



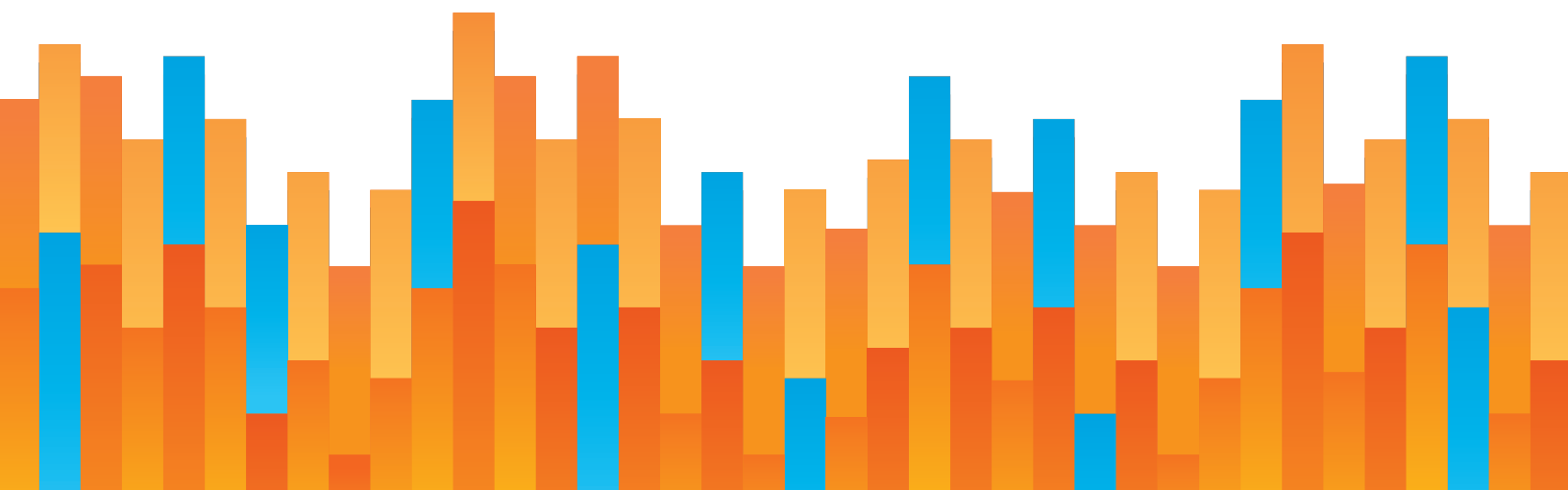
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# AIRLINE DEREGULATION: PAST EXPERIENCE AND FUTURE REFORMS

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by Marc Scribner

April 2023





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# PART 1

## INTRODUCTION

Heavy-handed economic regulation of airlines characterized the first several decades of civil aviation in the U.S. Basic business decisions on routes and fares were dictated by the federal Civil Aeronautics Board, which created and enforced a national cartel on interstate air transportation. Following deregulation in the late 1970s, market competition reshaped the domestic airline industry to serve many more travelers at far lower prices.

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Despite the unambiguous benefits that resulted from airline deregulation, some wish to resurrect regulatory barriers from the past. In addition, past airline deregulation did not address related civil aviation policies that continue to unduly restrict airline competition to the detriment of consumers.

This brief examines the past, present, and future of airline regulation in the U.S. It begins by surveying the pre-deregulation policy history of air travel, continues with an examination of the results of deregulation, and concludes with recommendations for policymakers on how to target future reforms in a manner that most benefits consumers.

## PART 2

# PRE-DEREGULATION ENVIRONMENT

The first decade of aviation in the United States following the Wright Brothers' historic 1903 flight was largely characterized by experimentation. World War I jumpstarted development of aircraft with more practical considerations in mind, resulting in substantial improvements in reliability and payload capacity.<sup>1</sup> While mail-carrying operations had been undertaken in the past on a small scale, by the end of the war, the U.S. Post Office viewed airmail as the future of long-distance mail transportation and began major airmail service expansions.

The Post Office's airmail operations grew rapidly to establish regular transcontinental service, including an overnight route from New York to Chicago. However, these early government-operated airmail operations were heavily subsidized, and political leaders began to call for contracting them out to private industry to better harness the technology improvements and declining costs enabled by the explosion of aviation entrepreneurs.<sup>2</sup> This led to Congress enacting the Contract Air Mail Act of 1925, which established the basic policy framework for scheduled air transportation in the U.S.<sup>3</sup>

This law was subsequently amended and a new policy focus of integrating nascent passenger service with airmail operations took shape. Most significant was the Air Mail Act

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<sup>1</sup> Michael E. Levine, "Regulating Airmail Transportation," *Journal of Law and Economics* 18, Oct. 1975. 317–359.

<sup>2</sup> Ibid. 318.

<sup>3</sup> Contract Air Mail Act of 1925, Pub. L. 68–359, 43 Stat. 805 (2 Feb. 1925)

of 1930, which further expanded and consolidated aviation regulatory authority under the postmaster general.<sup>4</sup> Following enactment, then-Postmaster General Walter F. Brown convened what came to be known as the “spoils conferences” in 1930, which produced rampant bid-rigging and the cartelization of airmail carriers.<sup>5</sup>

The public exposure of these 1930 conferences four years later caused a national scandal, which resulted in the cancellation of all existing airmail contracts and the temporary and disastrous operation of airmail routes by the U.S. Army Air Corps that killed a dozen pilots.<sup>6</sup> The situation stabilized somewhat with the passage of the Air Mail Act of 1934, which reintroduced competitive bidding for Post Office airmail contracts, transferred pricing regulatory authority from the Post Office to the Interstate Commerce Commission, created the Bureau of Air Commerce to regulate routes and safety, and established the Federal Aviation Commission to consider the future of aviation policy.<sup>7</sup>

The Federal Aviation Commission released its final report in 1935.<sup>8</sup> Most significantly, it called for consolidated economic regulation of the aviation sector by a single federal regulator, which would supplant the Air Mail Act of 1934’s policy framework that involved three separate federal regulators. These reforms garnered little support from either the Roosevelt administration or Congress at the time. However, the airline industry and an ad hoc Roosevelt administration interdepartmental committee began to build the case for a comprehensive aviation regulator.<sup>9</sup>

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*Despite the evolution in aviation policy being driven in large part by the negative response to government-supported airline cartelization that occurred in the early 1930s, one of the first activities of the CAA was to “grandfather” the 23 existing airlines into a new cartel of scheduled “trunk carriers.”*



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<sup>4</sup> Air Mail Act of 1930, Pub. L. 71–178, 46 Stat. 259 (29 Apr. 1930).

<sup>5</sup> Levine. 322.

<sup>6</sup> John T. Correll, “The Air Mail Fiasco,” *Air Force Magazine*, Mar. 2008. 60–65.

<sup>7</sup> Air Mail Act of 1934, Pub. L. 73–308, 48 Stat. 933 (12 June 1934).

<sup>8</sup> Howard C. Westwood and Alexander E. Bennett, “A Footnote to the Legislative History of the Civil Aeronautics Act of 1938 and Afterword,” *Notre Dame Law Review* 42, Feb. 1967. 309–362.

<sup>9</sup> *Ibid.* 326–327.

Following two years of legislative fits and starts, Congress and the Roosevelt administration eventually coalesced around the Civil Aeronautics Act of 1938.<sup>10</sup> The law created the independent Civil Aeronautics Authority (CAA) as the aviation industry's economic and safety regulator. Despite the evolution in aviation policy being driven in large part by the negative response to government-supported airline cartelization that occurred in the early 1930s, one of the first activities of the CAA was to "grandfather" the 23 existing airlines into a new cartel of scheduled "trunk carriers." This "managed competition" framework severely limited competition on routes and pricing between trunk carriers, and prevented entry into the market by new carriers.<sup>11</sup>



*In 1966, Congress enacted the Department of Transportation Act, which moved the FAA under the new cabinet department and renamed it the Federal Aviation Administration.*



As part of a 1940 reorganization of federal agencies, the CAA's safety regulatory authorities were spun off into a new Civil Aeronautics Administration housed at the Department of Commerce, with economic regulatory authorities being transferred to the independent Civil Aeronautics Board (CAB).<sup>12</sup> Safety regulatory functions would continue to be housed at the Department of Commerce until enactment of the Federal Aviation Act of 1958, which superseded the Civil Aeronautics Act and created the independent Federal Aviation Agency (FAA).<sup>13</sup> In 1966, Congress enacted the Department of Transportation Act, which moved the FAA under the new cabinet department and renamed it the Federal Aviation Administration.<sup>14</sup>

Charter carriers had been exempted from regulation by the Civil Aeronautics Act. This allowed them to charge lower airfares than the scheduled trunk carriers.<sup>15</sup> The CAB responded by limiting the number of charter carrier flights to prevent them from offering anything approaching scheduled service, as well as encouraging trunk carriers to apply to

<sup>10</sup> Civil Aeronautics Act of 1938, Pub. L. 75–706, 52 Stat. 973 (23 July 1938).

<sup>11</sup> George Williams, *The Airline Industry and the Impact of Deregulation* (New York: Routledge, 2016). 5.

<sup>12</sup> Westwood and Bennett, "A Footnote to the Legislative History of the Civil Aeronautics Act of 1938 and Afterword." 356.

<sup>13</sup> Federal Aviation Act of 1958, Pub. L. 85–726, 72 Stat. 731 (23 Aug. 1958).

<sup>14</sup> Department of Transportation Act, Pub. L. 89–670, 80 Stat. 931 (15 Oct. 1966).

<sup>15</sup> Williams, *The Airline Industry and the Impact of Deregulation*. 5–6.

the agency for permission to offer cheaper coach fares. Some charter carriers then responded by forming subsidiaries to circumvent these flight restrictions, but the CAB had effectively bifurcated the interstate airline market into scheduled and non-scheduled carriers.<sup>16</sup>

However, the CAB's jurisdiction was over interstate air travel. This created an opportunity for *intrastate* carriers to operate free of CAB's entry, route, and price regulations. In 1949, Kenny Friedkin founded Pacific Southwest Airlines (PSA) in California as a charter carrier.<sup>17</sup> By the late 1950s, PSA began offering scheduled service in the high-volume Los Angeles-San Francisco market. Because PSA operated only within California's borders, it was not subject to CAB regulation. Instead, it was regulated by the California Public Utilities Commission (CPUC). While the CPUC was required to review rates, in practice it approved nearly all rate changes.<sup>18</sup> Unlike the CAB, the CPUC was not authorized to regulate carrier entry or routes.<sup>19</sup>

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*As evidence mounted against the status quo regulatory environment, high-level political officials began to take notice.*

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As a result of this successful exercise in regulatory arbitrage, PSA was able to offer much lower fares than CAB-regulated trunk carriers. In 1965, the lowest airfare between Boston and Washington, D.C., a route served only by trunk carriers, was \$24.65 (\$230.06 in 2022 dollars).<sup>20</sup> PSA, using the same class of aircraft, charged \$11.43 (\$106.68 in 2022 dollars) between Los Angeles and San Francisco, which were only 59 miles closer together than Boston and Washington, D.C.<sup>21</sup> A contemporaneous analysis estimated that fares on trunk carriers would have been 32% to 47% lower than they were in 1965 absent CAB regulation.<sup>22</sup> PSA's success in the intrastate airline market inspired Herb Kelleher to

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<sup>16</sup> Ibid.

<sup>17</sup> Diane Bell, "65 Years Ago, PSA Took Flight," *San Diego Union-Tribune*, 5 May 2014.

<sup>18</sup> Levine, "Is Regulation Necessary? California Air Transportation and National Regulatory Policy," *Yale Law Journal* 74, July 1965. 1416–1447.

<sup>19</sup> Ibid. 1431.

<sup>20</sup> Ibid. 1433.

<sup>21</sup> Ibid.

<sup>22</sup> Williams, *The Airline Industry and the Impact of Deregulation*. 9.



cofound Southwest Airlines in 1965 as a Texas intrastate carrier that adopted many of PSA's low-cost business practices.<sup>23</sup>

As evidence mounted against the status quo regulatory environment, high-level political officials began to take notice. Under President Gerald Ford, reforming economic regulation of the airline industry first became a priority. President Ford appointed John Robson to chair the CAB, which led to modest steps toward relaxing airline regulation.<sup>24</sup> During the Ford administration, the CAB ended an informal route entry moratorium that had been in place for the previous five years, liberalized rules that applied to charter carriers and thereby allowed some competition between charter and trunk carriers, and released the *Report of the CAB Special Staff on Regulatory Reform*, which recommended further deregulatory reforms.<sup>25</sup>

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Future U.S. Supreme Court Justice Stephen Breyer, a native San Franciscan and then a professor at Harvard Law School, also took notice of PSA's success and the early CAB reform efforts.<sup>26</sup> Breyer was then hired by Senator Edward Kennedy, chairman of the Subcommittee on Administrative Practice and Procedures of the Senate Judiciary Committee, to investigate the CAB. The subcommittee produced a scathing report of CAB's practices that was published in 1975. As Breyer later wrote, “The investigation produced strong evidence that the Board itself maintained unnecessarily high fares, prevented—sometimes unlawfully—new low-fare airlines from entering the industry, and tried to stop service, as well as price, competition.”<sup>27</sup>

Following the election of President Jimmy Carter in 1976, Cornell University economist Alfred Kahn, also a critic of CAB's cartel, was appointed to chair the CAB. Kahn, widely

<sup>23</sup> Michael Derchin, “Fly the Friendly Skies of Stephen Breyer,” *The Wall Street Journal*, 10 Feb. 2022.

<sup>24</sup> Stephen G. Breyer and Leonard Stein, “Airline Deregulation: The Anatomy of Reform,” *Instead of Regulation: Alternatives to Federal Regulatory Agencies*, ed. Robert W. Poole, Jr. (Lexington, Mass.: Lexington Books (D.C. Heath & Co.), 1982). 1–41.

<sup>25</sup> *Ibid.* 23–24.

<sup>26</sup> Derchin, “Fly the Friendly Skies of Stephen Breyer.”

<sup>27</sup> Breyer, “Antitrust, Deregulation, and the Newly Liberated Marketplace,” *California Law Review* 75, May 1987. 1009, fn. 10.

known as the “father of airline deregulation,” initiated a series of pro-competitive regulatory reforms upon becoming CAB chairman.<sup>28</sup> Kahn then led the Carter administration’s role in developing comprehensive airline deregulation legislation. Most carriers opposed deregulation at the time, but supporters of airline deregulation assembled a strange bedfellows coalition that brought together individuals, advocacy groups, and businesses as varied as Ralph Nader, the American Conservative Union, American Association of Retired Persons (AARP), National Association of Manufacturers, and Sears Roebuck.<sup>29</sup>

These efforts in the legislative and executive branches culminated in the enactment of the Airline Deregulation Act of 1978, which eliminated most economic regulation of the airline industry and ultimately abolished the CAB.<sup>30</sup> The key regulatory authorities that for four decades had allowed the CAB to fix prices, set routes, and prohibit entry by new competitors were phased out in favor of a “maximum reliance on competitive market forces.”<sup>31</sup> The few remaining CAB powers, most notably those related to consumer protection, were transferred to the Office of the Secretary of Transportation upon termination of the CAB in 1985.

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<sup>28</sup> Alfred E. Kahn, “Applications of Economics to an Imperfect World,” *American Economic Review* 69, May 1979. 1–13.

<sup>29</sup> Con Hitchcock, “Book Review: Deregulating the Airlines,” *The Cato Journal* 5, Fall 1985. 671–674. <https://www.cato.org/sites/cato.org/files/serials/files/cato-journal/1985/11/cj5n2-20.pdf>.

<sup>30</sup> Airline Deregulation Act of 1978, Pub. L. 95–504, 92 Stat. 1705 (24 Oct. 1978).

<sup>31</sup> *Ibid.* § 3.

## PART 3

# RESULTS OF AIRLINE DEREGULATION

Airline deregulation in the U.S. impacted carriers, travelers, and the broader economy in many ways. The net benefits have been enormous, with travelers in the U.S. enjoying far lower inflation-adjusted airfares and more frequent service to the destinations they wish to go, allowing the average individual, rather than just the wealthy, to access air transportation. Carrier operations are also much more efficient due to the resulting price and route competition that incentivized effective cost management and wise investment decisions. However, a national policy focused on airline competition rather than airline protectionism reduced the financial stability of incumbent U.S. carriers, most of which are now defunct.

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The initial years following airline deregulation saw many new interstate carrier entrants, most of which adopted a low-cost business model similar to what PSA and Southwest Airlines had done as intrastate carriers in California and Texas. Many of these new low-cost

carriers offered high-frequency service at prices that were 40% to 70% below the fares of the incumbent legacy trunk carriers.<sup>32</sup> The legacy carriers then responded by lowering prices and adopting cost structures like those of the new entrants.<sup>33</sup>

Aggressive price competition continues to broadly characterize the U.S. airline industry, where low-cost and now ultra-low-cost carriers put most of the downward pressure on airfares.<sup>34</sup> In 2022, inflation-adjusted average airfares were 47% lower than they were in 1978.<sup>35</sup> While lower fuel prices and improved technology explain some of this reduction, economists have attributed most of the decline in average prices since 1978 to improvements enabled by airline deregulation.<sup>36</sup>



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More recently, ultra-low-cost carriers such as Frontier Airlines and Spirit Airlines extended price competition by unbundling checked baggage and seat selection from base airfares and began charging à la carte fees for those ancillary services.<sup>37</sup> These practices were soon mimicked by legacy network carriers. This has led to criticism that declines in airlines' base fares misrepresent consumer gains because travelers must pay for services that were

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<sup>32</sup> Elizabeth E. Bailey, David R. Graham, and Daniel P. Kaplan, *Deregulating the Airlines* (Cambridge, Mass.: The MIT Press, 1985). 62.

<sup>33</sup> *Ibid.*

<sup>34</sup> Alexander R. Bachwich and Michael D. Wittman, "The emergence and effects of the ultra-low cost carrier (ULCC) business model in the U.S. airline industry," *Journal of Air Transport Management* 62, July 2017. 155–164.

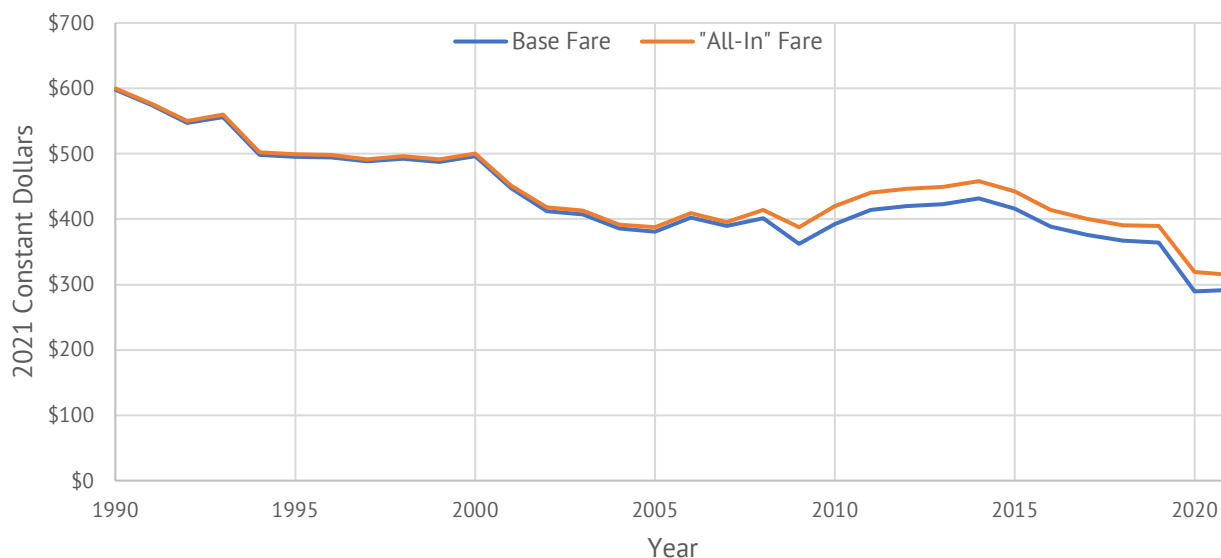
<sup>35</sup> Derchin, "Fly the Friendly Skies of Stephen Breyer." Bureau of Transportation Statistics, "Annual U.S. Domestic Average Itinerary Fare in Current and Constant Dollars," *Bts.gov*, Bureau of Transportation Statistics. <https://www.bts.gov/content/annual-us-domestic-average-itinerary-fare-current-and-constant-dollars>.

<sup>36</sup> Steven A. Morrison and Clifford Winston, "The Fare Skies: Air Transportation and Middle America," *The Brookings Review*, Fall 1997. <https://www.brookings.edu/articles/the-fare-skies-air-transportation-and-middle-america/>.

<sup>37</sup> Laurie A. Garrow, Susan Hotle, and Stacey Mumbower, "Assessment of product debundling trends in the US airline industry: Customer service and public policy implications," *Transportation Research Part A: Policy and Practice* 46, Feb. 2012. 255–268.

previously included with the purchase of tickets. However, examining “all-in” fare data (base fares plus baggage and ticket change fees) since 1990 shows a similar downward trend in prices, which is shown in Figure 1.

**FIGURE 1: AVERAGE DOMESTIC BASE AND “ALL-IN” ROUND-TRIP AIRFARES, 1990–2021**



Source: Airlines for America, “Average Domestic Airfare Time Series,” last updated 19 Nov. 2022. Compiled from data collected by the U.S. Department of Transportation’s Passenger Airline Origin and Destination Survey, and Form 41 Survey of U.S. Carriers.

*The additional routes offered by new carriers also spurred route network redesigns by legacy trunk carriers.*

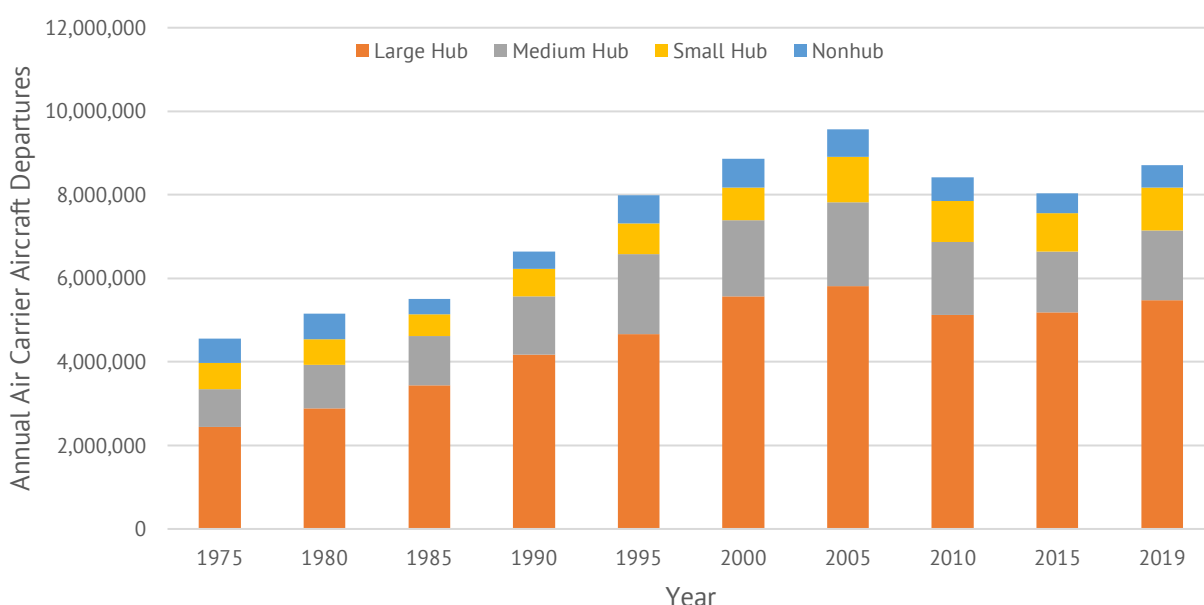
The additional routes offered by new carriers also spurred route network redesigns by legacy trunk carriers. Much of the period prior to deregulation was characterized by a system whereby trunk carriers operated long- and medium-haul linear interstate routes that were fed by local service carriers.<sup>38</sup> Because of the CAB’s rigid route allocations and restrictions on entry, trunk carriers were interdependent on one another, leading to approximately one in four passengers interlining between carriers to complete their journeys.<sup>39</sup>

<sup>38</sup> Williams, *The Airline Industry and the Impact of Deregulation*. 13.

<sup>39</sup> Ibid.

Immediately before deregulation, trunk carriers began developing hub-and-spoke networks, whereby traffic was funneled to large airport hubs and then distributed to the network of smaller spoke airports. This allowed more passengers to complete their journey on a single network carrier, which customers preferred, rather than interlining between carriers. Deregulation greatly accelerated the trend toward hub-and-spoke networks by the legacy trunk carriers, which viewed single-carrier service as a competitive advantage to differentiate their offerings from cheaper new entrants with smaller networks.<sup>40</sup>

**FIGURE 2: PERFORMED ANNUAL AIR CARRIER DEPARTURES BY AIRPORT CLASSIFICATION, 1975–2019**



Source: Bureau of Transportation Statistics, *National Transportation Statistics 2021*, Table 1-37, Nov. 2021.

Deregulation allowed carriers to add and reduce service to match consumer demand. One consequence is that air traffic grew much more rapidly at large hub airports in the years that followed. Total air carrier aircraft departures at all commercial service airports increased by 70% between 1975 and 2019, but that increase was mostly driven by the 125% increase in departures at large hubs.<sup>41</sup> Figure 2 displays performed annual air carrier aircraft departures by airport classification in five-year increments from 1975 to the

<sup>40</sup> Morrison and Winston, *The Economic Effects of Airline Deregulation* (Washington: The Brookings Institution, 1986). 5–10.

<sup>41</sup> Bureau of Transportation Statistics, *National Transportation Statistics 2021*, Table 1-37, Nov. 2021. <https://www.bts.dot.gov/content/us-air-carrier-aircraft-departures-enplaned-revenue-passengers-and-enplaned-revenue-tons>.

present.<sup>42</sup> While this has meant service cuts to some small communities with low demand, it has allowed carriers to add routes and increase service frequency to destinations that their customers prefer.



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*Despite allegations that recent airline mergers have harmed consumers through reduced competition, evidence suggests that consumers have on net benefited from increased network density enabled by past carrier mergers.*

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As the airline industry evolved in the post-deregulation marketplace, many trunk carriers went bankrupt and were consolidated into a smaller number of large legacy network carriers. In 1978, there were 11 trunk carriers in operation, which accounted for 100% of the scheduled interstate air travel market.<sup>43</sup> Today, the remnants of the pre-deregulation trunk carriers have consolidated into three legacy network carriers—American Airlines, Delta Air Lines, and United Airlines—that now account for 50.1% of the domestic market as measured by revenue passenger-miles (regional carriers operating under codeshare agreements with American, Delta, and United serve a small share of the remaining total).<sup>44</sup> Low- and ultra-low-cost carriers that would have been prohibited under CAB regulations now service the remaining market. Despite allegations that recent airline mergers have harmed consumers through reduced competition, evidence suggests that consumers have on net benefited from increased network density enabled by past carrier mergers.<sup>45</sup>

A key element of low- and ultra-low-cost carrier business models is maximizing the use of aircraft capacity. The average annual load factors of trunk carriers—passenger-miles of travel as a proportion of available seat-miles—had been generally declining for two decades before reaching their nadir of 48% in 1971.<sup>46</sup> Following deregulation of pricing and

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<sup>42</sup> This chart substitutes 2019 departures for 2020 departures due to the COVID-19 pandemic's generation of extremely atypical short-run travel patterns (see Figure 3).

<sup>43</sup> Williams, *The Airline Industry and the Impact of Deregulation*. 14. The trunk carriers operating in 1978 were American, Braniff, Continental, Delta, Eastern, National, Northwest, Pan American, TWA, United, and Western.

<sup>44</sup> Bureau of Transportation Statistics, "Airline Domestic Market Share November 2021–October 2022," *Transtats.bts.gov*, TranStats. <https://www.transtats.bts.gov>.

<sup>45</sup> Vikrant Vaze, Tian Luo, and Reed Harder, "Impacts of airline mergers on passenger welfare," *Transportation Research Part E: Logistics and Transportation Review* 101, May 2017. 130–154.

<sup>46</sup> Bailey et al., *Deregulating the Airlines*. 19.

routing, as well as new cost-focused competition, industry-wide load factors rose above 60% by the early 1980s.<sup>47</sup> By 2019, average load factors were at 84%.<sup>48</sup> The COVID-19 pandemic brought monthly average load factors to their lowest level of 17% in March 2020, but they had rebounded to 84% by July 2022.<sup>49</sup>

High load factors indicate more efficient use of available capacity and benefit airlines financially by spreading their aircraft operating costs over more paying customers. In addition to generating these private benefits, higher load factors similarly generate social benefits by reducing per passenger CO<sub>2</sub> emissions.



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The changes to the airline industry that followed deregulation have allowed many more people to travel. Between 1978 and 2019, the annual number of enplaned passengers more than tripled, growing five times faster than population growth.<sup>50</sup> Figure 3 displays annual passenger enplanements on scheduled airlines from 1950 through 2021. By 2017, 88% of Americans had flown in their lifetimes and 48% had flown in the previous year, up from 63% and 25%, respectively, in 1977.<sup>51</sup>

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<sup>47</sup> Ibid.

<sup>48</sup> Bureau of Transportation Statistics, “T-100 Domestic Segment (All Carriers),” *Transtats.bts.gov*, TranStats, July 2022. [https://www.transtats.bts.gov/Fields.asp?gnoyr\\_VQ=GEE](https://www.transtats.bts.gov/Fields.asp?gnoyr_VQ=GEE).

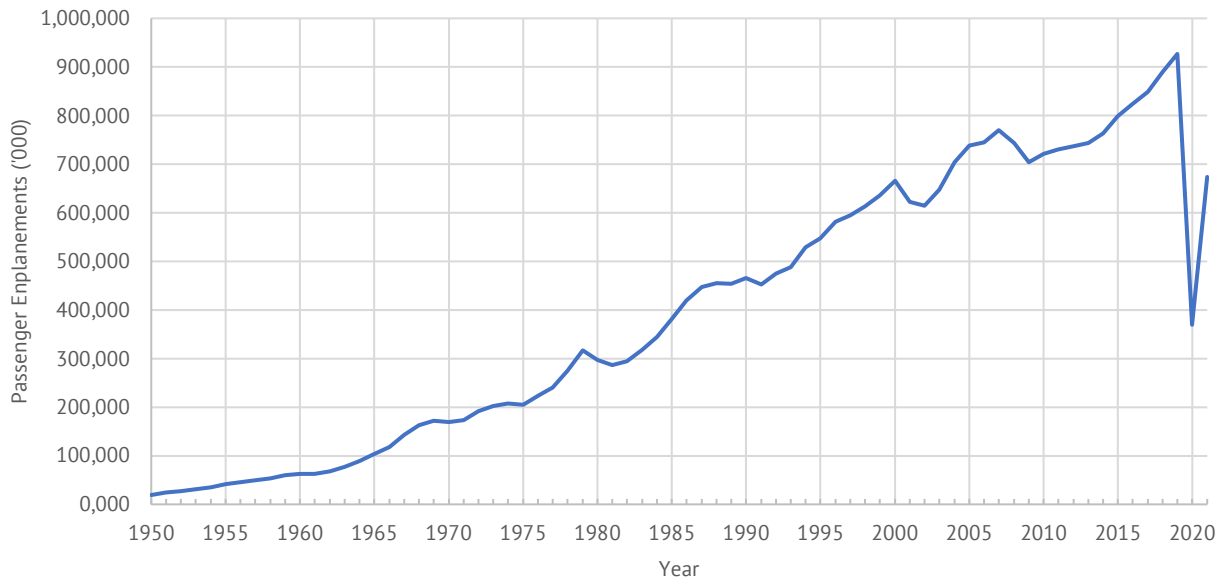
<sup>49</sup> Ibid.

<sup>50</sup> “U.S. Airline Traffic and Capacity,” *Airlines.org*, Airlines for America, 10 Mar. 2022. <https://www.airlines.org/dataset/annual-results-u-s-airlines-2/>. “National Population Estimates,” *Census.gov*, U.S. Census Bureau. <https://www2.census.gov/programs-surveys/popest/tables/>.

<sup>51</sup> John P. Heimlich and Chris Jackson, “Air Travelers in America: Findings of a Survey Conducted by Ipsos,” *Airlines.org*, Airlines for America, 20 Feb. 2018. 3. <https://airlines.org/wp-content/uploads/2018/02/A4A-AirTravelSurvey-20Feb2018-FINAL.pdf>.



**FIGURE 3: U.S. SCHEDULED AIRLINE PASSENGER ENPLANEMENTS, 1950–2021**



Source: Airlines for America, “U.S. Airline Traffic and Capacity,” last updated 10 March 2022.

## PART 4

# FUTURE REFORMS TO ENHANCE AIRLINE COMPETITION

Thanks to the reforms enabled by the Airline Deregulation Act, competition has democratized air travel so that consumers enjoy more frequent service to their preferred destinations at much lower prices. However, additional reforms could build on this success by further enhancing airline competition.

### 4.1

## AVIATION CONSUMER PROTECTION

What is now known as the aviation consumer protection authority—the term the U.S. Department of Transportation uses for its statutory authority to police unfair or deceptive practices in the aviation industry—long predates the department itself.<sup>52</sup> The authority was created as Section 411 of the Civil Aeronautics Act of 1938 and modeled on the “unfair or deceptive acts or practices” language included months before in the Federal Trade Commission Act of 1938, which covered most other commercial contexts.<sup>53</sup> In 1958, Congress expanded Section 411 to cover not only air transportation itself but the sale of air transportation by ticket agents.<sup>54</sup>

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<sup>52</sup> 49 U.S.C. § 41712.

<sup>53</sup> Federal Trade Commission Act, Pub. L. 75–447, 52 Stat. 111 (21 Mar. 1938).

<sup>54</sup> Federal Aviation Act of 1958. § 411.

When Congress passed the Airline Deregulation Act in 1978, it eliminated most economic regulation in the aviation sector and wound down the CAB. When the CAB was terminated in 1985, Section 411 consumer protection authority was transferred to the Department of Transportation's Office of the Secretary. In 1994, Congress reorganized the Title 49 Transportation Code, and Section 411 was recodified as Section 41712.<sup>55</sup>



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While reorganizing the Transportation Code, Congress was also working to modernize authorities held by the Federal Trade Commission (FTC).<sup>56</sup> The FTC Act amendments of 1994, among other things, codified longstanding internal FTC policy in dealing with claims of unfair or deceptive acts or practices that were synthesized for Congress in the FTC's December 1980 "Policy Statement on Unfairness."<sup>57</sup> The FTC's approach, as affirmed by Congress, requires that specific elements be met to prove unfairness allegations, one of which necessitates careful benefit/cost analysis.

Specifically, the FTC Act amendments added three standards of proof to the FTC's broad statutory prohibition on unfair business practices. For conduct to qualify as legally unfair, it must be (1) "likely to cause substantial injury to consumers," (2) not "reasonably avoidable by consumers themselves," and (3) "not outweighed by countervailing benefits to consumers or to competition."<sup>58</sup>

It is worth noting that these reforms were made at a time when Democrats controlled both chambers of Congress and the White House, and they earned bipartisan support. Similar language was included in the Dodd-Frank Act of 2010, covering the enforcement

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<sup>55</sup> An Act to revise, codify, and enact without substantive change certain general and permanent laws, related to transportation, as subtitles II, III, and V-X of title 49, United States Code, "Transportation", and to make other technical improvements [H.R. 1758] in the Code, Pub. L. 103-272, 108 Stat. 745 (5 July 1994).

<sup>56</sup> Federal Trade Commission Act Amendments of 1994, Pub. L. 103-312, 108 Stat. 1691 (26 Aug. 1994).

<sup>57</sup> "FTC Policy Statement on Unfairness," Federal Trade Commission, 17 Dec. 1980. <https://www.ftc.gov/legal-library/browse/ftc-policy-statement-unfairness>.

<sup>58</sup> 15 U.S.C. § 45(n).

responsibilities of the Consumer Financial Protection Bureau, also when the federal government was fully controlled by Democrats.<sup>59</sup>

While bipartisan recognition of the problem of ill-defined “unfairness” exists in virtually every other federal consumer protection context, Congress has so far not moved to reform the Department of Transportation’s similar Section 41712 aviation consumer protection authority. This failure to act has enabled regulators in recent years to engage in a variety of re-regulatory activities, including new restrictions on airfare advertising that prohibit government taxes and fees from being “displayed prominently,”<sup>60</sup> outlawing true nonrefundable ticketing that puts upward price pressure on airfares due to the forced risk transfer from consumers to air carriers,<sup>61</sup> and an inflexible tarmac delay rule suspected of increasing flight cancellations—particularly at smaller and more-rural airports.<sup>62</sup>

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*Despite congressional inaction, there has been some official interest in modernizing the Department of Transportation’s Section 41712 powers.*

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Despite congressional inaction, there has been some official interest in modernizing the Department of Transportation’s Section 41712 powers. At the International Air Transport Association Legal Symposium in New York in February 2020, then-Transportation Secretary Elaine Chao announced that the Department of Transportation would propose a rule to update policies and procedures for its aviation consumer protection authority.<sup>63</sup> The final rule on defining unfair or deceptive practices was published in December 2020.<sup>64</sup>

<sup>59</sup> 12 U.S.C. § 5531(c).

<sup>60</sup> 14 C.F.R. § 399.84(a).

<sup>61</sup> 14 C.F.R. § 259.5(b)(4).

<sup>62</sup> 14 C.F.R. § 259.4. Hideki Fukui and Koki Nagata, “Flight cancellation as a reaction to the tarmac delay rule: An unintended consequence of enhanced passenger protection,” *Economics of Transportation* 3, Mar. 2014. 29–44. Susan Fleming, “Airline Passenger Protections: More Data and Analysis Needed to Understand Effects of Flight Delays,” Government Accountability Office, GAO-11-733, 7 Sep. 2011. <https://www.gao.gov/assets/gao-11-733.pdf>.

<sup>63</sup> Remarks of U.S. Secretary of Transportation Elaine L. Chao, International Air Transportation Association Legal Symposium, 20 Nov. 2020. <https://www.transportation.gov/briefing-room/international-air-transport-association-iata-legal-symposium>.

<sup>64</sup> Defining Unfair or Deceptive Practices, *Final Rule*, Office of the Secretary of Transportation, Docket No. DOT-OST-2019-0182, 85 Fed. Reg. 78,707 (7 Dec. 2020).

This rule added FTC-style standards of proof to Section 41712 enforcement and rulemaking procedures, while also codifying internal agency practices for allowing alleged violators to present evidence defending themselves against possible enforcement or rulemaking activity derived from the aviation consumer protection authority. While this would have improved airline and ticket agents' defensive positions, it also would have required the Department of Transportation to clearly explain itself along the way and give consumers better insight into how decisions that affect them are made. In this way, the FTC-style standards of proof in unfairness claims are best understood as promoting regulatory quality and consistency in enforcement.

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*... the FTC-style standards of proof in unfairness claims are best understood as promoting regulatory quality and consistency in enforcement.*

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Following the transition between administrations, the Biden administration quickly moved to reverse these reforms. In his July 2021 Executive Order 14036, President Biden ordered the Department of Transportation to amend the new FTC-style definitions of “unfair” and “deceptive” for Section 41712.<sup>65</sup> In August 2022, the Department of Transportation published a guidance document suggesting it will again take an expansive view of how its Section 41712 powers are defined and limited.<sup>66</sup> This will likely open the door for future discretionary rulemaking guided more by political whims than careful empirical analysis.

Fortunately, Congress can help counteract the Department of Transportation's anti-competitive re-regulatory efforts by bringing the aviation consumer protection authority into alignment with other federal consumer protection authorities and investigating the Office of the Secretary of Transportation's recent conduct. At a minimum, it should adopt the FTC-style unfairness definition. This can be accomplished by adding a new subsection (d) at 49 U.S.C. § 41712 to read:

(d) Unfairness defined; standard of proof

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<sup>65</sup> Exec. Order No. 14036 (9 July 2021).

<sup>66</sup> Guidance Regarding Interpretation of Unfair and Deceptive Practices, *Guidance Document*, Office of the Secretary of Transportation, Docket No. DOT-OST-2019-0182, 87 Fed. Reg. 52,677 (29 Aug. 2022).

The Secretary shall have no authority under this section to declare unlawful a practice or method of competition on the grounds that such practice or method of competition is unfair unless the practice or method of competition causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.

## 4.2

## AIRPORT ACCESS

Airport access for new airline entrants is often constrained at the largest U.S. airports due to outdated policies that limit financing options for new gates and inefficiently allocate carrier takeoff and landing slots at the most congested airports. Modernizing policies that unduly restrict airport access would enhance airline competition and benefit consumers in the form of more choices at lower prices.

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The most significant policy impacting gate access is the stagnating passenger facility charge (PFC).<sup>67</sup> The PFC is a congressionally authorized, federally regulated, local airport user fee.<sup>68</sup> It exists alongside the federal Airport Improvement Program (AIP), a grant program funded through the Airport and Airways Trust Fund by a variety of aviation taxes.<sup>69</sup> The PFC and AIP combined have historically accounted for roughly half of the total airport funding available for capital projects, according to the Government Accountability Office.<sup>70</sup>

<sup>67</sup> Marc Scribner, “Modernizing the Passenger Facility Charge for Aviation Recovery,” *Reason Foundation Policy Brief*, Sep. 2022. <https://reason.org/wp-content/uploads/modernizing-passenger-facility-charge.pdf>.

<sup>68</sup> 49 U.S.C. § 40117.

<sup>69</sup> Federal Aviation Administration, “Current Aviation Excise Tax Structure,” *FAA.gov*, FAA website, 19 Mar. 2019. [https://www.faa.gov/about/budget/aatf/media/Excise\\_Tax\\_Rate\\_Structure\\_2018.pdf](https://www.faa.gov/about/budget/aatf/media/Excise_Tax_Rate_Structure_2018.pdf).

<sup>70</sup> Statement for the Record to the Subcommittee on Aviation Operations, Safety, and Security, Committee on Commerce, Science, and Transportation, U.S. Senate of Gerald L. Dillingham, Ph.D., Director, Physical Infrastructure Issues, Government Accountability Office (23 Mar. 2017). 7. <https://www.gao.gov/assets/690/683640.pdf>. Note that interest payments are subtracted from PFC and airport-generated revenue used to finance, rather than fund, projects in order to make a like-for-like comparison with state and federal grant funding sources.

The federal PFC cap was last raised by Congress in 2000.<sup>71</sup> Under current law, public airports in the United States can charge a maximum PFC of \$4.50 per boarding for the first two flight segments of a trip, with PFC collections per passenger being capped at \$9 per one-way and \$18 per round-trip.<sup>72</sup> Thanks to inflation, the passenger facility charge has seen its purchasing power plummet by approximately half, negatively impacting airports' ability to address their growing list of needed improvements.

Due to restrictions on use, Airport Improvement Program funds tend to support airside projects such as runways, taxiways, aprons, and noise abatement.<sup>73</sup> In contrast, PFC revenue has fewer restrictions and tends to support landside projects such as passenger terminals. Table 1 presents data collected by the Congressional Research Service on the distribution of PFC approvals and AIP grants. Importantly, unlike AIP funds, PFC funds can be used to service debt, which allows airports to long-term finance rather than merely fund improvements. These differences in flexibility have led to a strong preference for the PFC over AIP at commercial airports with sizable passenger volumes.

**TABLE 1: DISTRIBUTION OF PFC APPROVALS AND AIP GRANTS, FY 2018**

Type of Project	Percentage of PFC	Percentage of AIP
Airside	9.1%	67.4%
Landside	48.1%	12.8%
Noise	0.3%	4.5%
Roads/Access	11.7%	1.0%
Interest on bonds	30.9%	n/a
Unclassified, state block grants, misc.	n/a	14.2%
Total	100.1%	99.9%

Source: Rachel Y. Tang, "Financing Airport Improvements," Congressional Research Service (2019). Percentages do not sum to 100% because of rounding.

The flexibility of the PFC vis-à-vis AIP also has consequences for airport productivity. Recent empirical research has found that increasing airport reliance on PFC revenue while decreasing airport reliance on AIP revenue increases airport efficiency.<sup>74</sup> This enhanced

<sup>71</sup> Wendell H. Ford Aviation Investment and Reform Act for the 21<sup>st</sup> Century, Pub. L. 106–181, 114 Stat. 61 (5 Apr. 2000). § 105.

<sup>72</sup> 49 U.S.C. §§ 40117(b)(4) & 40117(e)(2)(A).

<sup>73</sup> Rachel Y. Tang, "Financing Airport Improvements," Congressional Research Service, 15 Mar. 2019. 15. <https://crsreports.congress.gov/product/pdf/R/R43327>.

<sup>74</sup> Bo Zou, Nabin Kafle, Young-Tae Chang, and Kevin Park, "US airport financial reform and its implications for airport efficiency: An exploratory investigation," *Journal of Air Transport Management* 47, Aug. 2015. 66–78. Young-Tae Chang, Hyosoo (Kevin) Park, Bo Zou, and Nabin Kafle, "Passenger facility charge vs.

productivity is thought by researchers to be the result of the PFC being available to finance a wider array of airport projects than AIP funding, which allows airports to better prioritize and undertake projects with greater returns on investment. The implication is that leaving the PFC cap at the current \$4.50 while increasing AIP funding would have a negative airport efficiency impact.

Some opponents of PFC reform have argued that airports should rely more on non-aeronautical revenue as a substitute for raising or eliminating the PFC cap.<sup>75</sup> The problem is these non-aeronautical revenue sources are inherently riskier than PFC revenue. This is because PFC revenue is tied solely to enplaned passenger volumes while non-aeronautical revenue depends on travelers purchasing optional goods and services at airports that are not directly linked to air travel itself. Thus, the risk to and predictability of various airport revenue sources is fundamentally about what is avoidable and unavoidable by individual consumers. Revenue data from the last few years at the height of the COVID-19 pandemic illustrate this problem and are presented in Table 2.

**TABLE 2: SELECT U.S. COMMERCIAL SERVICE AIRPORT REVENUE SOURCES, 2019–2021 (\$ BILLIONS)**

Revenue Source	2019	2020	2021	2019-2021 Change
Passenger Airline Aeronautical Revenue	\$10.91	\$9.44	\$9.43	-13.57%
Non-Passenger Aeronautical Revenue	\$2.47	\$2.44	\$2.51	1.62%
Non-Aeronautical Revenue	\$11.38	\$7.89	\$7.24	-36.38%
• Land and non-terminal lease revenue	\$0.87	\$0.82	\$0.83	-4.60%
• Food and beverage	\$0.95	\$0.60	\$0.46	-51.58%
• Retail stores and duty free	\$0.87	\$0.54	\$0.37	-57.47%
• Terminal services and other	\$0.52	\$0.41	\$0.33	-36.54%
• Rental cars	\$1.98	\$1.47	\$1.58	-20.20%
• Parking and ground transportation	\$4.85	\$2.98	\$2.69	-44.54%
• Hotel	\$0.32	\$0.16	\$0.19	-40.63%
• Other non-aeronautical revenue	\$1.02	\$0.91	\$0.75	-26.47%
Passenger Facility Charges	\$3.64	\$2.10	\$2.16	-40.66%
Grant Receipts	\$2.33	\$5.47	\$6.74	189.27%

Source: Federal Aviation Administration, Certification Activity Tracking System, Form FAA-5100-127 Report data.

airport improvement program funds: A dynamic network DEA analysis for U.S. airport financing,” *Transportation Research Part E: Logistics and Transportation Review* 88, Apr. 2016. 76–93.

<sup>75</sup> John Breyault, “Congress should abandon plan that would burden air travelers with fee hike,” *Thehill.com*, The Hill, 6 Dec. 2019. <https://thehill.com/blogs/congress-blog/politics/473422-congress-should-abandon-plan-that-would-burden-air-travelers/>.



The COVID-19 pandemic had varying impacts on non-aeronautical revenue sources. Between 2019 and 2021, the declines in PFC revenue and parking revenue were similar to the 44.75% drop in enplanements at commercial service airports.<sup>76</sup> Restaurant and retail revenue declines were steeper than PFC and parking revenue declines, likely reflecting less time spent at the airport by those who did travel by air, concerns about crowding and ventilation, and masking. Rental car revenue fared better, with less-severe declines likely the result of a shift away from shared ground transportation (ride-hail, taxi, mass transit) and new demand from some arriving passengers for rental cars for trips that would formerly have been completed by a connecting flight.

While PFC revenue, like non-aeronautical operating revenue, depends on the demand for passenger airline service, it does not face additional risks from ground transportation modal substitution. As air travel recovers in general, so too should PFC revenue. In contrast, parking and rental car revenue are likely to be less reliable due to renewed competition from ride-hailing, which is likely to result in a net reduction in ground transportation airport revenue.<sup>77</sup>

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*As air travel recovers in general, so too should PFC revenue.*

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Aside from its fiscal purpose, the passenger facility charge was also specifically designed to enhance airline competition and promote lower airfares.<sup>78</sup> In the 1950s and 1960s, in exchange for airlines committing to rents and other fees to service existing airport debt and other financing arrangements, many airports granted incumbent airlines long-term exclusive-use gate leases. This led to a paucity of gates being available for new carrier entrants.<sup>79</sup> Economists have estimated that annual airfares are \$5.81 billion higher in 2019 dollars than they would be with adequate gate access to support new carrier entrants at

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<sup>76</sup> Federal Aviation Administration, Certification Activity Tracking System, Form FAA-5100-127 Report data. Note that reporting enplanement statistics to the FAA is optional for airports having fewer than 25,000 enplanements in the preceding calendar year.

<sup>77</sup> Peter Mandle and Stephanie Box, “Transportation Network Companies: Challenges and Opportunities for Airport Operators,” *Airport Cooperative Research Program Synthesis* 84, National Academies of Sciences, Engineering, and Medicine (2017). 5, 28–33.

<sup>78</sup> Thomas Gale Moore, “Good Enough for Government Work: Why Moving America Is Unsatisfactory,” *Regulation* 13 (Summer 1990). 15.

<sup>79</sup> Morrison and Winston, “Delayed! U.S. Aviation Infrastructure Policy at a Crossroads,” *Aviation Infrastructure Performance: A Study in Comparative Political Economy*, eds. Clifford Winston and Gines de Rus (Washington: Brookings Institution Press, 2008). 20–22.

large and mid-sized airports.<sup>80</sup> This figure dwarfs the \$3.51 billion in nationwide PFC collections in 2019.<sup>81</sup>

Further expanding the passenger facility charge’s purchasing power by eliminating the statutory cap and focusing on improving airline competition—especially through expanding common-use gates available to new carrier entrants—could result in substantial airfare savings for consumers.

In addition to airport access problems arising from federal limitations on airport financing, outdated airport congestion management policies also restrain airline competition. In response to growing congestion at several of the busiest airports, the FAA created a system of takeoff-and-landing slot controls in 1969.<sup>82</sup> This command-and-control rationing regime allocates these time slots in a manner that heavily favors incumbent carriers who possess “historic slots” based on past use.<sup>83</sup>



*An even more market-oriented mechanism to mitigate congestion and promote airline competition would be to replace slots with runway congestion pricing.*



This incumbency advantage incentivizes slot-holding carriers to plan operations around maintaining slots and excluding would-be competitors. In the recent merger between American Airlines and US Airways, the combined carrier was required to divest some of its slots at capacity-constrained Reagan National Airport and LaGuardia Airport by the Department of Justice.<sup>84</sup> The inefficiency of slot administration was also highlighted during

<sup>80</sup> Ibid. 22. \$4.4 billion in January 2005 dollars adjusted by Consumer Price Index to January 2019 dollars via Bureau of Labor Statistics’ CPI Inflation Calculator, <https://data.bls.gov/cgi-bin/cpicalc.pl>.

<sup>81</sup> Federal Aviation Administration, Certification Activity Tracking System, Form FAA-5100-127 Report data.

<sup>82</sup> Robert W. Poole, Jr. and Viggo Butler, “Airline Deregulation: The Unfinished Revolution,” Reason Foundation Policy Study, Mar. 1999. <https://reason.org/wp-content/uploads/files/2ad199e8224f814ae006d35fbd9b2924.pdf>.

<sup>83</sup> Federal Aviation Administration, “Slot Administration - Slot Allocation Process,” *Faa.gov*, FAA website. [https://www.faa.gov/about/office\\_org/headquarters\\_offices/ato/service\\_units/systemops/perf\\_analysis/slot\\_administration/slot\\_allocation\\_process](https://www.faa.gov/about/office_org/headquarters_offices/ato/service_units/systemops/perf_analysis/slot_administration/slot_allocation_process) (19 Jan. 2023).

<sup>84</sup> Press Release, “Justice Department Requires US Airways and American Airlines to Divest Facilities at Seven Key Airports to Enhance System-wide Competition and Settle Merger Challenge,” *Justice.gov*, Department of Justice website, 12 Nov. 2013. <https://www.justice.gov/opa/pr/justice-department-requires-us-airways-and-american-airlines-divest-facilities-seven-key>.

the COVID-19 pandemic, when the FAA suspended minimum slot usage requirements and in effect locked in pre-pandemic allocations—thereby perpetuating existing airport access problems.<sup>85</sup>

Economists have long proposed more-efficient ways to allocate scarce airport capacity at the most congested U.S. airports. These alternatives vary but would generally require carriers to pay for access, in contrast to the status quo of unpriced historic slots that are allocated by agency fiat. Some have suggested slot auctions as a superior method of allocation.<sup>86</sup> An even more market-oriented mechanism to mitigate congestion and promote airline competition would be to replace slots with runway congestion pricing.<sup>87</sup> At the very least, the Department of Transportation should conduct a comprehensive review of the FAA’s status quo slot policies and compare them with the international best practices contained in the Worldwide Airport Slot Guidelines jointly published by Airports Council International, International Air Transport Association, and Worldwide Airport Coordinators Group.<sup>88</sup>

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*Some have suggested slot auctions as a superior method of allocation.*

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## 4.3

## CABOTAGE

Despite the Airline Deregulation Act’s success in fostering competition in the domestic airline market and improving consumer welfare, regulatory barriers to international airline competition remain in place. Most notably, the longstanding prohibition on cabotage—the service of domestic routes by foreign air carriers—continues to restrict competition and prevent the airline industry from reaching its full potential in a global marketplace. The European experience with airline cabotage suggests deregulation targeting these

<sup>85</sup> Orders Limiting Operations at John F. Kennedy International Airport and New York LaGuardia Airport; High Density Traffic Airports Rule at Ronald Reagan Washington National Airport, *Notice of Limited Waiver of the Minimum Slot Usage Requirement*, 85 Fed. Reg. 15,018 (16 Mar. 2020).

<sup>86</sup> S.J. Rassenti, V.L. Smith, and R.I. Bulfin, “A combinatorial auction mechanism for airport time slot allocation,” *The Bell Journal of Economics* 13, Autumn 1982. 402–417.

<sup>87</sup> Robert W. Poole, Jr. and Benjamin Dachis, “Congestion Pricing for the New York Airports: Reducing Delays while Promoting Growth and Competition,” Reason Foundation Policy Study, Dec. 2007. <https://reason.org/wp-content/uploads/files/bec884a9b25a2e4c07228fec28eb1972.pdf>.

<sup>88</sup> *Worldwide Airport Slot Guidelines (WASG), Edition 2* (Montreal: Worldwide Airport Slot Board, 2022).

remaining barriers could enhance airline competition and lower consumer airfares in the U.S.

Since the Air Commerce Act of 1926, the United States has prohibited airline cabotage.<sup>89</sup> This law was designed to protect the nascent air travel industry and was modeled on the Merchant Marine Act of 1920 (commonly known as the Jones Act), which prohibits cabotage in maritime freight transportation.<sup>90</sup>

Unfortunately, as the domestic air travel industry matured, restrictions on foreign carrier participation in domestic civil aviation did not decrease. Under current law,<sup>91</sup> airline cabotage is prohibited unless the secretary of transportation declares an air service emergency and specifically exempts a specific foreign carrier so it can serve a specific route,<sup>92</sup> which has occasionally happened with far-flung Pacific territories after the sole domestic carrier exits the market or severely cuts air service.<sup>93</sup>



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*Two decades following the EU's authorization of cabotage among member states in 1997, comparable airfares in Europe were significantly cheaper than those in the United States, even when considering the significantly higher taxes and fees imposed on EU air travel.*

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In contrast to the U.S.'s rigid stance against airline cabotage, Europe has liberalized its internal air travel marketplace. In the early 1990s, the European Union (EU) began phasing in airline cabotage among member countries as part of its liberalization of civil aviation. In just a couple of years, the EU was seeing positive results. George Mason University transportation economist Kenneth Button noted in a 1998 article, "Since 1993, 80 new airlines have been created while only 60 have been dissolved; 90 to 95 percent of the

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<sup>89</sup> Air Commerce Act of 1926, Pub. L. 69–254, 44 Stat. 568 (20 May 1926).

<sup>90</sup> Merchant Marine Act, 1920, Pub. L. 66–261, 41 Stat. 988 (5 June 1920).

<sup>91</sup> 49 U.S.C. § 41703(c).

<sup>92</sup> 49 U.S.C. § 40109(g).

<sup>93</sup> Notice of Action Taken re: Polynesian Limited, U.S. Department of Transportation, Docket No. OST-2003-16404 (5 Dec. 2003).

passengers are now traveling at fares that are lower in real terms than they were in 1993.”<sup>94</sup>

Two decades following the EU’s authorization of cabotage among member states in 1997, comparable airfares in Europe were significantly cheaper than those in the United States, even when considering the significantly higher taxes and fees imposed on EU air travel.<sup>95</sup> The evidence from Europe and basic economic theory suggests that cabotage can improve service and lower prices. National security concerns that have been expressed about the potential impact of cabotage on the Civil Reserve Air Fleet have been overstated and can be addressed with more targeted measures that do not require forgoing the benefits of market liberalization.<sup>96</sup>

In December 2022, Mexican President Andrés Manuel López Obrador filed a draft bill to authorize cabotage as a means to improve airline service in his country, suggesting there is interest in North America to begin the next phase of airline deregulation.<sup>97</sup> While unilateral authorization of cabotage in the U.S. is politically unlikely, a more realistic approach would be for Congress to amend the current statutory prohibition on airline cabotage to specifically encourage the U.S. to engage in negotiations with foreign countries to adopt reciprocal cabotage authorizations.

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<sup>94</sup> Kenneth J. Button, “Opening U.S. Skies to Global Airline Competition,” Cato Institute Policy Analysis, 24 Nov. 1998. 4. <https://www.cato.org/sites/cato.org/files/pubs/pdf/tpa-005.pdf>.

<sup>95</sup> Rick Noack, “Why are flights so much cheaper in Europe than in the U.S.?” *Washingtonpost.com*, The Washington Post, 12 Oct. 2017. <https://www.washingtonpost.com/news/worldviews/wp/2017/10/12/why-are-flights-so-much-cheaper-in-europe-than-in-the-u-s/>.

<sup>96</sup> Boaz Moselle, James Reitzes, Dorothy Robyn, and John Horn, “The Economic Impact of an EU-US Open Aviation Area,” Prepared for the European Commission by the Brattle Group, Dec. 2002. [https://www.brattle.com/wp-content/uploads/2017/10/6190\\_the\\_economic\\_impact\\_of\\_an\\_eu-us\\_open\\_aviation\\_area\\_moselle\\_et\\_al\\_dec\\_2002.pdf](https://www.brattle.com/wp-content/uploads/2017/10/6190_the_economic_impact_of_an_eu-us_open_aviation_area_moselle_et_al_dec_2002.pdf).

<sup>97</sup> Manuel Romano and Arturo de la Parra, “Mexico’s President Presents Bill to Allow Cabotage Flights,” *Jonesday.com*, Jones Day, Jan. 2023. <https://www.jonesday.com/en/insights/2023/01/mexicos-president-presents-bill-to-allow-cabotage-flights>.

## PART 5

# CONCLUSION

The U.S. experience with airline deregulation shows that eliminating government barriers to competition can generate enormous benefits for consumers. The market liberalization enabled by the Airline Deregulation Act effectively democratized air travel, transforming a luxury service into a conventional mode of transportation for the masses.

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*The U.S. experience with airline deregulation shows that eliminating government barriers to competition can generate enormous benefits for consumers.*

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Despite these undeniable gains to consumer welfare, there is unfinished business for policymakers to address. First, Congress has left a large loophole in deregulation by poorly defining unfair business practices and methods of competition, allowing the Department of Transportation to flout the spirit of the Airline Deregulation Act and gradually chip away at Congress' reforms. Second, airport access limitations due to outdated financing and slot policies deny consumers the benefits of new carrier competition at the busiest airports. Finally, airline deregulation stopped at the border, and consumers could benefit from unleashing international air carrier competition on domestic routes.

Policymakers are facing renewed pressure from misguided activists and special interests to resurrect the failed policies of the past—often in the name of promoting airline competition and consumer welfare. These proposals should be rejected. Instead, Congress should focus on addressing the remaining policy barriers to air carrier competition to usher in a long-awaited new era of airline deregulation and the benefits to consumers that will arise.

# ABOUT THE AUTHOR

**Marc Scribner** is a senior transportation policy analyst at Reason Foundation.

Scribner's work focuses on a variety of public policy issues related to transportation, land use, and urban growth, including infrastructure investment and operations, transportation safety and security, risk and regulation, privatization and public finance, urban redevelopment and property rights, and emerging transportation technologies such as automated road vehicles and unmanned aircraft systems. He frequently advises policymakers on these matters at the federal, state, and local levels.

Scribner has testified before Congress at the invitation of both Democrats and Republicans on issues including highway revenue collection, traffic congestion management, and airport financing. He is a member of the Transportation Research Board's Standing Committee on Emerging Technology Law.

He has appeared on television and radio programs in outlets such as Fox Business Network, National Public Radio, and the Canadian Broadcasting Corporation, and has also written for numerous publications, including *USA Today*, *The Washington Post*, *Wired*, *CNN.com*, *MSNBC.com*, *Forbes*, and *National Review*. And his work has been featured by *The Wall Street Journal*, *New York Times*, *Washington Post*, *Los Angeles Times*, *Scientific American*, *Congressional Quarterly*, *Washington Monthly*, *POLITICO*, CNN, Bloomberg, BBC, C-SPAN, and other print, television, and radio outlets.

Scribner joined Reason Foundation in 2020 after more than a decade at the Competitive Enterprise Institute, where he was a senior fellow in transportation policy. He received his undergraduate degree in economics and philosophy from George Washington University.



