case law appears to have expanded the scope of the “proprietary exception” to federal preemption beyond noise or environmental issues, extending that exception so as to include issues related to an air carrier’s route structure and service. See Western Air Lines v. Port Auth., 817 F.2d 222 (2d Cir. 1987) (local “perimeter rule,” prohibiting nonstop flights to or from New York City’s LaGuardia Airport in excess of 1500 miles, was not preempted by § 105(a) of the Deregulation Act), cert. denied, 108 S. Ct. 1467 (1988). The validity of this expansion of the proprietary exception to federal preemption is dubious at best, particularly when air restraints (non-stop flight segments) are applied to deal with the ground concerns of auto and terminal congestion.

Federal Aviation Act of 1958, supra note 1. This Act states:

(a) The [Administrator] . . . is authorized and directed to develop plans for and formulate policy with respect to the use of the navigable airspace; and assign by rule, regulation, or order the use of the navigable airspace under such terms, conditions, and limitations as he may deem necessary in order to insure the safety of aircraft and the efficient utilization of such airspace. He may modify or revoke such assignment when required in the public interest.

(c) The [Administrator] . . . is further authorized and directed to prescribe air traffic rules and regulations governing the flight of aircraft, for the navigation, protection, and identification of aircraft, for the protection of persons and property on the ground, and for the efficient utilization of the navigable airspace, including rules as to safe altitudes of flight and rules for the prevention of collision between aircraft, between aircraft and land or water vehicles, and between aircraft and airborne objects.

Id.
the FAA's mandate. Both the Senate and House Reports use the term "plenary" to describe the authority of the FAA Administrator with respect to air traffic control and use of the navigable airspace. This broad, sweeping authority includes the latent ability to affect, and indeed virtually manage, a critical aspect of an air carrier's operation — the ability to operate in and through the navigable airspace from any point to any other point at any particular time.

Section 307, by its terms, does more than establish the FAA's safety authority. The statute authorizes the FAA to regulate the use of the navigable airspace and prescribe air traffic rules designed to promote "the efficient utilization of such airspace." This statutory language, when considered in conjunction with the plenary authority of the FAA to regulate the use of the navigable airspace, provides the FAA with the legal authority to adopt and enforce regulations which substantially limit the ability of now deregulated air carriers to exercise independent decision-making in applying only the concepts of market forces and competition.

It is clear that the navigable airspace is finite. The capacity of the navigable airspace is a function of a number of different factors. These include the number and type of aircraft operating in the airspace at any given time and place, the altitude and speed of those aircraft in both absolute terms and in relation to each other, and their mode of flight (i.e., whether climbing, descending, or in level flight). While an individual aircraft, defined as an object in the airspace at any given time, occupies only a relatively small amount of the total airspace available, the dynamics of flight do not operate in frozen time segments. Instead,


the dynamics of flight require a substantial volume of airspace for every aircraft. In effect, a moving envelope of airspace surrounds each aircraft, and the dimensions of this envelope may vary from three to ten miles in length, from one to two thousand feet in width, and from five hundred to two thousand feet in depth. This airspace envelope constantly changes, moving at speeds of ninety to six hundred miles per hour, or from one and one half to ten miles each minute. Limits on the ability of the navigable airspace to safely and efficiently accommodate increasing traffic demands are related not only to the finite nature of airspace itself, but also involve the capacity of airports to handle the movement of airplane traffic.

Congress recognized and addressed the need to expand airport capacity in specific legislative findings that the nation's airport system is not adequate to meet the demands currently being placed on it, nor the demands expected to develop in the future. Consequently, substantial expansion and improvement of the airport and airway system is considered necessary, if not vital. In order to effect this

55 Pursuant to section 307, the FAA established extensive rules and regulations applicable to all flight operations in the navigable airspace. These rules are set out in 14 C.F.R. § 91 (1988) and include rules regulating the minimum safe altitudes (§ 91.79), operation at airports (§§ 91.85-.89), terminal control areas (§ 91.90), positive control areas (§ 91.97), VFR weather minimums (§ 91.105), VFR cruising altitudes (§ 91.109), IFR minimum altitudes (§ 91.119), and IFR cruising altitudes (§ 91.121).

In addition, the FAA established a comprehensive body of procedures implementing aircraft separation criteria which are applied by air traffic controllers to effect the safe and efficient movement of flights through the navigable airspace. See Federal Aviation Admin., U.S. Dep't of Transp., Air Traffic Control 7110.65E (Apr. 9, 1987). These criteria are designed to apply to and cover specific circumstances. For example, IFR vertical separation is 1000 feet up to flight level 290 or 29,000 feet, and above flight level 290 the vertical separation increases to 2000 feet. Id. at 6-12. IFR longitudinal separation of aircraft on the same, converging, or crossing courses ranges from five to ten miles or three to five minutes depending on specific circumstances; radar separation criteria ranges from three to ten miles depending on the location of the aircraft in relation to the particular radar antenna. Id. at 6-12, 5-15.

56 Airport capacity is a product of many different factors. These factors include the number of runways at an airport, their length and weight bearing strength, their design configuration, and the overall design of the airport in terms of runways, taxiways, terminals, and other related ground facilities.

expansion and improvement, over nine billion dollars in federal funds have been obligated since 1970 for the express purpose of airport development. Since these federally granted funds can only be applied to eligible airport projects and can only constitute a percentage of the project cost, the total amount expended for airport development is probably double or triple the amount of federal grants.

In terms of the national air transportation system, a clear and direct relationship exists between the ability of the air traffic control system to efficiently manage the use of the navigable airspace, and the capacity of airports to handle the movement of air traffic. By statutory definition, navigable airspace includes the airspace needed to effect the safe landing and takeoff of aircraft. The logical consequence of this relationship, considered in combination with the statutory definition and the pervasive authority given in section 307 to regulate the use of the navigable airspace for safety or efficiency, is that the FAA has the legal authority to regulate, manage, and control the amount, type, and flow of traffic at any airport in the nation. In fact, a persuasive argument can be made, in view of the pervasive federal authority with respect to the control of air traffic, that only the FAA has the legal authority to regulate, control, limit, or allocate flights.

\[\textit{\text{repealed and replaced by} \quad \text{Airport and Airway Improvement Act of 1982, 49 U.S.C. app. \$ 2201(a) (1982).}}\]

\[\textit{\text{See supra notes 22-24 and accompanying text. In addition to the funds used for airport development, substantial federal funds have been expended for a wide range of ground based air navigation facilities.}}\]

\[\textit{\text{The statute permits grants to be made by the Secretary of Transportation for airport development. 49 U.S.C. app. \$ 2204(a) (1982); see also 49 U.S.C. app. \$ 2202(a)(2) (1982) (defining airport development). Further, airport development project costs must be found to be “allowable” as defined by the statute to be covered by grant funds. 49 U.S.C. app. \$ 2212 (1982); see also 49 U.S.C. app. \$ 1720 (1970) (repealed 1982).}}\]

\[\textit{\text{49 U.S.C. app. \$ 2209 (1982) (providing that up to 90\% of allowable project costs can be funded by the U.S.); see also 49 U.S.C. app. \$ 1717 (1970) (repealed 1982).}}\]

\[\textit{\text{49 U.S.C. app. \$ 1348(a) (1982) (authorizing the Secretary of Transportation to do what is necessary with respect to the use of the navigable airspace to insure the safety of aircraft).}}\]
among airport users at any given airport. However, this is not a new or novel concept.

Twenty years ago, the FAA established hourly flight operational quota limits for five designated high density airports. The total hourly flight limits at each airport were based on the FAA’s evaluation of the airport’s capacity to handle the flow of air traffic, assuming that all aircraft would be operating in accordance with instrument flight rules. One effect of this assumption is that some inefficiencies were considered acceptable since instrument flight rule criteria are more limiting than visual flight rule criteria. In addition to establishing an hourly limit on the total number of flights at each airport, the FAA also allocated those flights among different classes of airport users: air carriers, commuters or air taxis, and general aviation.

The principal consideration was the FAA’s perception that the public interest would best be served by giving greater priority and preference to commercial operators in the allocation of “slots.” Commercial operators pro-

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52 See supra note 51 which points out that while the purpose of section 105(b) was to preserve the ability of an airport proprietor to deal with noise and other environmental problems, airport proprietors did not obtain new authority under airline deregulation which they did not previously have. An action by an airport proprietor to establish limits on the number of flights at the airport, the type of flights (i.e., whether air carrier, or commuter, or general aviation), or the origin or destination of those flights is not based on inherent proprietary authority which may have existed prior to passage of the 1978 Deregulation Act.


54 14 C.F.R. § 93.123; 33 Fed. Reg. at 17,897. IFR landings require more time and attention by flight controllers, and represent a conservative estimate of airport traffic capacity. Id., 33 Fed. Reg. at 17,897.

55 14 C.F.R. § 93.123. The Secretary of Transportation must, under sections 103(c) and 306 of the Federal Aviation Act of 1958, consider the requirements of commercial and general aviation, as well as the public right of freedom of transit through the navigable airspace in his decision-making. See supra note 1.

56 The term “slots” has come into fairly common usage in aviation parlance since the passage of the 1978 Airline Deregulation Act, and more specifically, since the PATCO air traffic controllers’ strike in 1981. The term “slots” basically refers to an airplane’s ability to land or take off at a designated airport during a designated hourly time period. See 14 C.F.R. § 93.213(a)(2) (1988).
vide services to the general public, which have greater value in terms of accommodating the public interest than the more limited value of private or general aviation. At the same time, however, the FAA was aware of its responsibility to consider the statutory public right of freedom of transit through the navigable airspace, and to provide some slots to accommodate the needs of general aviation. The FAA's adoption of these regulations limiting flights at the high density airports regulated more than the use of the navigable airspace; the high density rules regulated the use of airports that the FAA neither owned nor operated. These regulations were later challenged, and the FAA's action was upheld. An important caveat to keep in mind is that the FAA's allocation of slots among the various classes of airport users did not exclude any user. In allocating the slots among the diverse users of the designated high density airports, the FAA considered the historical percentage of use by each of the class of users at each airport.

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68 Id.; see also 49 U.S.C. app. §§ 1303(c), 1347 (1982).
69 Aircraft Owners and Pilots Ass'n v. Volpe, No. 23,146 (D.C. Cir. Nov. 19, 1969) (oral opinion affirming summary judgment for the defendant against plaintiffs' claim that the "high density" rules promulgated by the Federal Aviation Administrator were irrational); see also Aircraft Owners and Pilots Ass'n v. Port Auth., 305 F. Supp. 93 (E.D.N.Y. 1969) (justifying take-off and landing fees on small aircraft, and citing Volpe). In an analogous case, Wilderness Public Rights Fund v. Kleppe, 608 F.2d 1250 (9th Cir. 1979), cert. denied, 446 U.S. 982 (1979), there was a challenge to a National Park Service decision to allocate rafting and boating use of a portion of the Colorado River between commercial and private users. In upholding the Park Service allocation plan and finding that the Park Service's preferential allocation to commercial users was not unreasonable, the court discussed the limited capacity of the river and its inability to accommodate the demand for access from all interested users. Id. at 1254. The court noted that the Park Service allocation plan allowed more persons to make the trip. Id.
70 Section 308(a) of the Federal Aviation Act precludes the granting of an exclusive right particularly at facilities where federal funds have been expended. This prohibition considered in conjunction with the affirmative expression of a public right of freedom of transit through the navigable airspace noted above establishes a Congressional policy of open access to all users to the extent possible, but where that is not possible and some restriction on access is warranted, no class of user can be excluded or denied access. 49 U.S.C. § 1348(a) (1982).
The FAA's use of slot allocation became more extensive in 1981 as a result of the PATCO strike. However, prior to the strike, but after the passage of the Airline Deregulation Act, a dispute arose concerning the distribution of the allocated air carrier slots at Washington National Airport.\textsuperscript{72} The air carriers met under a grant of anti-trust immunity from the CAB to distribute Washington National slots among themselves.\textsuperscript{73} When the air carriers were unable to reach an agreement, the Secretary of Transportation took prompt regulatory action to effect the distribution of these slots among the individual air carriers.\textsuperscript{74} The court upheld this action when it was later challenged.\textsuperscript{75}

The federal perception of what, in a specific factual context, will best serve the public interest is of critical importance. Giving consideration to the needs of commercial and general aviation clearly differs from creating legally enforceable rights in either of the other two components of the tripartite national air transportation system as a re-

\textsuperscript{72} Northwest Airlines v. Goldschmidt, 645 F.2d 1309, 1312 (8th Cir. 1981).

\textsuperscript{73} \textit{Id.} at 1312-13.

\textsuperscript{74} \textit{Id.} at 1313.

\textsuperscript{75} \textit{Id.} at 1322. The court specifically held that the authority conferred by sections 307(a) and (c) of the Federal Aviation Act of 1958 encompasses more than air safety, and extends to judgments as to efficiency. \textit{Id.} at 1316. One issue in the case concerned the allegation that the Secretary of Transportation improperly favored the New York-Washington market. \textit{Id.} at 1317-18. In upholding the decision to distribute the allocated air carrier slots among the individual carriers, the court noted that the slots were distributed to air carriers, not to particular markets. \textit{Id.} at 1318-19. Of significance to the court was the fact that the demand for slots exceeded the air carriers' allocation and the carriers had failed to agree on their distribution. \textit{Id.} at 1318. Under these circumstances, the court found it appropriate and in the public interest for the Secretary of Transportation to resolve this problem by effecting the distribution of the slots. \textit{Id.} at 1319.

While not discussed by the court, this decision, in effect, expands the authority of section 307. The Secretary's decision went beyond distributing slots among the different classes of users to distributing slots among members of a particular class. This extension of authority to effect the distribution of slots among individual air carriers, while understandable from a practical standpoint, has doubtful legal validity. Whether considered from a safety or efficiency perspective, from an air traffic — airspace management or airport use perspective, the corporate identity (\textit{i.e.}, Delta, American, United, Continental) of identical aircraft (\textit{i.e.}, B-727 or DC-9) is immaterial.
result of slot allocation or distribution. The absence of vested legal rights is consistent with the policies established by the Airline Deregulation Act. These policies involve the concept that the general public interest is served by placing "maximum reliance on competitive market forces and on actual and potential competition... to provide the needed air transportation system," and by encouraging entry into air transportation markets by new carriers and existing carriers. In applying the policy concepts of the Deregulation Act, the FAA has supported an increase in air carrier service as a means of expanding competition at a number of airports which were subject to various restrictions on access imposed by the airport operator.

B. Statutory Obligations of Recipients of Federal Airport Grant-In-Aid Funds

In addition to the FAA's "plenary" authority to regulate and assign the use of the navigable airspace of the United States, the FAA must also administer the federal airport grant program. The federal airport development program requires an airport sponsor grant recipient to make various specific assurances as a "condition precedent" to federal approval of the airport grant. The key statutory

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76 The courts have rejected efforts to characterize or treat slots as a property right. Eastern Air Lines v. FAA, 772 F.2d 1508, 1511 (11th Cir. 1985); In re Braniff Airways, 700 F.2d 935, 942 (5th Cir. 1983). Since those decisions, the FAA recognized slots as an operating privilege and while asserting that they do not constitute "property," has permitted their transfer by trade or sale among members of the same class. 14 C.F.R. §§ 93.221, .223 (1988).


76 See Air Cal. v. United States Dep't of Transp., 654 F.2d 616, 618-19 (9th Cir. 1981); Pacific Southwest Airlines v. Orange County Bd. of Supervisors, No. CV 81-3248-TJH (GX) (C.D. Cal. Apr. 21, 1983).


assurance required of airport sponsors who are recipients of federal grant-in-aid development funds is that "the airport to which the project relates will be available for public use on fair and reasonable terms and without unjust discrimination."\footnote{49 U.S.C. app. § 2210(a)(1) (1982 & Supp. 1988); 49 U.S.C. app. § 1718(a)(1) (repealed 1982).
}

Airport grant assurances are mandatory, prospective in nature, and describe an affirmative obligation on the airport sponsor with respect to its future actions and policies.\footnote{49 U.S.C. app. § 2210(a)(1) (Supp. 1988). The various statutory assurances are framed in terms of what the airport operator "will" do. \textit{Id.} The subjects covered by these assurances include marking approaches and maintaining airport facilities, exercising control over land uses adjacent to the airport to effect compatibility with airport operations, financial and operational recordkeeping, and limitations on the use of revenue derived from the airport.
} The Secretary of Transportation is responsible for insuring compliance with these various assurances.\footnote{49 U.S.C. app. §§ 2210(b), 2218 (1982).
} As a result, an airport operator who applies for and receives federal grant funds is not an independent and autonomous entity. Its ability to act is constrained by the affirmative obligations it assumed when it requested and accepted federal grant-in-aid funds. The combination of an affirmative obligation on airport operators with respect to future actions and policies and the Secretary of Transportation's responsibility for insuring compliance with the assurances, vests the FAA with a significant role vis-à-vis the airport operators and their policies.

The 1982 Airport and Airway Improvement Act not only requires affirmative prospective assurances from airport sponsors as a condition precedent to a grant of federal funds, it also specifically directs that the administration of the airport grant program be consistent with the provisions of economic policies established by the Airline Deregulation Act.\footnote{The statute states that "all airport and airway programs should be administered . . . with due regard for the goals expressed therein of fostering competition, preventing unfair methods of competition in air transportation, maintaining essential air transportation, and preventing unjust and discriminatory practices . . . ." 49 U.S.C. app. § 2201(a)(5) (1982).
} In the Airport and Airway
Safety and Capacity Expansion Act of 1987, Congress added two findings: (1) projects which increase capacity and reduce delay should be undertaken to the maximum extent feasible, and (2) "artificial restrictions on airport capacity are not in the public interest."\(^8\)

Findings aside, the required statutory assurance is very clearly susceptible to differing interpretations when applied, and consequently, provides fertile ground for wide-ranging controversy. What, for example, constitutes unjust discrimination? What test should be applied to evaluate an unjust discrimination claim: the disparate treatment test with its shifting burden of proof and focus on showing an unbiased application of lawful reasons,\(^8\) or the disparate impact test which focuses on consequences rather than rationale?\(^8\) What constitutes "available on fair and reasonable terms" is a particularly fertile field for controversy and advocacy. Disputes over the application of these concepts have ranged from the setting of landing fees\(^8\) to lease rates,\(^8\) and have included such


\(^8\) See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-06 (1973) (holding in an employment discrimination action that the employee must first prove a prima facie case of discrimination, and then the burden shifts to the employer to "articulate some legitimate, nondiscriminatory reason for the employee's rejection").

\(^8\) See Griggs v. Duke Power Co., 401 U.S. 424, 429-32 (1971) (holding that in a discrimination action an employer has the burden of showing that any given employment requirement must have a "manifest relationship to the employment in question" and that the court must examine the consequences of the employment practices, and not just the motivation behind them); City of Pompano Beach v. FAA, 774 F.2d 1529, 1541-45 (11th Cir. 1985) (city found to be unjustly discriminating against potential lessee of fixed base at the city's airport and thus, in effect, granting an exclusive right to incumbent lessees).

\(^8\) Indianapolis Airport Auth. v. American Airlines, 733 F.2d 1262, 1270-71 (7th Cir. 1984) (holding that the airport's user fees and rental rates "imposed upon the airlines and passengers a cost for the use of the airport that greatly exceeds a reasonable estimate of the costs that the airlines impose on the airport").

\(^8\) Southern Airways v. City of Atlanta, 428 F. Supp. 1010, 1018-19 (N.D. Ga. 1977) (holding that the allocation of certain maintenance and operations costs among air carriers at the Atlanta airport had a discriminatory effect and was unreasonable under the Airport and Airway Development Act).
diverse disputes as noise standards\textsuperscript{90} and "through-the-fence" operation of an aeronautical activity.\textsuperscript{91} Specifics of any particular controversy aside, two points are clear: (1) with the acceptance of federal grant-in-aid funds by an airport sponsor, various affirmative obligations are imposed on the sponsor with respect to its future actions and policies; and (2) responsibility for insuring compliance with those assurances is vested in the Secretary of Transportation.\textsuperscript{92} Combining the existence of a duty on the airport operator with the FAA responsibility for enforcement of those affirmative assurances establishes a significant role for the FAA vis-à-vis airport operators.\textsuperscript{93}

It is appropriate at this point to examine the nature of the FAA's role. In contrast to the FAA's plenary authority with respect to regulation and management of the navigable airspace and air traffic, and its concomitant ability to directly control the users of the airspace, the FAA's role vis-à-vis airport operators is indirect and limited. It is more a matter of FAA reacting and responding to initia-

\textsuperscript{90} Arrow Air v. Port Auth., 602 F. Supp. 314, 320-22 (S.D.N.Y. 1985) (finding the airport proprietor had the power to establish nondiscriminatory regulations to abate airplane noise, and had administered such regulations in a nondiscriminatory way).

\textsuperscript{91} Standridge Flying Serv. v. Department of Transp., 712 F.2d 1223, 1224 (8th Cir. 1983) (holding that the adjacent landowner was not discriminated against when the airport refused to permit "through the fence" operations, which would allow the owner to construct a taxiway connecting his property to the airport).

\textsuperscript{92} 49 U.S.C. app. § 2210(b) (1983) ("To insure compliance with this section, the Secretary [of Transportation] shall prescribe such project sponsorship requirements, consistent with the terms of this chapter, as the Secretary considers necessary."); see also 49 U.S.C. app. § 2218 (1982) (defining the Secretary's general powers to insure that the provisions concerning the airport and airway improvement are carried out).

\textsuperscript{93} City of Pompano Beach, 774 F.2d at 1529 (upholding FAA order requiring the city to offer terms to a potential lessor which were substantially the same as existing lease terms); United States v. County of Westchester, 571 F. Supp. 786, 789 (S.D.N.Y. 1983) (curfew on flight operations by the county was found to constitute a breach of the assurances and conditions in the grant-in-aid agreement between the FAA and the county, and therefore the FAA was justified in refusing to pay any additional grant money to the county). The issue of the ability, or more exactly the inability, of airport users to rely on the affirmative obligations created by the statutorily required assurances accepted by the airport sponsor as the basis for a private right of action is discussed infra in notes 119-127 and accompanying text.
It may be more accurate to describe the relationship between the FAA and airport sponsors as somewhat schizophrenic. On one hand, Congress has declared the growth and development of the nation’s airports to be a national priority. In conjunction with this declared priority, the FAA is charged with the responsibility to prepare and publish a plan for the development and improvement of the public-use airport system of the United States. In support of this priority, Congress made available over nine billion dollars in federal funds and the FAA obligated these funds for airport development. On the other hand, airports are created, designed, and developed locally. The statutory goal “to maintain a safe and efficient nationwide system of public-use airports to meet the present and future needs of civil aeronautics” is dependent on requests for grant funds for a specific eligible project being presented by airport sponsors. In short, the federal “plan” is in reality more in the nature of a wish list than it is a blueprint. This dichotomy is at the core of

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91 49 U.S.C. app. § 2201(a)(1) (1982) (“the safe operation of the airport and airway system will continue to be the highest aviation priority”); 49 U.S.C. app. § 2201(a)(2) (1982) (“the continuation of airport and airway improvement programs and more effective management and utilization of the Nation’s airport and airway system are required to meet the current and projected growth of aviation and the requirements of interstate commerce, the United States Postal Service, and the national defense”); 49 U.S.C. app. § 1701 (1970) (repealed 1982).
93 See supra note 24 and accompanying text.
94 See supra note 40 and accompanying text, in particular Mr. Justice Douglas’ description in Griggs v. Allegheny County, 369 U.S. at 89.
96 49 U.S.C. app. § 2208(a) (1982). An airport sponsor must submit an application for a specific project. Although the statute directs that capacity enhancing projects be given priority status when discretionary funds are obligated, there is nothing that requires an airport sponsor to propose such projects or to use its entitlement funds for such projects. Id.; see also infra note 105. In fact, at some airport locations FAA suggestions and recommendations for capacity enhancing projects have been summarily rejected.
the dilemma. The nationwide system of airports, considered by Congress to be an important national priority, is dependent for its substance on local, not national decisions. The federal role is indirect rather than direct, a process of responding and reacting to initiatives and decisions of local airport operators.

A closer examination of the FAA's role in airport development discloses that it mirrors the role established by Congress for the FAA with respect to airport imposed noise based use restrictions.\textsuperscript{100} Many locally established airport use restrictions are based on and related to airport noise issues. As a matter of federal law, airport proprietors are encouraged, but not required, to prepare and submit noise exposure maps\textsuperscript{101} and develop noise compatibility programs for FAA review.\textsuperscript{102} The statute clearly indicates, however, that this course of action is discretionary; the FAA cannot require compliance.\textsuperscript{103} By statute, the role of the FAA is limited to a review function whereby the FAA either approves or disapproves the program developed by the airport proprietor and submitted for review.\textsuperscript{104} Just as the FAA has no authority to create a noise plan for a particular airport or to require the airport pro-


\textsuperscript{102} 49 U.S.C. app. § 2104(a) (1982).

\textsuperscript{103} DiPerri v. FAA, 671 F.2d 54, 56 (1st Cir. 1982) (holding that the FAA has discretion in establishing rules controlling airport noise, and that airport noise abatement is an issue to be addressed by the proprietor); 49 U.S.C. app. § 2103(a)(1) (1982).

\textsuperscript{104} 49 U.S.C. app. § 2104(b) (1982). In the airport noise area, the criteria that the FAA can apply in its review process is statutorily limited, as is the time period within which the review must occur or the airport sponsor's program is approved as a matter of law. Id. In the area of airport development, the Airport and Airway Improvement Act of 1982 describes the airport grant project application and approval process applied by FAA when a grant request is received. 49 U.S.C. app. § 2208 (1982); see also City of Los Angeles v. Adams, 556 F.2d 40 (D.C. Cir. 1977)
prietor to create such a plan, and despite the fact that the FAA is charged with responsibility for developing a national airport system plan, the FAA has no authority to create, design, or implement an airport development plan for an airport operator. The FAA’s role is constrained in both the airport noise and airport development areas. The statutory authority available to the FAA to make judgments with respect to the selection of projects to be implemented is limited to approval or disapproval of what the airport proprietor proposes.

Returning to the central point of this article, although Congress abolished direct economic regulatory authority, not all economic regulatory authority has disappeared. The confluence of the plenary authority of the FAA to regulate the use of the navigable airspace, including the authority to exercise direct operational control over air traffic, and the FAA’s more limited, indirect authority to review and respond to particular restrictive airport actions in the context of enforcing the grant assurance obligations of an airport operator has resulted in the FAA, an aviation safety agency, becoming an indirect economic regulatory agency. Clearly, this kind of regulation marks a departure from the role that the CAB played in the direct regulation of airline rates, routes, and services.

(discussing the application process under the Airport and Airway Development Act of 1970 (repealed 1982)).

105 49 U.S.C. app. §§ 2104(b), 2208(b) (1982). In the airport development area, funds are apportioned by both a statutory enplanement formula and a separate geographic formula. 49 U.S.C. app. § 2206(a)-(b) (1982). The FAA’s discretion to fund projects is also constrained by the category of project involved. 49 U.S.C. app. § 2207(d) (1982).

106 See City and County of San Francisco v. Engen, 819 F.2d 873, 874 (9th Cir. 1987) (discussing the review of a proposed FAA order to suspend current and future grants to the San Francisco Airport Commission based on the commission’s denial of a request to fly Boeing 707s into the airport because of local noise regulations); Air Cal. v. Department of Transp., 654 F.2d 616 (9th Cir. 1981) The court held review of an FAA action under the Airport and Airway Development Act of 1970 was improper because no final order had been issued. The suit arose out of preliminary findings by the FAA that the airport board could no longer deny airport access to airlines based on local noise control policy. Air Cal., 654 F.2d at 616; see supra notes 69-76.
Indirect regulation is more nebulous than direct regulation and is therefore more difficult to evaluate.

The result, however unintended it may be, is that the FAA, a safety agency, has become a quasi aviation economic regulatory entity. In large part this result stems from the fact that the FAA is the only agency having any system responsibility among the three constituent elements comprising the United States tripartite air transportation system. The responsibility of airport operators is to serve their local community, and they cannot expand the scope of their authority beyond their local jurisdiction. In contrast, the responsibility of air carriers and commuters providing commercial aviation services is to provide those services that are of greatest value to the corporation. In short, their responsibility is to manage the services they provide so as to make a profit. Private or general aviation, whether conducted for pleasure or in conjunction with business, has no discernible system responsibilities. With the abolition of the CAB, the FAA is the only entity having any responsibility for the air transportation system of the United States.

IV. QUASI-REGULATED Deregulation Applied

The FAA has some aviation economic responsibility to give the statutory policies of economic deregulation effect, and it is important to consider the FAA's options.


108 Section 102 of the Federal Aviation Act of 1958, as amended by the Airline Deregulation Act of 1978, established as goals and policies the prevention of unfair, deceptive, predatory, or anti-competitive practices in air transportation, as well as the fostering of competition. 49 U.S.C. app. §§ 1302(a)(3), (7), (9), 1303 (1982). The FAA must apply these policies in the airport grant program pursuant to the Airport and Airway Improvement Act of 1982. See 49 U.S.C. app. § 2201(a)(5) (1982). While this is not to suggest that the FAA's role in air safety has diminished, or that the FAA has or should become a mini-Federal Trade Commission, the fact is that the FAA has taken action designed to foster competition among air carriers by requiring that a situation which had the effect of excluding
in exercising that responsibility. In short, the means available to the FAA to deal with economic issues are inadequate. Clearly those means were neither designed nor intended to be applied to economic issues.

Prior to deregulation, economic regulatory authority had been vested in the CAB. The FAA does not have direct legal authority to regulate economic issues. This does not mean that a vacuum of authority exists, but it does mean that federal authority in this area is indirect, limited, and negative.

The FAA’s expertise involves the wide range of aeronautical technology, such as aerodynamics, aeronautical engineering, air traffic control procedures, flight operating procedures, and air navigation and communication electronics. The FAA does not possess expertise regarding economic concepts and their application in establishing rate and fare structures, marketing, route design and structure, and service levels related to market demand. The primary role and responsibility of the FAA remains focused on air safety.

The enforcement tools available to the FAA were designed and intended to be applied in conjunction with the agency’s safety function. For example, one remedy gives the FAA the authority to amend, suspend, or revoke any certificate issued by the agency. The FAA may also impose a civil penalty of $1000 for a violation of the Federal Aviation Act or regulations promulgated under that Act. While these remedies are appropriate and can be effectively used by the FAA in performing its safety re-

See supra note 78 and accompanying text for discussion of the FAA’s support of expanded carrier service; see infra note 128 and accompanying text for a discussion of how a private cause of action would affect deregulation.


See 49 U.S.C. app. § 1471 (1982) (amended 1987). The changes to the civil penalty provision of the Federal Aviation Act, effected by Public Law 100-223, increased the civil penalty maximum from $1000 to $10,000 for air carriers and established a civil penalty demonstration program permitting administrative adjudication of certain penalties. Id. However, neither the nature nor the character of the remedy was changed, and it remains a civil penalty sanction. Id.
Responsibilities, their use as a vehicle to effect the resolution of economic issues is suspect at best.

In the airport grant area, the FAA has the discretion to withhold grant funds if an airport operator fails to comply with any of the various statutory requirements or the grant agreement assurances.111 In applying this discretion, the FAA may refuse to enter into any new grants,112 suspend making payments on existing grants,113 or terminate outstanding grants.114 From a policy perspective, the efficacy of withholding airport development grant funds from a project designed to enhance either safety or airport capacity because of economic issues is arguable. In any event, while the FAA may avail itself of these various remedies, and their application in particular circumstances may effect a change in behavior, the remedies are all indirect, limited, and negative in nature. None of these remedies include the authority to direct or require that any specific course of action be taken.

Another possible remedy is the initiation of or participation in litigation.115 Using litigation to implement or give effect to the concepts and policies of deregulation is difficult at best. Apart from the fact that any lawsuit is

111 See City and County of San Francisco v. Engen, 819 F.2d 873 (9th Cir. 1987) (denying San Francisco’s petition for review of FAA proposed order to suspend current grants and to refuse grants because of lack of jurisdiction); United States v. County of Westchester, 571 F. Supp. 786, 789 (S.D.N.Y. 1983) (holding county’s curfew on night flight operations breached the grant-in-aid agreement assurances and justified the FAA’s refusal to tender further grant funds). But cf. 49 U.S.C.A. app. § 2218(b) (West Supp. 1988) (added by Public Law 100-223 in 1987). The statute limits the ability of the FAA to withhold apportioned airport enplanement funds for 180 days, and requires a full administrative adjudicatory proceeding within that time period. Any withholding beyond the 180 days will be dependent on the findings issued in connection with that administrative proceeding. Id.

112 In order to be eligible for a grant, an airport sponsor must provide assurances indicating a willingness to comply with the various terms, conditions, and assurances required by statute. See 49 U.S.C.A. app. § 2210(a) (West Supp. 1988). One indication of such willingness is compliance with prior grant assurances. See 14 C.F.R. § 152.103(a)(3) (1988).


115 Decisions to initiate or participate in litigation requires coordination with and authorization from the Department of Justice. 28 U.S.C. §§ 516-519 (1982).
inherently limited since it is highly fact specific and deals with relatively narrow issues, the courtroom is not an appropriate forum for the resolution of broad questions involving the exercise of discretion in selecting among alternative policy choices and implementing the various means available to effect the choices made. However, since deregulation, airlines have frequently resorted to litigation to challenge various actions taken by airport operators which inhibit or limit access to airport facilities, or limit decision making by airport users.

Litigation over airport access has two objectives. The first objective of the lawsuit is to prevent the initiation or continuation of a particular practice involving an airport use restriction. Frequently the lawsuit takes the form of a declaratory judgment action with a request for injunctive relief. While recognizing that injunctive litigation is essentially proscriptive, the fact that policy choices are available provides some latitude and requires the exercise of discretion. Consequently, litigation in this area does not lend

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116 See FED. R. CIV. P. 16. The core of the pre-trial process is intended to simplify, narrow, and focus the issues to be tried.

117 See, e.g., Alaska Airlines v. City of Long Beach, 815 F.2d 714 (9th Cir. 1987) (unpublished opinion), cert. denied, 108 S. Ct. 96 (1987); Western Airlines v. Port Auth., 817 F.2d 222 (2d Cir. 1987) (denying injunctive relief to airline challenging airport authority's application of local "perimeter" rule to prevent access to LaGuardia Airport for flights originating more than 1500 miles from New York City); Montauk-Caribbean Airways v. Hope, 784 F.2d 91 (2d Cir. 1986) (dispute over airline's request to serve as an air carrier and fixed-base operator at airport on a year-round basis); City of Houston v. FAA, 679 F.2d 1184 (5th Cir. 1982) (upholding the Department of Transportation's regulations imposing a perimeter rule upon flights to and from Washington National Airport); Air Cal. v. United States Dep't of Transp., 654 F.2d 616 (9th Cir. 1981) (airline contested FAA determination that Orange County Board of Supervisors must permit new carriers to use Orange County Airport); Northwest Airlines v. Goldschmidt, 645 F.2d 1309 (8th Cir. 1981) (airline sought review of Department of Transportation rule allocating reservations of takeoff and landing slots at Washington National Airport); New York Airlines v. Dukes County, 623 F. Supp. 1435 (D. Mass. 1985) (airline sought damages and injunctive relief against county and airport commission for denial of access to airport); Midway Airlines v. County of Westchester, 584 F. Supp. 496 (S.D.N.Y. 1984) (airline sought injunction requiring county to grant immediate access to county airport); Pacific Southwest Airlines v. Orange County Bd. of Supervisors, Civil No. 81-3248-TIH (GX) (C.D. Cal. Apr. 21, 1983).
itself to an action in mandamus. A second objective of litigation may be to effect a change in behavior. In this context, litigation may serve as a catalyst, providing an incentive to negotiate, as well as a framework which can be used by the parties to develop a mutually acceptable resolution of the particular controversy. However, this ad hoc approach to resolving specific airport access issues prevents the development and articulation of a clear set of consistent principles to be applied in making a selection from among alternative policy choices. Each separate problem is resolved by negotiated compromise agreement.

Litigation over airport access and use restriction has focused on the requirement that airports which receive federal grant funds "will be available for public use on fair and reasonable terms and without unjust discrimination." The decisions emphasize the concepts and policies of deregulation, particularly competitive market forces and the preclusion of local economic regulatory action.

In *Cort v. Ash* the Supreme Court limited the ability of

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118. For example, in *Alaska Airlines*, the court found that the City of Long Beach limited the number of air carrier flights and allocated that limited number without the benefit of an adequate study or analysis. *Alaska Airlines*, 815 F.2d 714 (9th Cir. 1987)(unpublished opinion), *cert. denied*, 108 S. Ct. 96 (1987). The action was therefore illegal, arbitrary, and capricious, and the court enjoined the city from enforcing its ordinance or in any way affecting the number of flights. *Id.* However, the same court order preserved the "status quo ante," which had the effect of continuing the limitation on the number of flights which the court had just held to be illegal. *Id.*


122. *Cort v. Ash*, 422 U.S. 66 (1975). The Court cited four factors to be considered when determining whether a private remedy could be implied in a federal statute. First, whether the plaintiff is one of a class for whose special benefit the statute was enacted; second, whether there was any indication in the legislative history of intent to create or deny such a remedy; third, whether it is consistent with the underlying purpose of the legislative scheme to imply such a remedy; and finally, whether the cause of action is one traditionally relegated to state law, in an area basically the concern of the states, so that it would be inappropriate to infer a cause of action based solely on federal laws. *Id.* at 78; see also *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979) (holding a limited private right of
a plaintiff to bring a lawsuit when that action was predicated on an implied private right based on the existence of a federal statute. In Cannon v. University of Chicago, the Court indicated that a private right of action will be inferred from the existence of a federal statute only in exceptional situations. In Cort, the Court described a four-prong test to determine whether an implied private right of action exists under a federal statute. While all four elements are important, the first two are the most critical: (i) whether Congress enacted the statute for the special benefit of the plaintiff; and (ii) whether the legislative history reflects or indicates an intent to create a private right. Applying these concepts to the economic issues involving airport access and airport use restrictions, the courts have held that the principles of deregulation do not per se give rise to an implied private right of action. Further, the courts have held that the terms and conditions of the grant agreements between the FAA and an airport operator do not confer third party beneficiary rights on the users of an airport.

A key problem for any private litigant to overcome is the fact that Congress enacted both the Airline Deregulation Act of 1978 and the Airport and Airway Improvement Act of 1982 for the benefit of the general public at large, and not for the benefit of any particular private person or class of persons. Furthermore, no legislative his-

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123 Cannon, 441 U.S. at 688.
124 Cort, 422 U.S. at 78; see supra note 122 for a discussion of the four part test applied in Cort.
125 Cort, 422 U.S. at 78.
tory exists that would indicate congressional intent to create private rights or to authorize a private right of action based on either statute. While these circumstances make the initiation of private litigation difficult, they are not an absolute bar to such litigation. The initiation of litigation does not necessarily depend on the assertion of either a private right of action under the 1978 Airline Deregulation Act, or implied third-party beneficiary status under grants issued pursuant to the Airport and Airway Improvement Act of 1982. The use of general federal question and diversity jurisdiction in conjunction with the allegations of a federal law violation which causes a burden on commerce or conflicts with principles of federal preemption or equal protection, should be sufficient to avoid a motion to dismiss so as to at least get to a trial on the merits.

After considering all the frustrations and problems associated with the various available indirect and limited remedies, the FAA's plenary authority to regulate the use of the navigable airspace becomes an attractive alternative approach to implement the policies of deregulation. Relying on the FAA's authority, however, shifts the focus. The regulatory issues become a matter of applying the economic policies underlying deregulation to the process of exercising control over air traffic and use of the navigable airspace. The very act of doing so however, creates a contradiction, in that regulatory action to control and manage the safe and efficient use of the navigable airspace is transformed into a vehicle to implement the economic policy goals and objectives of deregulation. The result is economic regulatory action in the guise of air traffic-airspace rule.

V. Conclusion

The Airline Deregulation Act of 1978 not only effected

127 See Dukes County, 623 F. Supp. at 1440 (airline brought an action under the Sherman Act, the Supremacy Clause, and the Commerce Clause in challenging the county's refusal to grant plaintiff access to the airport).
major changes in the operation and functioning of commercial aviation in the United States, it also substantially altered the legal relationships among the entities which together comprise the national air transportation system: airport operators, airport users, and the federal government. The assumption that the Airline Deregulation Act eliminated economic regulatory issues in aviation, thereby leaving the subject area unregulated and open to the operation of market forces, is false. While some economic regulatory issues have been eliminated, new economic issues have arisen, and the forum within which those issues are being dealt has changed.

In the past, the CAB resolved economic aviation issues in extensive administrative proceedings. Now, the forum is likely to be either direct negotiations between airport users and operators, confrontations between the two groups, or both. In any circumstance, the FAA is usually brought into the controversy by one of the protagonists in an effort to bolster its position. As the FAA’s role is generally advisory in nature, the agency tries to facilitate a negotiated resolution of the specific issues. While this ad hoc approach has been successful in resolving particular controversies, it has not produced a cohesive national air transportation policy. At the same time, this ad hoc approach recognizes that since there has been no substantive change in the FAA’s fundamental statutory authority, the agency’s ability to act is limited.

Essentially, the FAA remains a technical agency charged with responsibility for air safety. The agency’s staff is comprised of highly skilled, technical experts who regularly deal with a wide range of air safety issues. Nevertheless, the FAA now finds itself more frequently involved in aviation economic issues. The FAA does not have the professional expertise nor, more importantly, the clear legal authority to resolve these issues. The FAA, however, can neither avoid nor disregard the goals and objectives established by Congress in the Deregulation Act. The goals and objectives of that Act go beyond matters of air
safety, airspace management, and air traffic control responsibilities. They extend to and involve the agency in economic issues; particularly the agency’s obligation to effect compliance with the statutorily managed assurances required of airport operators who request and receive federal grant-in-aid funds.

The FAA has limited negative authority to issue findings proscribing a particular action and a limited capability to act to enforce its views, whether by withholding grant funds or imposing civil penalties. The FAA does not have the legal authority to prescribe or direct that a particular course of action be implemented, however, the FAA is the only component of the tripartite national air transportation system which has system responsibilities and the statutory responsibility to apply the goals and objectives of the Deregulation Act. This creates the anomaly of a deregulated industry being quasi-regulated by a safety agency on somewhat tangential legal authority and oblique contractual relationships. Recognition of the fact that economic regulatory issues remain viable is the easy first step. That fact does not imply the failure of deregulation. Further, the fact that legal authority to deal with these economic regulatory issues is limited does not per se warrant re-regulation. A much easier and simpler alternative is available.

If, as an adjunct to deregulation, a concomitant private right of action was available, those persons directly affected by various regulatory or other decisions could challenge the decisions based on the concepts of deregulation and the various grant agreement assurances. Clearly it would require legislative action to create a private right of action which would permit airport users to directly challenge regulatory actions by airport operators. Presumably these challenges would occur when the regulatory action by the airport operator produced a real and significant impact on the airport user, and not merely a theoretical or hypothetical one. At the same time, airport operators faced with the prospect of litigation would pre-
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In any event, the present situation is hardly satisfying to any of the protagonists. By creating a private right of action, the airport users and airport operators, who in a deregulated context are the key protagonists, would either resolve their differences or else their differences would be resolved by judicial decree. Involving the FAA in economic regulatory issues, which it has neither the expertise nor the legal authority to handle, would end. The myth of the FAA as the designer or arbiter of the national air transportation system would cease, and the FAA would be able to focus its time, attention, energy, and resources on resolving issues related to air traffic, airspace management, and flight safety.

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This approach would avoid the prolonged, tedious, and expensive administrative-legal process in which San Francisco has engaged. See In re San Francisco Airports Comm'n, No. 13-86-2 (U.S. Dep't of Transp., Fed. Aviation Admin., Dec. 12, 1988). This proceeding, which began with notice to San Francisco in January 1986, has already been to the 9th Circuit Court of Appeals twice on peripheral issues, and went through a full administrative hearing which resulted in a recommended decision being issued on August 9, 1988. A decision by the FAA Administrator on December 12, 1988, is once more back in the courts.

It would also avoid the eccentric Boston-Logan situation in which the Massport proposed revised fee structure was the subject of district court litigation, New England Legal Foundation v. Massachusetts Port Authority, Civil Action 88-0873-MA, (D. Mass June 29, 1988), as well as a formal administrative investigation. See Investigation Into Massport's Landing Fees, FAA Docket 13-88-2 (U.S. Dep't of Transp., Office of the Secretary Dec. 22, 1988). The latter resulted in an administrative law judge issuing a recommended decision on November 10, 1988, after a formal hearing, and a decision by the Deputy Secretary issued on December 22, 1988. On a motion for summary judgment, the district court, in its June decision, found the new Massport fees to be reasonable and not unjustly discriminatory. The court noted, however, that its decision excluded consideration of the obligations flowing from the Airport and Airway Improvement Act, since the Act and the related grant agreements cannot be the basis for a private right of action. Deputy Secretary Dawson's December decision considered the district court's position, focusing on the same basic issues of reasonableness and discrimination in the context of obligations flowing from the Airport and Airway Improvement Act and related grant agreements, and came to the opposite conclusion. There must be a better way.