

Article

**Attention Passengers: Your Flight Will Be Delayed—
Congestion Pricing as a Solution to
Airport Traffic Management**

Gregory M. Seigel¹

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1. Gregory M. Seigel, May 2013 J.D. candidate at the University of Miami School of Law. Thanks are expressed to his advisor, Rachel H. Smith, for her assistance in the writing process. This article is dedicated to the Seigel family for all of their love and support.

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I. INTRODUCTION TO TODAY’S AIR TRAFFIC CONGESTION PROBLEMS

Many airline passengers have become accustomed to the hassles associated with air travel. Whether it is the intrusiveness of security or additional baggage fees and taxes, air travelers experience numerous inconveniences even before getting on the airplane. Yet, the largest inconveniences stem from the over-congestion of flight arrivals and departures, which lead to widespread delays across the country.

By 2007, air travelers were experiencing record delays. Nearly a quarter of all flights were delayed, with roughly two percent of flights being cancelled.² Airplane arrivals were also delayed by a total of 4.3 million hours in 2007.³ As of 2010, the United States National Airspace System was handling 787 million passengers, a two percent increase from the previous year.⁴ Experts predict passenger loads to increase to a billion passengers by 2015.⁵

Furthermore, flight delays have increased in the past decade, with an economic impact of \$40.7 billion.⁶ Over the last decade, delayed flights have increased by nearly 150,000.⁷ More than twenty percent of flights were delayed in 2011, and more than two percent of flights were cancelled.⁸ Causes for the flight delays stem from extreme weather, air traffic control issues, air carrier delays, and late plane arrivals.⁹ Contributors

2. Justin T. Barkowski, *Managing Air Traffic Congestion Through the Next Generation Air Transportation System: Satellite-Based Technology, Trajectories, and—Privatization?*, 37 PEPP. L. REV. 247, 262 (2010).

3. Air Transp. Ass’n of Am. v. U.S. Dep’t of Transp., 613 F.3d 206, 208 (D.C. Cir. 2010).

4. Press Release, Research & Innovative Tech. Admin., 2010 Traffic Data for U.S. Airline and Foreign Airlines U.S. Flights: Total Passengers Up from 2009, Still Below 2008 (Mar. 22, 2011), available at http://www.bts.gov/press_releases/2011/bts017_11/pdf/bts017_11.pdf.

5. Final Brief for Respondents at 10, Air Transp. Ass’n of Am., 613 F.3d 206.

6. Barkowski, *supra* note 2, at 262-63.

7. See *On-time Performance – Flight Delay at a Glance*, RESEARCH & INNOVATIVE TECH. ADMIN., <http://www.transtats.bts.gov/homedrillchart.asp> (last visited Nov. 22, 2012) (defining delayed flights as those arriving or departing the gate more than 15 minutes after scheduled arrival or departure times).

8. *Id.*

9. *Airline On-Time Statistics and Delay Causes*, RESEARCH & INNOVATIVE TECHN. AD-

to National Aviation System delays include weather, flight volume, equipment, and closed runways.¹⁰

While the airline industry is facing a passenger increase in demand, airport operators have struggled to off-set the increased demand by establishing new airport runways.¹¹ By 2025, fourteen major United States airports will have their capacity for expansion fully constrained.¹² For example, New York's LaGuardia Airport is constrained from increasing its runway space due to a lack of available land, while Long-Beach Daugherty Field is constrained due to environmental policies.¹³

In addition to problems with airport growth, many of the airports that are subject to these physical and environmental constraints are also the airports experiencing the most congestion. Thirty-seven of the country's airports have been defined as currently congested.¹⁴ For example, delays from the three major airports in the New York metropolitan area "[C]an account for up to one-third of the delays throughout the entire national system."¹⁵

Thus, the Department of Transportation ("DOT") has sought to remedy the problem of airport congestion by providing airport operators with tools to change the economic incentives of airlines to more efficiently and effectively utilize airport runways.¹⁶ The 2008 Amendment to the Policy Regarding Airport Rates and Charges clarifies that airport operators can charge airlines a two-part landing fee during peak hours of airport operation.¹⁷ While airport operators currently charge airlines based upon the weight of the plane, the DOT has explained that a second fee, a surcharge for landing during peak hours, may be charged to air carriers.¹⁸

MIN., http://www.transtats.bts.gov/OT_Delay/ot_delaycause1.asp?type=21&pn=1 (last visited Nov. 22, 2012).

10. *Causes of National Aviation System Delays*, RESEARCH & INNOVATIVE TECHN. ADMIN., http://www.transtats.bts.gov/OT_Delay/ot_delaycause1.asp?type=5&pn=1 (last visited Nov. 22, 2012)

11. *See* Policy Regarding Airport Rates and Charges, 73 Fed. Reg. 40430-02, 40432 (July 14, 2008).

12. *Id.*

13. *Id.*

14. Brief for Intervenor at 2-3, *Air Transp. Ass'n of Am. v. U.S. Dep't of Transp.*, 613 F.3d 206 (D.C. Cir. 2010) (No. 08-1293); *See* Scott P. Lewis et al., LEIGH FISHER, *NEW CONGESTION PRICE RULING: WHAT IT MEANS AND WAYS IT CAN BE APPLIED 2* (2010), available at <http://www.leighfisher.com/sites/default/files/publications/LeighFisher-Focus-CongestionPricingRuling-September2010.pdf> (defining "congested" airports as those having one-percent of total flights experiencing delays or an airport found to be congested in FAA's 2004 Capacity Benchmark Report or identified in FAA's FACT 2 Report).

15. Final Brief for Respondents, *supra* note 5, at 10.

16. *See* Policy Regarding Airport Rates and Charges, 73 Fed. Reg. at 40432.

17. *Id.* at 40430-31.

18. *See id.* at 40433.

This article examines the decision in *Air Transport Association of America, Inc. v. Department of Transportation*, in which the airline industry challenged the 2008 Amendments to the Policy Regarding Airport Rates and Charges.¹⁹ Part II examines the economic model behind congestion pricing through examples demonstrating congestion pricing on the roadways.²⁰ Part III surveys the history of government policies addressing airport congestion along with the story of the short-lived but successful congestion pricing scheme of the Massachusetts Port Authority's PACE program.²¹ Part IV analyzes the 2008 Amendments in conjunction with the litigation that followed these amendments.²² Part V addresses the current state of airport congestion pricing in the United States following the D.C. Circuit Court's ruling on the 2008 Amendments.²³ Last, Part VI concludes this article with practical suggestions for implementing congestion pricing.

II. CONGESTION PRICING ON THE ROADWAYS

A. THE ECONOMIC MODEL FOR CONGESTION PRICING

While many of the nation's busiest airports suffer from congestion, passengers are likely to encounter congestion while driving to the airport. Like airports, one of the major reasons for congested roadways is a lack of physical capacity. On average, roughly two thousand cars pass through a freeway lane each hour, but rush hour conditions cluster roads beyond capacity.²⁴ Over the last thirty years, the miles driven on roadways have increased to more than 2.5 trillion miles.²⁵ Coupled with increasing population growth, passenger vehicle travel is expected to increase by twenty-five percent in the next few years.²⁶

The economic basis of congestion helps to explain the reasons for congestion on the roadways.²⁷ Traffic occurs when the externalized costs to drive on the road exceed the costs for drivers to use the road.²⁸ The willingness of a person to pay for the use of a road represents the demand

19. See *Air Transp. Ass'n of Am.*, 613 F.3d at 208.

20. See *infra* text accompanying notes 24-106.

21. See *infra* text accompanying notes 107-73.

22. See *infra* text accompanying notes 174-213.

23. See *infra* text accompanying notes 214-43.

24. Michael H. Schuitema, *Road Pricing As a Solution to the Harms of Traffic Congestion*, 34 *TRANSP. L.J.* 81, 84-85 (2007).

25. *FHWA Strategic Plan*, FED. HIGHWAY ADMIN., <http://www.fhwa.dot.gov/policy/fhplan.html#highway> (last visited Nov. 22, 2012).

26. Schuitema, *supra* note 24, at 85.

27. See generally RICHARD ARNOIT ET AL., *ROAD PRICING, TRAFFIC CONGESTION AND THE ENVIRONMENT* 4-5 (Kenneth J. Button & Erik T. Verhoef eds., 1998).

28. See Schuitema, *supra* note 24, at 93.

for the road.²⁹ The costs levied upon drivers to use the road represent the marginal private costs.³⁰ These costs include tolls, gasoline, licenses, and corresponding taxes, such as gasoline tax. The marginal social costs reflect the aggregate costs to drivers plus the externalized costs that a driver imposes onto society during each drive.³¹ Thus, when the marginal social costs are greater than the marginal private costs, congestion ensues.³²

To promote a socially optimal usage of the roadways, an additional road cost must be assessed on drivers to offset the hidden or internalized costs of driving that are imposed on other users of the roadways, but not felt by the driver—the marginal external congestion costs.³³ Levying this added road cost to consumers will promote optimal usage of the road system during times of congestion.³⁴ In short, such an additional charge will account for the true cost of driving on the roadways.

Traffic congestion also highlights the negative externalities that result from congestion.³⁵ As each driver enters a congested roadway, the driver increases the travel delays for others, which in turn adds to the costs of utilizing the roadway.³⁶ These externalities arise because the perceived costs to use the roadways by drivers are less than the actual total costs of driving on the road.³⁷

The effect of these negative externalities is the inefficient allocation of roadway space to drivers who undervalue the cost of driving on the roadway. When any scarce good is sub-optimally valued, consumers who undervalue the scarce good will gravitate toward the good.³⁸ Furthermore, the ability for drivers to externalize the hidden costs of using the roadway allows for drivers to over-utilize roadway space.³⁹ Thus, to promote the optimal usage of the roadways, drivers must internalize some portion of the externalized costs being passed on to other drivers.⁴⁰

B. TRAFFIC CONGESTION SOLUTIONS

Traffic congestion imposes numerous hazards on the community, in-

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. Jonathan R. Nash, *Economic Efficiency versus Public Choice: The Case of Property Rights in Road Traffic Management*, 49 B.C. L. REV. 673, 687 (2008).

36. *Id.* at 686-87.

37. *See id.* at 690.

38. *See id.*

39. *Id.*

40. *See id.*

cluding an increase in noise and air pollution, an increase in pedestrian accidents with the accompanying hospitalization costs and vehicular damage costs, the clustering of the traffic grid and its resulting delay times, the increase in gasoline consumption while stuck in traffic, and the widespread financial losses in economic productivity, among other hazards.⁴¹

To alleviate the problem of traffic congestion, major cities around the world have implemented congestion pricing plans. Congestion pricing serves to decrease drivers' demand to use the roadways during peak hours, while encouraging travelers to either drive on the roadways during off-peak hours, to share rides with others, or to use alternative forms of public transportation.⁴² Furthermore, congestion pricing creates revenue that can be used to expand or build roadway infrastructure, while shifting driver behavior toward alternative forms of public transportation, such as buses or subways.⁴³ The removal of five percent of vehicles from congested roadways can have a large impact in alleviating congestion.⁴⁴

Congestion pricing systems differ from other toll systems because they use dynamic pricing, which varies the price based upon the amount of traffic.⁴⁵ The three types of congestion pricing for roadways are facility pricing, road pricing, and cordon pricing.⁴⁶

1. Facility Pricing

The first pricing scheme is facility pricing, which levies a toll for the entire use of a bridge, tunnel, or roadway.⁴⁷ These tolls vary depending upon the time of day the driver uses the roadway. The goal of facility pricing is to encourage motorists to shift their use of the facility to off-peak hours, allowing traffic to flow more freely during peak hours.⁴⁸ Facility pricing can effectuate price fluctuations on current toll roads, or implement a new toll on congested segments of toll-free roads.⁴⁹ As of spring 2010, there were facility pricing tolls in California, New Jersey, Florida, Illinois, and New York.⁵⁰

41. CONG. BUDGET OFFICE, USING PRICING TO REDUCE CONGESTION 1 (2009), available at <http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/97xx/doc9750/03-11-congestionpricing.pdf>.

42. FED. HIGHWAY ADMIN., CONGESTION PRICING A PRIMER 1 (2006), available at <http://ops.fhwa.dot.gov/publications/congestionpricing/congestionpricing.pdf>.

43. *Id.* at 4.

44. *Id.* at 1.

45. See CONG. BUDGET OFFICE, *supra* note 41, at 5.

46. Schuitema, *supra* note 24, at 93-94.

47. *Id.* at 93.

48. FED. HIGHWAY ADMIN., *supra* note 42, at 3.

49. *Id.*

50. CONG. BUDGET OFFICE, *supra* note 41, at 6; see also *Value Pricing Pilot Program Project Reports*, FED. HIGHWAY ADMIN., http://ops.fhwa.dot.gov/tolling_pricing/value_pricing/projects/allprojects.htm (last visited Nov. 23, 2012).

A prominent example of facility pricing in the United States is the Bay Bridge in Northern California, connecting Oakland to San Francisco. Drivers pay \$6 from 5am to 10am and from 3pm to 7pm during weekdays, while only paying \$4 for all other times during the week.⁵¹ After implementation in 2010, traffic on the Bay Bridge decreased by fifteen percent, while ridership on the BART public transportation system increased by 4,000 passengers in the first month of operation.⁵² Congestion pricing has helped decrease the \$2 billion worth of congestion delays imposed upon the city of San Francisco.⁵³

In addition, the Port Authority of New York and New Jersey (PANY) has implemented variable pricing on six of its tunnels and bridges that connect New York City to New Jersey.⁵⁴ In 2001, the PANY installed a system in which peak-hour tolls using the EZ Pass electronic transponder were more expensive.⁵⁵ As a result, morning traffic decreased by seven percent and evening traffic decreased by four percent, while overall traffic remained the same.⁵⁶ These results highlight the impact that congestion pricing can have on driver behavior to more efficiently utilize the roadways during peak hours.

2. Road Pricing

Road pricing assesses a fee to drivers for using a specific portion of the roadway.⁵⁷ Road pricing includes both the use of express toll lanes, and the conversion of high-occupancy vehicle lanes (HOV)—requiring two or more passengers in the car—into high-occupancy toll lanes (HOT).⁵⁸ Express lanes, which are separated by pylons from adjacent lanes, are designated lanes in which tolls are levied onto users.⁵⁹ The price for driving in express lanes is displayed in real-time on overhead

51. Michael Cabanatuan, *Reminder: Bridge Toll Goes Up July 1*, S.F. GATE, May 13, 2010, <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2010/05/13/BA011DDKKU.DTL>; Bay Area Toll Authority, *Toll Schedule for Toll Bridges*, July 1, 2010, available at http://www.mtc.ca.gov/pdf/Toll_Schedule_July_2010.pdf.

52. Ami Cholia, *Congestion Pricing Works on the Bay Bridge*, ALTRANSPORT, Jan. 13, 2011, available at <http://www.altransport.com/2011/01/congestion-pricing-works-on-the-bay-bridge>.

53. S.F. CNTY. TRANSP. AUTH., SAN FRANCISCO MOBILITY, ACCESS, AND PRICING STUDY 1-7, 1-8. (2010), available at <http://www.sfcta.org/images/stories/Executive/Meetings/cac/2010/12dec/MAPS-Enclosure.pdf>.

54. CONG. BUDGET OFFICE, *supra* note 41, at 24.

55. *Id.* at 8.

56. *Id.*

57. Nash, *supra* note 35, at 706.

58. See CONG. BUDGET OFFICE, *supra* note 41, at 5, 10.

59. ROBERT W. POOLE JR. & C. KENNETH ORSKI, BUILDING A CASE FOR HOT LANES: A NEW APPROACH TO REDUCING URBAN HIGHWAY CONGESTION 17 (1999), available at <http://reason.org/files/d9a8a29899b8f5bba4a5eb1f78707db7.pdf>.

signs just before the express lane, which gives drivers the option of whether to use the express lane at a given time.⁶⁰ Drivers using the non-express lanes do not pay the toll. In addition, HOV lanes can be converted into HOT lanes, serving the same purpose as express lanes. The difference between HOT lanes and express lanes is that some drivers are exempt from the tolls in HOT lanes.⁶¹ Exemptions for the HOT lanes vary depending upon the road, but can include buses and emergency vehicles.⁶²

The most prominent example of the use of road pricing is the FasTrak program in San Diego.⁶³ Starting in December 1996, single occupant vehicles pay a per-trip fee along an eight mile stretch of HOT lanes on I-15.⁶⁴ Fees along this HOT lane vary depending on real-time traffic conditions.⁶⁵ By the first year of the program, users of the HOT lanes increased by five percent.⁶⁶ The FasTrak program led to a two to three percent decrease in the non-HOT lanes, while factoring into an eighteen percent decrease in the economic costs of congestion along the I-15 corridor to the San Diego region.⁶⁷ Half of the \$2 million dollars of revenue generated from the FasTrak program funds other transit services along the I-15 corridor.⁶⁸ As of spring 2010, the conversion of HOV lanes into HOT lanes has occurred in Texas, Florida, Minnesota, Utah, Colorado, and Washington.⁶⁹

Another variation of road pricing that has yet to be implemented in the United States is the Fast and Intertwined Regular (FAIR) lanes.⁷⁰ While similar to the express lanes, drivers using the non-express lanes would be subsidized by express lane drivers. A portion of the toll on FAIR lanes would be credited to drivers with electronic transponders between twenty-five and fifty percent of the toll.⁷¹ These credits could then

60. *Id.* at 19.

61. See FED. HIGHWAY ADMIN., *supra* note 42, at 6.

62. *Id.* at 2.

63. See Schuitema, *supra* note 24, at 105.

64. *Id.* at 105.

65. *Id.* at 104.

66. CONG. BUDGET OFFICE, *supra* note 41, at 10.

67. Schuitema, *supra* note 24, at 105.

68. FED. HIGHWAY ADMIN., *supra* note 42, at 10.

69. CONG. BUDGET OFFICE, *supra* note 41, at 6; see also *Value Pricing Pilot Program Projects Involving Tolls: Priced Lanes*, FED. HIGHWAY ADMIN., http://www.ops.fhwa.dot.gov/tolling_pricing/value_pricing/projects/involving_tolls/priced_lanes/index.htm#p3 (last visited Nov. 23, 2012).

70. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-03-735T, CONGESTION PRICING HAS PROMISE FOR IMPROVING USE OF TRANSPORTATION INFRASTRUCTURE: TESTIMONY BEFORE THE JOINT ECONOMIC COMMITTEE 108TH CONG. 6 (2003) [hereinafter CONGESTION PRICING HAS PROMISE] (statement of JayEtta Z. Hecker, Director of Physical Infrastructure Issues), available at <http://www.gao.gov/assets/90/82013.pdf>.

71. *Id.*

be redeemed for either use of the express lane at another time or for another mode of transportation.⁷² The only FAIR program currently under consideration is in California.⁷³

3. Cordon Pricing

The third form of congestion pricing is cordon pricing, in which a fee is levied onto drivers to enter the city-center.⁷⁴ A form of cordon pricing uses a series of toll collection stations in a ring surrounding a city.⁷⁵ Cordon-style toll rings exist in three of Norway's largest cities: Bergen, Oslo, and Trondheim.⁷⁶ While these tolls were originally created to generate revenue, a byproduct was a decrease in traffic congestion.⁷⁷ Trondheim has experienced a ten percent reduction in traffic during peak-hours, while only ten percent of fees are needed to cover operating costs.⁷⁸ The remaining portion of the tolls have been used to finance additional infrastructure improvements to roadways while subsidizing public transit and bicycle pathways.⁷⁹

A more common variant of cordon pricing is the use of an enclosed congestion zone, in which a toll is charged to any driver who passes through the congestion zone.⁸⁰ In 2003, London began a cordon-style congestion pricing system by requiring a daily fee for driving into the city-center between 7:00 am and 6:30 pm on weekdays.⁸¹ Drivers do not have to stop at toll booths or gentries because enforcement is based on a system where license plates are checked against a list of registered drivers.⁸² Unless the charges are paid in advance or on the day traveled by midnight, the registered owner of the automobile will receive a fine.⁸³ In addition, residents within the congestion zone receive a ninety percent discount.⁸⁴ The results of the congestion charge led to a fifteen percent decrease in traffic within the congestion zone, along with average travel

72. *Id.* at 6-7.

73. See *Value Pricing Pilot Program Projects Involving Tolls: Priced Lanes*, *supra* note 69 (follow "CALIFORNIA: FAIR Lanes with Dynamic Ridesharing in Alameda County" hyperlink).

74. FED. HIGHWAY ADMIN., *supra* note 42, at 6.

75. Schuitema, *supra* note 24, at 93-94.

76. *Id.* at 100.

77. *Id.* at 100-01.

78. *Id.* at 101.

79. CONGESTION PRICING HAS PROMISE, *supra* note 70, at 13.

80. See FED. HIGHWAY ADMIN., *supra* note 42, at 6.

81. Sam Schwartz et al., *A Comprehensive Transportation Policy for the 21st Century: A Case Study of Congestion Pricing in New York City*, 17 N.Y.U. ENVTL. L.J. 580, 597 (2008).

82. FED. HIGHWAY ADMIN., *supra* note 42, at 11.

83. Georgina Santos & Blake Shaffer, *Preliminary Results of the London Congestion Charging Scheme*, 9 PUB. WORKS MGMT & POL'Y 164, 169 (2004).

84. FED. HIGHWAY ADMIN., *supra* note 42, at 11.

delays decreasing by nearly a third.⁸⁵ Annual revenues generated from the London cordon pricing are \$216 million U.S. dollars.⁸⁶

Another major European city that has implemented cordon pricing is Stockholm, Sweden. Beginning in January of 2006, Stockholm began a six-month trial of cordon pricing.⁸⁷ Fees to enter central Stockholm ranged from 20 kronor (roughly \$3) during peak hours to 10 kronor (roughly \$1.50) during off-hours.⁸⁸ During the trial period, traffic was reduced by twenty-two percent, while public transit ridership increased by nine percent.⁸⁹ The congestion pricing was re-instated permanently in 2007.⁹⁰ Annual revenue of approximately \$100 million U.S. Dollars is generated from the Stockholm congestion fee.⁹¹

C. CONGESTION PRICING CRITICISMS AND SUBSEQUENT RESPONSES

While congestion pricing has been effective in reducing traffic delays, the general public remains unenthusiastic about tolls. Many people feel that road pricing is taxing the use of something that had previously been free.⁹² The new surcharges for use of the roadways are characterized as an additional tax, which spawns public disapproval.⁹³ Motorists feel that the revenue from gasoline taxes, in addition to other general taxes, sufficiently covers the costs associated with road construction.⁹⁴ In essence, many objectors see the additional congestion fee as a form of “double taxation.”⁹⁵

However, these congestion fees do not function to offset the economic costs of roadway infrastructure. Rather, congestion fees are implemented to offset the costs associated with traffic delays.⁹⁶ The revenue obtained from congestion surcharges may indirectly be used for the same purposes that drivers have already paid taxes, but only to offset the costs related to traffic delays.⁹⁷

Currently, the conversion of a portion of I-85 in Atlanta into a HOT lane has encountered public backlash, forcing the governor of Georgia to

85. *Id.*

86. S.F. CNTY. TRANSP. AUTH., *supra* note 53, at 1-3.

87. Schwartz et al., *supra* note 81, at 597.

88. *Id.*

89. FED. HIGHWAY ADMIN., *supra* note 42, at 11.

90. *Id.*

91. S.F. CNTY. TRANSP. AUTH., *supra* note 53, at 1-3.

92. CONGESTION PRICING HAS PROMISE, *supra* note 70, at 9.

93. Nash, *supra* note 35, at 728.

94. FED. HIGHWAY ADMIN., *supra* note 42, at 17.

95. *Id.*

96. *Id.*

97. *See id.* at 7, 17.

slash tolls by forty percent within the first month of its use.⁹⁸ Yet, initial public disapproval is not new. Many congestion pricing schemes in the United States appear without much public awareness, garnering minimal support from local residents.⁹⁹ These residents are often not informed about the purpose of congestion pricing as well as its benefits for all roadway travelers during rush hour. However, as the public becomes aware of the benefits of congestion pricing, a majority of residents support the additional tolls. Public opinion surveys show that seventy percent of the public opposes congestion pricing prior to its implementation, but only thirty percent of the public objects to congestion pricing following its implementation.¹⁰⁰ However, public officials must continue to explain to constituents the benefits of congestion pricing—increased revenue for mass transport and reduction in overall traffic times—for the public to embrace this model.

In addition, others argue that the express lanes created through congestion pricing are simply “Lexus lanes” that disproportionately favor those people with the disposable income to pay the additional tolls.¹⁰¹ Critics argue that there is inherent unfairness because the surcharge imposes a greater financial burden onto low-income persons who cannot afford the tolls.

However, proponents of congestion pricing enumerate the benefits that congestion pricing can have for low-income drivers. First, a San Francisco Mobility, Access and Pricing Study proposed fifty percent discounts in tolls for low-income individuals who use the Focus Area discussed in the study.¹⁰² In addition, the number of low-income motorists who use congestion pricing facilities makes up a small percentage.¹⁰³ Only five percent of the motorists traveling to the Focus Area were categorized in the low-income or “lifeline” category.¹⁰⁴

Congestion pricing can also subsidize poorer drivers through the creation of FAIR lanes, which would credit low-income drivers a portion of the toll charges.¹⁰⁵ Additionally, the revenue from congestion fees could help low-income persons utilize more efficient means of public transportation that have benefited from these congestion fees. Studies also show

98. Patty Winsa, *Hot Lanes Gain Popularity*, TORONTO STAR, Nov. 6, 2011, <http://www.thestar.com/news/transportation/article/1082292—hot-lanes-gain-popularity>; Baruch Feigenbaum, *Lanes Need Time to Show Value*, ATLANTA J. CONST., Oct. 17, 2011, <http://www.ajc.com/opinion/lanes-need-time-to-1204011.html>.

99. See Schuitema, *supra* note 24, at 109.

100. FED. HIGHWAY ADMIN., *supra* note 42, at 17.

101. See Schuitema, *supra* note 24, at 106-07.

102. S.F. CNTY. TRANSP. AUTH., *supra* note 53, at 19.

103. *Id.*

104. *Id.*

105. Schuitema, *supra* note 24, at 108.

that low-income drivers support congestion pricing, such as the seventy percent of low-income drivers who support the HOT lanes in San Diego.¹⁰⁶

The numerous examples of congestion pricing on the roadways in the United States and Europe highlight the benefits of these programs. Although public sentiments towards congestion pricing remain questionable, the overarching benefits of reducing traffic while generating additional revenues shows the viability of implementing congestion pricing in the airline industry.

III. CONGESTION PRICING ON THE RUNWAYS

A. THE HISTORY OF CONGESTION PRICING FOR AIRLINES

Beginning in the 1960s, airports began experiencing problems associated with airport congestion.¹⁰⁷ Airports were being forced to manage the requests for runway use. During this period, airports operated under the first-come, first-served rule.¹⁰⁸ Under the first-come, first-served rule, a plane would depart based upon where it lined up in the queue, without any consideration given to the scheduled departure time.¹⁰⁹

After recognizing the inefficiencies and increased congestion from the first-come, first-served rule, the Federal Aviation Administration (“FAA”) in 1968 implemented the High Density Rule (“HDR”) at five congested airports: LaGuardia, O’Hare, JFK, Newark, and Reagan National.¹¹⁰ These airports were limited in the number of hourly arrivals and departures based upon FAA guidelines from 6 A.M. to midnight.¹¹¹ The “perimeter rule,” established at Reagan and LaGuardia, placed an additional limitation by prohibiting departures of flights over a specific distance.¹¹² The FAA maintained that HDR was not a permanent solution for the air congestion problem, yet continued to extend the HDR until 1973, when it was permanently adopted.¹¹³

As a means to circumvent the HDR, airlines began parking planes in

106. FED. HIGHWAY ADMIN., *supra* note 42, at 16.

107. Michael E. Levine, *Airport Congestion: When Theory Meets Reality*, 26 YALE J. ON REG. 37, 56 (2009).

108. See Barkowski, *supra* note 2, at 310.

109. Levine, *supra* note 107, at 51.

110. Barkowski, *supra* note 2, at 252 n.17, 310; Don Brown, *FAA History Lesson – July 19, GET THE FLICK* (July 19, 2007, 12:18 PM), <http://www.gettheflick.blogspot.com/2007/07/faa-history-lesson-july-19.html>.

111. Brown, *supra* note 110.

112. Levine, *supra* note 107, at 56-57 (noting the perimeter rules originally prohibited flights over 1200 miles in distance from Reagan and 1800 miles in distance from LaGuardia).

113. Eileen M. Gleimer, *Slot Regulations at High Density Airports: How Did We Get Here and Where Are We Going?*, 61 J. AIR L. & COM. 877, 880 (1996).

slots without using them, a system known as “pocket slots.”¹¹⁴ Combined with the major scheduling impasse at Reagan Airport in 1980 over the coveted New York to Washington flight, the FAA intervened by implementing a reduction in slots at twenty-two of the nation’s busiest airports.¹¹⁵ The FAA incentivized airlines to use their slots under the “use it or lose it rule” requiring that the slot be used 80% of the time or be subject to re-allocation through a lottery system.¹¹⁶

Under the HDR, airline carriers were required to secure reservations for scheduling flights.¹¹⁷ These reservations were allocated with minimal issues, for the number of airlines prior to deregulation was limited.¹¹⁸ However, the Deregulation Act in 1978 enabled new airlines to enter the field, making available slot reservations scarcer.¹¹⁹ The benefits underlining the Deregulation Act were to enable new airlines an easier access into the airline industry, along with allowing airlines to compete freely based upon airline ticket pricing and route selection.¹²⁰ However, hindrances for new airlines under the HDR—the inability to buy or otherwise obtain slots from incumbent airlines that were hoarding the slots—increased resentment by new airlines.¹²¹

In 1985, the FAA amended the HDR by creating a “buy-sell rule,” which allowed airlines to buy, sell, or lease slots on the free market.¹²² In addition, the FAA implemented a one-time five percent withdrawal of slots at Reagan, O’Hare, and LaGuardia from incumbent airlines that were then distributed by a lottery system to new airlines.¹²³ This withdrawal intended to counteract the windfall that incumbents would receive by being “grandfathered” into the slot.¹²⁴ The FAA required that a minimum number of slots be released for each hour to prevent incumbents from giving up less-desirable slots to new entrants.¹²⁵

114. *See id.* at 882.

115. *Id.* at 882-83.

116. *See Levine, supra* note 107, at 57.

117. Barkowski, *supra* note 2, at 310.

118. *Id.*

119. *See id.* at 310-11. Based on 49 U.S.C. §§ 41716(b) and 41717(c), a “new entrant carrier” is a “commuter operator or air carrier which does not hold a slot at a particular airport and has never sold or given up a slot at that airport after Dec 16, 1985.” 14 C.F.R. § 93.213(a)(1) (2012). A “limited incumbent carrier” includes those air carriers that “hold[] or operate[] fewer than 12 air carrier or commuter slots. . . .” 14 C.F.R. § 93.213(a)(5).

120. *See Airline Deregulation and Fares at Dominated Hubs and Slot-Controlled Airports: Hearing Before the H.R. Comm. on the Judiciary*, 105th Cong. 1 (1997) (statement of Steven A. Morrison, Professor of Economics Northeastern University), available at <http://www.economics.neu.edu/morrison/research/house971105.pdf>.

121. *See Levine, supra* note 107, at 57.

122. *Id.* at 58.

123. Barkowski, *supra* note 2, at 311 n.303.

124. Gleimer, *supra* note 113, at 890.

125. *See id.* at 890-91.

However, the buy-sell rule contained two major flaws in attempting to open up slots for new entrants. First, the buy-sell rule did not take into account the long-term terminal leases of incumbent airlines.¹²⁶ The only way new entrants could obtain terminal space was through subleases, for which incumbents would charge an extravagant fee.¹²⁷ Even if new entrants could gain access to terminal space, “majority in interest” clauses gave veto power to prevent new entrants from building new airport facilities.¹²⁸

Second, incumbent airlines became hesitant to sell slots to airlines that would become eventual competitors.¹²⁹ Because incumbent airlines had actual knowledge of the airline buying the slot, incumbent airlines were reluctant to sell the slots because they could not project the extent to which new entrants could compete with them.¹³⁰ Prospective sellers would essentially compare the revenue generated from the sale of the slot to the loss in potential revenue from the entry of a low-cost competitor into the market.¹³¹

In 2001, Congress included a provision within the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR-21) that phased out the High Density Rule (HDR) at O’Hare after July 1, 2002 and at LaGuardia and JFK after January 1, 2007.¹³² Once the HDR was repealed, each airport began experiencing major congestion delays.¹³³ Incumbent airlines had the ability to increase the number of scheduled flights, while the repeal of the HDR enabled new airlines to more easily obtain access to slots.¹³⁴

Following the elimination of the HDR at O’Hare, airport delays began to significantly increase, leading to the worst performance levels of any major airport in America with only a 57% on-time arrival rate.¹³⁵ As a result, the FAA placed a cap on arrivals at O’Hare to eighty-eight

126. Barkowski, *supra* note 2, at 311.

127. Robert M. Hardaway, *The FAA ‘Buy-Sell’ Slot Rule: Airline Deregulation at the Crossroads*, 52 J. Air L. & Com. 1, 20 (1986).

128. *Id.*

129. Levine, *supra* note 107, at 58.

130. *Id.*

131. *Id.*

132. See Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR-21), 49 U.S.C. §§ 41715-18 (2006). The High Density Rule remained in effect at Reagan, and the FAA indefinitely restricted reservations at Newark.

133. Barkowski, *supra* note 2, at 312.

134. Memorandum from Lou E. Dixon on New York Flight Delays to the Federal Aviation Administrator (Oct. 28, 2010), available at <http://www.oig.dot.gov/sites/dot/files/NY%20Delays%20Final.pdf>.

135. Congestion and Delay Reduction at Chicago O’Hare International Airport, 71 Fed. Reg. 51382-01 (Aug. 29, 2006) (codified at 14 C.F.R. § 93.123).

flights during most hours of the day.¹³⁶

Between 1999 and 2007, New York experienced an eight percent increase in flight departures without any increase in runway space.¹³⁷ The resulting congestion led the FAA to begin placing flight caps at JFK, LaGuardia, and Newark in 2008.¹³⁸ However, the FAA set caps at levels of maximum capacity at times of optimal weather conditions, which overstated the airports' actual capacity to accommodate the capped number of flights.¹³⁹ The FAA extended the caps until October 29, 2011.¹⁴⁰ Although the FAA decreased the capped number of flight operations at LaGuardia from seventy-five to seventy-one flights per hour, New York still experienced critical airport congestion concerns.¹⁴¹

With the expiration of the flight caps looming, the FAA proposed a market-based mechanism to retrieve a percentage of its slots from airlines operating at JFK, LaGuardia, and Newark, and to then auction these slots to the highest bidder.¹⁴² The Air Transportation Association filed suit, with the D.C. Circuit Court of Appeals granting a motion to stay these proposed slot auctions.¹⁴³ Critics opposing the slot auctions argued that the airlines could still circumvent the intended benefits of the slot auctions by keeping the purchasers of the new slots from obtaining gate-facility leases.¹⁴⁴

B. A POSSIBLE SOLUTION: THE MASSPORT PACE EXPERIMENT

In 1987, Boston's Logan Airport was suffering from severe congestion problems.¹⁴⁵ The number of passengers had nearly doubled over the past decade and poor weather conditions limited the number of flights it could accommodate to one-third.¹⁴⁶ The Massachusetts Port

136. *Id.* On August 18, 2004, the FAA issued the order to limits U.S. and Canadian air carriers to eighty-eight arrivals during most hours of the day. The two largest airlines at O'Hare, United Airlines and American Airlines, also made a voluntary agreement to reduce the number of their scheduled flights to help alleviate the congestion.

137. Memorandum from Lou E. Dixon, *supra* note 134.

138. *Id.* The FAA approved 81 operations per hour for scheduled flights for JFK and Newark and 75 operations per hour for flights at LaGuardia.

139. *Id.*

140. John Hughes, *New York-Airport Flight Caps Fail to Curb Delays*, BLOOMBERG, (Nov. 3, 2010 8:51 AM), <http://www.bloomberg.com/news/2010-11-02/new-york-airport-flight-caps-fail-to-curb-delays-report-finds.html>.

141. Memorandum from Lou E. Dixon, *supra* note 134.

142. Barkowski, *supra* note 2, at 313.

143. *Id.* at 313-14.

144. *Id.* at 315-16.

145. Daniel R. Polsby, *Airport Pricing of Aircraft Takeoff and Landing Slots: An Economic Critique of Federal Regulatory Policy*, 89 CALIF. L. REV. 779, 806 (2001).

146. *Id.* Total enplanements at Logan Airport between 1976 and 1987 increased from eleven to twenty-three million passengers. While ideal weather conditions enabled Logan Airport to

Authority (“Massport”), the airport proprietor of Logan Airport, faced mounting pressures to alleviate the congestion, often a result of small, regional flights backlogging traffic.¹⁴⁷

In March 1988, Massport introduced a new program entitled “Program for Airport Capacity and Efficiency” (“PACE”) for implementation at Logan Airport.¹⁴⁸ The PACE program created a landing fee schedule that was based on two components: (1) the weight of the aircraft, and (2) a fixed landing fee for all aircraft at all times of the day.¹⁴⁹ The fixed landing fee was roughly \$90.00 per landing and was charged during both peak and off-peak hours.¹⁵⁰ As a result, the landing fees for small aircrafts greatly increased (from \$25 to \$105), while the landing fees for the large commercial and freight airplanes decreased (from \$936 to \$451) to keep the landing fees revenue neutral.¹⁵¹ In addition, PACE exempted the fixed landing fee for several regional airlines, allowing these airlines to pay the pre-PACE minimum landing fee of \$25.¹⁵²

On the same date that Massport approved the change in the landing fee structure, a complaint was filed with the FAA on behalf of the National Business Aircraft Association,¹⁵³ alleging that PACE violated federal statutes by not setting “fair and reasonable” rates.¹⁵⁴ A month later, a suit was filed by the New England Legal Foundation as well as various groups representing general aviation and commuter aircraft against Massport in federal court.¹⁵⁵ The District Court for the district of Massachusetts upheld the fee structure on the basis of a three-part test.¹⁵⁶ First, the District Court held that the new fees were reasonable and “non-excessive in comparison with the governmental benefit conferred.”¹⁵⁷ Furthermore, the fees were not unjustly discriminatory, for “[t]he goal . . . was to promote a fair and reasonable landing fee which would recover

handle 120 flights per hour, poor weather conditions limited Logan’s capacity to handle only 40 flights per hour.

147. *Id.*

148. *Id.* at 807.

149. *New Eng. Legal Found. v. Mass. Port Auth.*, 883 F.2d 157, 159 (1st Cir. 1989).

150. FLAVIO LEO, MASSPORT, BOSTON LOGAN INTERNATIONAL AIRPORT’S PEAK PERIOD SURCHARGE REGULATION – OVERVIEW 1, 3 (2007), available at http://www.isr.umd.edu/NEXTOR/Conferences/200706_Airport_Access_Rights/Leo.pdf.

151. See Luix Overbea, *Boston Backs Down on Program to Reduce Airport Congestion*, CHRISTIAN SCIENCE MONITOR, Dec. 29, 1988, <http://www.csmonitor.com/1988/1229/aseg.html>.

152. Polsby, *supra* note 145, at 807.

153. The National Business Aircraft Association is a non-profit association of owners, operators, and users of business aircraft. *About NBAA*, NAT’L BUS. AVIATION ASS’N, <http://www.nbaa.org/about/> (last visited Nov. 23, 2012).

154. *New Eng. Legal Found.*, 883 F.2d at 159.

155. Polsby, *supra* note 145, at 807-08.

156. *New Eng. Legal Found.*, 883 F.2d at 162.

157. *Id.*

from each user the cost incurred by the proprietor in providing the fees and facilities[.]”¹⁵⁸ Last, the District Court found that the landing fees were not preempted because under section 1305(a) of the Deregulation Act, Congress intended airport proprietors authority to set landing fees.¹⁵⁹

Five months later, the Administrative Law Judge (“ALJ”) in the complaint filed with the FAA reached a decision contrary to that of the district court.¹⁶⁰ On appeal, the Secretary of the Department of Transportation (“Secretary”) affirmed the ALJ’s decision on the basis that small planes were allocated a disproportionate amount of the airport costs.¹⁶¹ In addition, the Secretary determined that charging higher fees for small planes did not bear any relationship with the actual periods of congestion.¹⁶² Facing the risk of losing federal funds by continuing PACE, Massport terminated the program on December 27, 2008.¹⁶³

For the six months that PACE was in effect airport congestion at Logan greatly improved.¹⁶⁴ On-time performance went from twenty-first to twelfth, with September 1988 seeing on-time flights at 86.4%, up from 69.5% for the previous September.¹⁶⁵ The landing fees shifted one-third of aviation traffic away from Logan field to Hanscom Field, a small Boston regional airport.¹⁶⁶ Furthermore, regional commuter flights at Logan decreased by 3.1 percent.¹⁶⁷

The PACE example highlights the benefits of congestion pricing within the airline industry. However, many critics of PACE mischaracterize the Secretary’s ruling as a blanket prohibition of any peak-time pricing systems.¹⁶⁸ The Secretary overturned PACE because it mixed weight-based pricing with “the inappropriate use of opportunity costs considerations.”¹⁶⁹ In essence, the PACE congestion pricing raised rates during all hours of the day, rather than specifically during peak hours. Thus, the additional landing fees were inappropriate to levy against small aircrafts during times when there was no shortage of runway capacity that was not imposing congestion related costs onto other users.¹⁷⁰ Had

158. *See id.*

159. *Id.*

160. Polsby, *supra* note 145, at 808.

161. *Id.*

162. New Eng. Legal Found., 883 F.2d at 165.

163. *Id.* at 166; Polsby, *supra* note 145, at 808.

164. Polsby, *supra* note 145, at 809.

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.* at 810.

169. *Id.* (quoting New Eng. Legal Found. v. Mass. Port Auth., 883 F.2d 157, 165 (1st Cir. 1989)).

170. Policy Regarding Airport Rates and Charges, 73 Fed. Reg. 40430-02, 40432 (July 14,

Massport only raised the landing fees during peak hours, the DOT would likely have upheld the pricing formula.¹⁷¹ In fact, the Secretary's opinion stated that "it is within an airport proprietor's authority to impose reasonable (, nondiscriminatory,) [sic] landing fees . . . even if such fees may result in the declined usage by a class of users or other indirect effects on users."¹⁷² In sum, the Massport case shows that a properly structured peak pricing system could be deemed reasonable.¹⁷³

IV. AIRLINE INDUSTRY CHALLENGES TO THE POLICY REGARDING AIRPORT RATES AND CHARGES

A. POLICY REGARDING AIRPORT RATES AND CHARGES

In 1994, Congress enacted section 113 of the Federal Aviation Administration Authorization Act, requiring the Secretary of Transportation to publish guidelines for determining whether an airport fee is reasonable.¹⁷⁴ On June 21, 1996, the DOT issued its Final Policy Regarding Airport Rates and Charges ("1996 Policy").¹⁷⁵ The 1996 Policy adhered to two statutory requirements for landing fees.¹⁷⁶ The first statutory requirement is the Airport Improvement Act, requiring airports that receive federal assistance to "be available for public use on reasonable conditions and without unjust discrimination[.]"¹⁷⁷ The second statutory requirement is the Anti-Head Tax, which allows airport operators to collect reasonable landing fees, but does not allow airport operators to collect fees or charges on "an individual traveling in air commerce[.]"¹⁷⁸ Under the 1996 Policy, airport proprietors' fees for airfield use were calculated using a historic cost accounting method.¹⁷⁹ However, the D.C. Circuit Court of Appeals vacated this portion of the 1996 Policy, leaving airport operators the discretion to use any reasonable methodology in setting fees, so long as they were justified and applied on a consistent basis.¹⁸⁰

2008) (referencing Investigation into Massport's Landing Fees, Opinion and Order, FAA Docket 13-88-2 (Dec. 22, 1998)).

171. *Id.*

172. Polsby, *supra* note 145, at 810 (quoting New Eng. Legal Found., 883 F.2d at 165).

173. Policy Regarding Airport Rates and Charges, 73 Fed. Reg. at 40433.

174. 49 U.S.C. § 47129(b)(2) (2006); Roy Goldberg, *Airline Challenges to Airport Abuses of Economic Power*, 72 J. AIR L. & COM. 351, 353 (2007).

175. Monica H. Kemp, *Mechanisms for Addressing Capacity-Related Delays at U.S. Airports*, 22 No. 2 AIR & SPACE LAW. 1, 17 (2009).

176. Air Transp. Ass'n of Am. v. U.S. Dep't of Transp., 613 F.3d 206, 210 (D.C. Cir. 2010).

177. 49 U.S.C. § 47107(a)(1) (2012).

178. Goldberg, *supra* note 174, at 361-362 (quoting 49 USC § 40116(e)(2) (2006)).

179. Kemp, *supra* note 175, at 17.

180. Policy Regarding Airport Rates and Charges, 73 Fed. Reg. 40430-02, 40431 (July 14, 2008).

In January 17, 2008, the DOT issued a Notice of Proposed Rule Making to address whether airport operators of congested airports could use pricing mechanisms to discourage airline carriers from operating at these congested airports during peak times.¹⁸¹ The basis for these amendments was to address the increased congestion at major U.S. airports while also exploring potential benefits of congestion pricing.¹⁸²

The 2008 Amendments to the Policy Regarding Airport Rates and Charges made three significant changes from the 1996 Policy.¹⁸³ First, the 2008 Amendments clarified the position that airport proprietors can impose a two-part landing fee that is based upon a weight-based charge and a per-operation charge during peak hours, as long as the fee reasonably allocated the cost on a rational and economically justified basis.¹⁸⁴ In addition, the total revenues from the landing fee must not exceed the costs of operating the airfield by the airport operators.¹⁸⁵ Second, congested airports can include in their landing fees the costs of secondary airports that are owned and operated by the same proprietor during peak hours.¹⁸⁶ Third, congested airports can include in the landing fees a portion of the costs of airfield projects under construction.¹⁸⁷ In addition, the 2008 Amendments provided further guidance by revising the definitions of a congested airport and a congested hour.¹⁸⁸

As stated by the DOT in the 2008 Amendments, raising the cost of airfield usage at congested airports during peak hours, would incentivize airlines to (1) adjust their flight schedules to operate during less congested times if possible, (2) use less congested secondary airports to relieve congested airports, and (3) use the airport more efficiently through the use of large aircrafts during peak hours.¹⁸⁹

B. THE ATA'S CHALLENGE TO THE 2008 AMENDMENTS

On September 5, 2008, the Air Transport Association of America, Inc. ("ATA") filed a petition to the D.C. Circuit Court of Appeals, challenging the 2008 Amendments to the Policy Regarding Airport Rates and

181. Policy Regarding Airport Rates and Charges, 73 Fed. Reg. 3310-01, 3310 (Jan. 17, 2008).

182. *Id.*

183. Policy Regarding Airport Rates and Charges, 73 Fed. Reg. at 40430.

184. *Id.*

185. *Id.* at 40430, 40445. As a result of total revenues not surpassing expenses, airport operators will have to lower the per-operation charge portion of the two-part landing fee during non-peak period hours. Thus, it must remain revenue-neutral.

186. *Id.* at 40430-31 (Amending Subsection 2.5.4(a) on Fair and Reasonable Fees).

187. *Id.* at 40431.

188. *See id.* at 40445. Section 6(c) of Congested Airport defines a congested hour as a period when "demand exceeds average runway capacity resulting in volume-related delays, or is anticipated to do so."

189. *Id.* at 40432.

Charges.¹⁹⁰ The ATA opposed the 2008 Amendments, arguing that they (1) “allow airports to charge unreasonable and discriminatory fees,” (2) are preempted by federal law, and (3) “provide inadequate guidance to airports on how the DOT” evaluates the reasonableness of their landing fees.¹⁹¹

However, the ATA only brought a facial challenge of these amendments because no airport operator had implemented the system of congestion pricing encouraged by the 2008 Amendments at the time of filing.¹⁹² Due to the difficulties of prevailing on a facial challenge, the ATA’s decision to challenge these amendments prior to any airport operator’s implementation shows the airline industry’s preemptive response to the DOT’s amendments to the Policy Regarding Airport Rates and Charges.¹⁹³

1. Reasonableness and Unjust Discrimination

On the issue of the reasonableness of the two-part landing fee, the court held that a congestion pricing scheme that would make airlines pay a premium to land during peak hours is reasonable.¹⁹⁴ While the court mentioned that some operation charges might not be deemed reasonable, a two-part landing fee that is appropriately executed can satisfy the statutory requirement of reasonable landing fees set forth in the Anti-Head Tax Act.¹⁹⁵

Regarding the claim that the fees were unjustly discriminatory, the ATA argued that by allowing airport operators to include a cost related to secondary airports, the net effect would unfairly subsidize the secondary airports, whose landing fees would be lowered due to the revenue neutral requirement of the landing fees.¹⁹⁶ The court found that a two-part landing fee is not unjustly discriminatory since users of the runway space are paying a premium to efficiently allocate the resource.¹⁹⁷ In essence, the operational charge is necessary to promote an optimal level of efficiency to maximize the scarce resource of airport capacity.¹⁹⁸ Furthermore, the two-part landing fee serves to enable the free market to dictate whether a particular airline is willing to pay an additional charge

190. Final Brief for Respondents, *supra* note 5, at 2. .

191. Air Transp. Ass’n of Am. v. U.S. Dep’t of Transp., 613 F.3d 206, 208 (D.C. Cir. 2010).

192. *Id.* at 213.

193. *See id.* at 216. A facial challenge can prevail only when the party challenging the amendment can “establish that no set of circumstances exists under which the [Amendments] would be valid.” (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)).

194. *Id.* at 214.

195. *Id.* at 210, 215-16.

196. *Id.* at 215.

197. *Id.*

198. *Id.*

during peak hours.¹⁹⁹

2. Preemption Under the Deregulation Act

On the issue of preemption, the court held that the Airline Deregulation Act did not preempt the 2008 Amendments.²⁰⁰ The Airline Deregulation Act mandates that airport operators “may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier”²⁰¹ The ATA argued that because the imposition of a two-part landing fee would force airlines to make scheduling changes regarding their air services, the Airline Deregulation Act would preempt the landing fees.²⁰²

However, this statute was not intended to be interpreted so broadly, for all airport charges invariably affect the price airline carriers charge.²⁰³ The basis for this section of the Airline Deregulation Act was to eliminate state or other political authorities from being meddled in the airline’s decision of pricing to its consumers.²⁰⁴ Furthermore, the Airline Deregulation Act contains a preemption provision that permits airport proprietors the right to exercise their proprietary powers and rights.²⁰⁵ Other courts have ruled on the issue of preemption for landing fees that “it is . . . within an airport proprietor’s authority to impose reasonable [, nondiscriminatory,] [sic] landing fees . . . even if such fees may result in a decline in usage by a class of user or other indirect effects on users.”²⁰⁶ Therefore, the airport proprietor is within its scope to charge fees, so long as they are reasonable and are not a “head charge.”²⁰⁷

199. Policy Regarding Airport Rates and Charges, 73 Fed. Reg. 40430-02, 40439 (July 14, 2008). While the ATA contests the two-part landing fee by arguing that certain airline carriers will be better suited to pay the additional landing fees, this does not make the fees as a whole discriminatory. Rather, the landing fees provide a free-market model that enable airlines to determine the value of flying during peak hours. “This is the market working, not an indiscriminate side-effect of higher charges.”

200. Air Transp. Ass’n of Am., 613 F.3d at 217.

201. 49 U.S.C. § 41713(b)(1) (2006).

202. Air Transp. Ass’n of Am., 613 F.3d at 216.

203. Brief for Intervenor, *supra* note 14, at 20.

204. See Neil J. King & Bruce H. Rabinovitz, *Congestion Pricing and Capacity-Related Delay at U.S. Airports*, 22 No. 1 AIR & SPACE LAW. 1, 23 (2008).

205. 49 U.S.C. § 41713(b)(3).

206. *New Eng. Legal Found. v. Mass. Port Auth.*, 883 F.2d 157, 165 (1st Cir. 1989). The Court stated that airport operators should have a wide range of options to recover airport expenses, including through the use of operational landing fees. See also *W. Air Lines, Inc. v. Port Auth. of N.Y. & N.J.*, 817 F.2d 223, 226 (2nd Cir. 1987) (upholding an airport operator’s use of a perimeter rule to address airport congestion).

207. Goldberg, *supra* note 174, at 361-62.

3. *Guidance to Evaluate the Reasonableness of Landing Fees*

As required by law, the DOT is required to establish “standards or guidelines . . . in determining . . . whether an airport fee is reasonable.”²⁰⁸ The ATA argued that the 2008 Amendments are written to be self-defining: it is reasonable unless it unreasonable.²⁰⁹ Previously, the D.C. Circuit vacated portions of the 1996 Policy for failing to provide adequate guidance to airport operators for having a different fee structure between airfield and non-airfield fees.²¹⁰ However, the 2008 Amendments were written with proper guidance, for airport operators only have two variables to determine landing fees: cost per landing and cost based upon the weight of an aircraft.²¹¹ Because the 2008 Amendments clearly delineate the standards for operation-charges, which can include a fee for secondary airports or for airfield construction, along with a fee based on a proportion of the weight of an aircraft, the DOT provided adequate guidance to ascertain the reasonableness of landing fees.²¹² In sum, the D.C. Circuit upheld the 2008 Amendments, allowing airport operators the ability to charge airlines a two-part landing fee.²¹³

V. IMPACT OF LANDING FEES FOLLOWING THE DC CIRCUIT’S RULING

While the D.C. Circuit upheld the 2008 Amendments to the Policy Regarding Airport Rates and Charges, airport operators had the opportunity to recalculate their landing fees by including a peak hour surcharge.²¹⁴ Currently, no congested airport has incorporated the two-

208. 49 U.S.C. § 47129(b)(2) (2012).

209. *Air Transp. Ass’n of Am. v. U.S. Dep’t of Transp.*, 613 F.3d 206, 218 (D.C. Cir. 2010).

210. *See Air Transp. Ass’n of Am., v. Dep’t of Transp.*, 119 F.3d 38, 43, 45 (1997), *amended by* 129 F.3d 625, 625 (D.C. Cir. 1997); *see also City of L.A. v. Dep’t of Transp.*, 165 F.3d 972, 974-76 (D.C. Cir. 1999). In 1993, the city of Los Angeles began incorporating a charge on the fair-market value of the land (an “opportunity cost” methodology) where LAX resided. As a result of (LAX I), the landing fees tripled from 1993 to 1995. The Department of Transportation concluded that because the City of Los Angeles was not entitled to use the airport land for any other purpose beside an airport, there was no opportunity cost. The 1996 Policy Regarding Airport Rates and Charges required that evaluation of the landing fees to be based upon a historic cost methodology, which the City of Los Angeles opposed (LAX II). Goldberg, *supra* note 174, at 364. The D.C. Circuit Court held that because the 1996 Policy allowed airport operators to levy non-airfield fees based upon any methodology, the Secretary of Transportation was justified in prohibiting the use of historic cost evaluations. As a result, LAX was required to refund \$112.8 million dollars to numerous airlines. In sum, the DC Circuit Court has vacated portions of the 1996 Policy when improper guidance had been promulgated to airport operators.

211. Policy Regarding Airport Rates and Charges, 73 Fed. Reg. 40430-02, 40430 (July 14, 2008).

212. *Air Transp. Ass’n of Am.*, 613 F.3d at 218-19.

213. *Id.* at 212, 220.

214. *Id.* at 213-214.

part landing fee for commercial airlines.²¹⁵ For instance, the Port Authority of New York and New Jersey only imposes a two-part landing fee for non-commercial aviation.²¹⁶

Although congestion pricing has yet to be implemented, the gradual introduction of the Next Generation Air Transportation System (“NextGen”) may help to alleviate congestion on the runways. NextGen is the new generation of air traffic control, replacing the archaic radar-based air traffic management system used since World War II to a “‘satellite-based aircraft navigation system.’”²¹⁷ By enabling pilots the freedom in real-time to determine the plane’s flight path and speed, NextGen will create more efficient air travel, allowing for an increase in capacity for air travel.²¹⁸ Through NextGen’s performance-based navigation, airplanes will have the flexibility to use multiple paths to determine their arrival.²¹⁹ NextGen estimates that by 2018 it will reduce air traffic delays by thirty-five percent, providing \$23 billion in economic savings.²²⁰ At Atlanta-Hartsfield and Dallas/Fort Worth International, this equipment is already in use, providing savings of over \$100 million.²²¹

While NextGen had an intended completion date by 2025, delays have postponed this timeline.²²² Additionally, the estimated costs of NextGen will run between \$15 and \$22 billion by 2025.²²³ Thus, wide-scale reductions in air traffic delays through NextGen may not be felt for years to come based on the increased delays and budget concerns.²²⁴ Although NextGen will provide a well-needed transformation to air traffic control, the implementation of NextGen may not be sufficient to combat the increased volume of air traffic expected over the next decade.²²⁵

In addition, the revenue-neutral requirement for airport landing fees

215. *Id.* at 213.

216. See PORT AUTHORITY OF N.Y. & N.J., SCHEDULE OF CHARGES FOR AIR TERMINALS LAGUARDIA AIRPORT 5 (2012), available at <http://www.panynj.gov/airports/pdf/scheduleofcharges-lga.pdf>. Subsection 1(c) of The Public Landing Area Charges states that the additional \$100 fee for landing or taking-off does not apply to helicopters or scheduled airlines.

217. Barkowski, *supra* note 2, at 264, 271.

218. FED. AVIATION ADMIN., FAA’S NEXTGEN IMPLEMENTATION PLAN 27 (2011), available at http://www.faa.gov/nextgen/media/ng2011_implementation_plan.pdf.

219. Susan Baer, *National Alliance Supports Advancement of NextGen Initiative*, AIRPORT MAGAZINE, June/July 2010, at 21, 22, available at <http://www.panynj.gov/airports/pdf/AAAE-Airport-Mag-Sue-Baer-June-July-2010.pdf>.

220. FED. AVIATION ADMIN., *supra* note 218, at 20.

221. Baer, *supra* note 219, at 22.

222. J. Nicholas Hoover, *Problems Plague FAA’s NextGen Air Traffic Control Upgrade: Delays, Cost Overruns, and Other Problems Threaten to Push the Multi-Billion Air Traffic Control Upgrades off Track*, INFORMATIONWEEK, Oct. 5, 2011, <http://www.informationweek.com/news/government/info-management/231900067>.

223. Baer, *supra* note 219, at 20.

224. See Hoover, *supra* note 222.

225. See Barkowski, *supra* note 2, at 250-52, 289, 295, 334-35.

is an obstacle for implementing a two-part landing fee.²²⁶ To prevent an airport operator from abusing its powers, the 2008 Amendments provide that “[r]evenues from fees imposed for use of the airfield . . . may not exceed the costs to the airport proprietor of providing airfield services”²²⁷ In essence, the revenues generated from landing fees cannot exceed the cost to airport operators to utilize the airfield.²²⁸ This provision serves as a disincentive for airport operators to institute a two-part landing fee, because smaller weight-based fees would have to offset the additional operational charges.²²⁹ While the premise behind these landing fees is to curb potential abuses by airport operators, this provision hamstring airport operators from instituting policies to alleviate congestion.²³⁰ A congestion pricing fee is not being used as unfair leverage by the airport operator to obtain above-market leases.²³¹ Rather, the congestion fee is used to alter the behavior of airlines to more optimally schedule flights.²³² In fact, the D.C. Circuit states that “its creativity should be welcomed on its merits, not spurned for its novelty.”²³³

Another stronghold preventing airport operators from establishing congestion pricing is that airport operators are still contractually bound to airport-wide flight fee agreements.²³⁴ Until these flight fee agreements end, airport operators must continue to operate under only the weight-based landing fee. Airlines do not have any incentive to re-negotiate or otherwise change the fee agreements, for congestion pricing is

226. LEWIS ET AL., *supra* note 14, at 3.

227. Goldberg, *supra* note 174, at 362 (quoting Policy Regarding Airport Rates and Charges, 73 Fed. Reg. 40430-02, 40345 (July 14, 2008)). The 2008 Amendments revise this section by allowing fees that are in accordance with paragraph 2.5.3, which allows for a fee based upon an airfield project under construction and paragraph 2.5.4(a), which allows for a fee from secondary airports. The secondary airport must be “(1) designated as a reliever airport for the first airport in the FAA’s National Plan of Integrated Airport Systems” and (2) determining if the added “airfield costs of the second airport to the rate base of the first airport during congested hours would have the effect of reducing or preventing congestion” Policy Regarding Airport Rates and Charges, 73 Fed. Reg. at 40444-45.

228. Goldberg, *supra* note 174, at 362.

229. See *New Eng. Legal Found. v. Mass. Port Auth.*, 883 F.2d 157, 157, 159, 162, 166 (1st Cir. 1989); see also Policy Regarding Airport Rates and Charges, 73 Fed. Reg. at 40434.

230. See *Air Transp. Ass’n of Am. v. U.S. Dep’t of Transp.*, 613 F.3d 206, 215 (D.C. Cir. 2010).

231. See *id.*

232. Policy Regarding Airport Rates and Charges, 73 Fed. Reg. at 40432.

233. *Air Transp. Ass’n of Am.*, 613 F.3d at 220. In the holding, Justice Ginsburg supports the proposition that new and creative policies that can alleviate congestion should be allowed, provided they adhere to statutory regulations.

234. E-mail from David Kagan, Assistant Dir. of Bus. & Properties, Aviation Dep’t at the Port Authority of N.Y. & N.J., to author (Feb. 7, 2012, 12:02 EST) (on file with author). The peak hour surcharges do not apply to signatories of the airport-wide flight landing fee agreements, in which all major airline carriers are signatories.

seen as merely an additional cost.²³⁵ Yet, congestion pricing could be most beneficial to major air carriers since regional airlines and non-commercial aviation would be reluctant to pay the additional fee, driving away these aircrafts from operating during peak hours.²³⁶ By reducing the clutter of small aviation aircraft during peak hours the operating costs for large airlines would decrease, offsetting the added congestion fee.²³⁷ However, the airlines are extremely hesitant about congestion pricing because it signals a large change to the status quo, which may lead to larger changes in the relationship between airlines and airport operators.²³⁸

In spite of the obstacles in the United States that hinder the implementation of congestion pricing for airport operators, major airports across Europe and Central America have instituted landing fees.²³⁹ A sampling of seventy major airports throughout the world showed that European landing fees are more than double the landing fees in the Americas.²⁴⁰ European airports such as Frankfurt and London Heathrow have introduced landing fees based on airplane noise levels, incentivizing airlines to optimally utilize their fleet of varying aircrafts.²⁴¹ Mexico City has landing fees during peak hours that are 27.5% greater than normal hours.²⁴² Another variation of landing fees takes into account peak hours, noise levels, and seasonal differences, such as at London Gatwick.²⁴³ Thus, while many European airports have utilized congestion pricing for environmental and congestion-related reasons, the United

235. Policy Regarding Airport Rates and Charges, 73 Fed. Reg. at 40437, 40439 -40.

236. Amedeo R. Odoni, *Congestion Pricing for Airports and for En Route Airspace*, in *NEW CONCEPTS AND METHODS IN AIR TRAFFIC MANAGEMENT* 31, 38 (Lucio Bianco et al. eds., 2001).

237. *Id.*

238. *Id.* at 38-39.

239. George Saounatsos, *Airport Aeronautical Charges*, AIRPORT INTERNATIONAL, Oct. 2007, at 60.

240. *Id.* This article surveyed seventy major airports across the world (26 in Europe, 22 in North and South America, and 22 in Africa/Asia/ Australia). Percentages of total airport charges are broken down into seven categories: 1) airport landing fees; 2) airport parking fees; 3) terminal use and other charges; 4) terminal NAVAID charges; 5) declared airport fees on pax ticket; 6) declared security charges; 7) declared state taxes on pax tickets. The average landing fees in the Americas is only 11% of total airport charges, compared to 24% in Europe and 29% in Africa/Asia/Australia.

241. FRANKFURT AIRPORT SERVS. WORLDWIDE, AIRPORT CHARGES: FRANKFURT AIRPORT 6 (2012), available at http://www.frankfurt-airport.com/content/frankfurt_airport/en/misc/container/entgelte/flughafenentgelte01-01-12/jcr:content.file/Flughafenentgelte_Airport%20charges%202012.pdf; HEATHROW AIRPORT LTD., HEATHROW AIRPORT STRUCTURE OF AERONAUTICAL CHARGES PROPOSALS: A CONSULTATION DOCUMENT 27-28 (2010), available at http://www.heathrowairport.com/static/Heathrow/Downloads/PDF/Consultation_Document.pdf.

242. LEWIS ET AL., *supra* note 14, at 3; *Landing Tariffs*, BENITO JUAREZ INTERNATIONAL AIRPORT, http://www.aicm.com.mx/ClienteseInversionistas_en/Tarifas/index.php?Publicacion=1528 (last visited Nov. 23, 2012). The peak landing hours at Benito Juarez Airport in Mexico are from 9 AM to 11 AM, 1 PM to 3 PM, and 7 PM to 10 PM.

243. GATWICK AIRPORT LTD., CONDITIONS OF USE: INCLUDING AIRPORT CHARGES 1ST

States only moves sluggishly toward any actual implementation of congestion pricing.

VI. CONCLUSION

In road and air travel, passengers experience burdensome and costly delays that are a byproduct of congestion. While the model for congestion pricing on the roadways and the runways varies, they share the same problem: the scarcity of an in-demand commodity. By tailoring the cost of runway space and roadways to match the actual costs imposed upon the consumer, the decision to consume the product will shift to those willing to pay for its increased cost. Furthermore, the revenues generated from congestion pricing will provide additional revenues to expand infrastructure, whether it be more highways or runways.

With systemic congestion imposing higher costs to the airline industry and its passengers, it is imperative to enact policies that lead to a more efficient use of airport runways. Past experiments such as the Massport PACE program have shown that congestion pricing can alter the behavior of small aircrafts and major air carriers to use runway space more efficiently by either flying through alternative airports or paying a premium to land/take-off from a congested airport during peak hours.²⁴⁴

However, the adoption of a two-part landing fee appears far away. Airport operators are limited in their ability to change the status quo due to current landing fee agreements with airlines as well as the statutory requirement that landing fees be revenue neutral.²⁴⁵ Even if these obstacles are addressed in the future, landing fees may not be expensive enough to incentivize major air carriers to alter their flight schedules during peak hours.

Therefore, the DOT and FAA must do more to encourage the use of congestion pricing as a solution to airport congestion. This may include creating a landing fee schedule similar to Gatwick, in which landing fees are determined by both the time of season and by aircraft noise levels.²⁴⁶ If airport operators cannot implement congestion pricing in the near future, passengers will remain waiting on the ground.

APRIL 2011 9-10, 16, 19-20, 25 (2011), available at <http://airlines.gatwickairport.com/docs/Conditions%20of%20Use.pdf>.

244. See Polsby, *supra* note 145, at 806-07, 809.

245. Air Transp. Ass'n of Am. v. U.S. Dep't of Transp., 613 F.3d 206, 206, 208-09, 211, 213 (D.C. Cir. 2010).

246. GATWICK AIRPORT LTD., *supra* note 243, at 16, 20, 25.

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