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NATIONAL AIRLINE POLICY

Timothy M. Ravich^{*}

The “innovation” of ancillary fees for carry-on baggage, seat selection, and in-flight amenities, to say nothing of the inefficiency of congestion and delays caused by an old aviation infrastructure, has impaired some of the most important promises of airline deregulation for airline passengers. Meanwhile, airline carriers themselves are concerned about passenger fees they must charge, taxes they must bear, an aging air traffic system in which they must operate, and threats they daily confront in the form of national security risks and competition from state-sponsored foreign airlines. These realities suggest that the time is at hand for a national aviation policy.

This Article is the first to evaluate the legal implications of a proposed national aviation policy. An important part of this discussion involves presentation of recent decisional law—including Northwest, Inc. v. Ginsberg and Spirit Airlines, Inc. v. Dep’t of Transp.—along with a pending federal case attempting to enforce private passenger rights under RICO. These cases, along with pending legislation purportedly aimed at improving the experience of airline passengers, illustrate a deep disconnect between passengers and airlines, on the one hand, and airlines and aviation regulators, on the other hand.

In all, while a national airline policy may be desirable, the industry’s victim narrative advanced in the call for such legislative and regulatory reform is unhelpful. Moreover, the unilateral view that the federal government is both the villain and savior of business realities borne out of deregulation policy deflects and misses an opportunity for airlines themselves to self-

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examine legal and business practices that disappoint and aggravate their customers. In this context, this Article suggests that a national aviation policy is a pro-business initiative more than a pro-customer campaign and invites a multi-lateral approach to reforming national airline service, beginning with the industry and traveling public disabusing themselves of the notion that airline profit is a “dirty word” that should be sacrificed for illusory lower fares

I.	INTRODUCTION	2
II.	THE LAW AND POLICY OF AIRLINE DEREGULATION	4
	A. <i>Statutory Origins of Airline Economics</i>	6
	1. The Civil Aeronautics Acts	6
	2. Federal Aviation Act of 1958	8
	3. Airline Deregulation Act of 1978	9
	B. <i>Decisional Law</i>	12
	1. Airline Consumer Protection under State Tort Law	12
	a. <i>Morales v. Trans World Airlines</i>	12
	b. <i>Spirit Airlines, Inc. v. Dep’t of Transp.</i>	16
	2. Contract Principles Applied to Airline Consumer Protection	21
	a. <i>American Airlines, Inc. v. Wolens</i>	21
	b. <i>Northwest, Inc. v. Ginsberg</i>	27
	C. <i>RICO to the Rescue?</i>	30
III.	ANALYSIS	33
IV.	CONCLUSION	36

I. INTRODUCTION

In the decade following the violence of September 11, 2001, the U.S. airline industry has lost over \$35 billion and nearly a third of its workforce (e.g., 150,000 jobs), due to recession, fuel prices, and industry bankruptcies.¹ Aggravating these business realities is an onerous regulatory regime that diverts nearly twenty percent of a domestic airline ticket in the United States—\$61 of a typical \$300 roundtrip fare—to the federal government to satisfy seventeen different aviation fees and taxes. The airline industry is unlikely to avoid further excises as Congress recently enacted the Bipartisan Budget Act of 2013, increasing

¹ *Why You Should Want a National Airline Policy*, BLUE TALES (Sept. 24, 2013), <http://blog.jetblue.com/index.php/2013/09/24/why-you-should-want-a-national-airline-policy/>.

Transportation Security Administration (“TSA”) fees at an annual cost of over \$1 billion to the airline industry.² And, on July 21, 2014, regulators increased a “September 11th Security Fee,” costing passengers \$5.60 per one-way trip.³ Denouncing these and other facts and figures, the self-described industry trade organization for the leading airlines in the country, Airlines for America (“A4A”), has called for a National Airline Policy.⁴

Designed to spur economic growth and create more high-paying U.S. jobs,⁵ the proposed national airline policy is centered on several priorities: the reduction of aviation taxes, reformation of regulatory burdens on the commercial airline industry, modernization of the national airspace system, enhancement of global competitiveness, and mitigation of jet fuel price volatility.⁶ This Article, the first to evaluate the campaign for a national airline policy in the context of existing statutory and decisional law, agrees with the A4A’s objectives, but questions the industry’s victim narrative (though not necessarily the data) advanced in the call for legislative and regulatory reform of commercial aviation rules and regulations. The unilateral view that the federal government is both the villain and savior of business realities borne out of deregulation policy deflects and misses an opportunity for airlines themselves to self-examine legal and business practices that disappoint and aggravate consumers of commercial air transportation.

Indisputably, the airline industry is taxed aggressively relative to its contribution to the domestic and global economy. A4A effectively makes this argument by noting that commercial aviation generates approximately \$1 trillion annually in economic activity and five cents of every dollar in gross domestic product.⁷ Despite this contribution and the public good served by commercial aviation, federal levies imposed on the airline industry exceed the rate of government “sin taxes” attached to

² Bipartisan Budget Act of 2013, Pub. L. No. 113-67, 127 Stat. 1165.

³ See, e.g., Adjustment of Passenger Civil Aviation Security Fee, 79 Fed. Reg. 35,462 (June 20, 2014) (to be codified at 49 C.F.R. pt. 1510); see also Bill Poling, *DOT’s Proposed Rules Draw ire of Most in Travel Industry*, TRAVEL WKLY. (Oct. 5, 2014), available at <http://www.travelweekly.com/Travel-News/Government/Proposed-rules-draw-ire-of-most-in-travel-industry/>.

⁴ See, e.g., Madhu Unnikrishnan, *Airline Trade Group Lobbies for National Airline Policy*, AV. DAILY, Feb. 29, 2012, at 2012 WLNR 5985765.

⁵ Nicholas E. Calio, *Nation Needs a New Airline Policy*, THE HILL (Dec. 4, 2012, 8:00 PM), <http://thehill.com/blogs/congress-blog/economy-a-budget/270883-nation-needs-a-new-airline-policy>.

⁶ AIRLINES FOR AMERICA, 2014 LEGISLATIVE AND REGULATORY PRIORITIES—ENACTMENT OF A NATIONAL AIRLINE POLICY (April 2014).

⁷ *Id.*

the purchase of products such as alcohol and cigarettes.⁸ While this fact casts the commercial airline industry in a sympathetic light, individual carriers persist in a failed marketing effort that perpetually and artificially depresses air fares while collecting more than \$6 billion in revenue over six years in ancillary baggage and reservation charges that consumers despise.⁹ In this context, the call for a national airline policy is more complex than a garden-variety protest against “big government” and not as simple as the singling out of a particular industry as A4A supposes. Indeed, the merits of a national airline policy are dubious after actual or perceived business disadvantages endured by the nation’s airlines are measured alongside advantages the airline industry has enjoyed under decisional law interpreting the Airline Deregulation Act of 1978.

This Article evaluates the call for a national airline policy as a matter of law and business and aims to expose a mismatch between the letter of existing aviation laws and airline customer service, on the one hand, and the spirit of airline deregulation policy, on the other hand. Existing deregulatory rules are out of sync with industry and consumer wellbeing. As such, rather than framing the state of the commercial airline industry as pitting the federal government against airlines, or as airlines against consumers, this Article takes the position that a proper national airline policy should be a bilateral effort of public and private actors in the commercial aviation sector working to optimize what is, or has become, a public utility. Part II of this Article overviews the statutory framework in which commercial airlines operate. Part III evaluates the major court opinions illustrating the imperfect rights both airlines and passengers have in the deregulated marketplace. Ultimately, this Article suggests that a national aviation policy is a pro-business initiative more than a pro-customer campaign while inviting both the industry and traveling public to disabuse themselves of the notion that airline profit is a “dirty word” that should be sacrificed for illusory lower fares.

II. THE LAW AND POLICY OF AIRLINE DEREGULATION

The commercial airline industry is no more deregulated than a democratic government is unbound by rules. Strictly speaking, airlines

⁸ *Id.*; see also United Airlines, *Airlines for America Promotes a National Airline Policy*, Dec. 16, 2013, at <https://hub.united.com/en-us/news/company-operations/pages/a4a-promotes-national-airline-policy.aspx>.

⁹ *Extra Baggage*, AVIATION WK. & SPACE TECH., Aug. 25, 2014, at 19. See also David Berg, *DOT’s “Transparency of Airline Ancillary Fees” Rulemaking is Bad Policy and Wrong on the Law*, 27 AIR & SPACE LAW. (2014).

are free to compete in the marketplace as a matter of law. Yet, there are few industries more heavily supervised nationally and worldwide than the commercial aviation sector.¹⁰ In the past few years alone, Congress has enacted numerous statutes and regulations to advance safety and security and consumer welfare.¹¹ For example, in 2010, Congress passed the Airline Safety and Federal Aviation Administration Extension Act (*e.g.*, Airline Safety Act) to address issues of pilot fatigue and crew training and rest requirements.¹² In 2012, the Federal Aviation Administration (“FAA”) issued a notice of proposed rulemaking to revise a ratings and certification system for repair stations and air carrier maintenance outfits.¹³ In 2013, the FAA revamped its rules on pilot qualification and service and use of crewmembers and aircraft dispatchers.¹⁴ Most recently, the FAA relaxed its rules on the use of portable electronic devices for passengers during taxiing and flight.¹⁵ Indeed, from crew qualifications to passenger seat belt requirements, airline operations are extensively regulated. Moreover, on top of an extensive national framework of statutes, court decisions, advisories and policies, orders, and guidance statements, is a substantial body of international treaties, protocols, annexes, and authorities relating to international aviation operations and economics.¹⁶

¹⁰ See Peter C. Carstensen, *Evaluating “Deregulation” of Commercial Air Travel: False Dichotomization, Untenable Theories, and Unimplemented Premises*, 46 WASH. & LEE L. REV. 109, 116 (1989) (clarifying: “dichotomization [between regulation and deregulation] is false . . . ‘Deregulation’ has in fact meant eliminating a few, specific controls while retaining all others. Air travel today, [for example,] as in the past, is totally dependent on the existence and effective operation of such industry specific controls as the FAA’s air traffic system.”).

¹¹ See Jennifer P. Henry & Mackenzie S. Wallace, *Buried in Regulations*, 43-SPG BRIEF 50 (2014).

¹² See Airline Safety and Federal Aviation Administration Extension Act of 2010, Pub. L. No. 111-216, § 212, 124 Stat. 2348, 2362-65; *see also* Flightcrew Member Duty and Rest Requirements, 77 Fed. Reg. 330 (Jan. 4, 2012) (codified at 14 C.F.R. pts. 117, 119, 121); Clarification of Flight, Duty, and Rest Requirements, 78 Fed. Reg. 14,166 (Mar. 5, 2013) (codified at 14 C.F.R. pts. 117, 121).

¹³ Repair Stations, 77 Fed. Reg. 30,054 (proposed May 21, 2012) (to be codified at 14 C.F.R. pts. 43, 91, 145).

¹⁴ See Pilot Certification and Qualification Requirements for Air Carrier Operations, 78 Fed. Reg. 42,324 (July 15, 2013) (codified at 14 C.F.R. 61, 121, 135, 141, 142); *see also* Qualification, Service, and Use of Crewmembers and Aircraft Dispatchers, 78 Fed. Reg. 67,800 (Nov. 12, 2013) (codified at 14 C.F.R. pt. 121).

¹⁵ Prohibition on Personal Use of Electronic Devices on Flight Deck, 79 Fed. Reg. 8257 (Feb. 12, 2014) (codified at 14 C.F.R. pt. 121).

¹⁶ See, *e.g.*, Convention for the Unification of Certain Rules for International Carriage by Air, May 28, 1999, *reprinted in* S. Treaty Doc. No. 106-45, 1999 WL 33292734 (2000).

While the chief priority of aviation regulators here and abroad centers on safety, customer service issues have dominated the legal and policy landscape in the three decades since enactment of the Airline Deregulation Act of 1978. Indeed, contemporary aviation rules are shaped largely by two events: first, a series of public relations nightmares in the 1990s involving stranded airline passengers, and second, the sequence of national traumas inflicted when commercial jets were hijacked and crashed into the World Trade Center Twin Towers in New York and the Pentagon in Virginia in 2001.

During the late 1990s, airline passengers (among whom are federal legislators themselves) had become frustrated by the broken promises of commercial airline deregulation. They demanded better service as a matter of law, *e.g.*, an airline passenger bill of rights.¹⁷ That largely receded after September 11th as airline passengers focused on matters of life and death rather than pillows and peanuts. In fact, the evolution of aviation law has historically vacillated from passenger convenience to passenger safety.

A. *Statutory Origins of Airline Economics*

1. The Civil Aeronautics Acts

Modern commercial air transportation derives from airmail service, which began in 1911.¹⁸ By the late 1920s, airplane technology and airmail service were reliable as newly formed “airlines” bid competitively for contract airmail routes pursuant to the Airmail Act of 1925.¹⁹ Congress also passed the Air Commerce Act of 1926,²⁰ creating

¹⁷ A blizzard in Detroit that stranded more than two dozen airplanes for up to eleven hours prompted the proposal of various legislation titled “Airline Passengers’ Bill of Rights.” One bill proposed the imposition of financial liability on airlines for “excessive departure or arrival delay,” *i.e.*, a period of time excess of two hours —

(A) in the case of departure, beginning when the door of an aircraft is closed at an airport and ending when the aircraft takes off from the airport or when the door of the aircraft is open for deplaning of passengers at the airport; and

(B) in the case of arrival delay, beginning upon touchdown of an aircraft at an airport and ending when the door of the aircraft is open for deplaning of passengers at the airport.

Airline Passenger Bill of Rights, H.R. 700, 106th Cong. (1999). The penalty for a delay between two and three hours would have been 200 percent of the ticket purchase price, plus another 100 percent for each additional hour (or portion thereof) beyond a three hour delay.

¹⁸ CAMILLE ALLAZ, HISTORY OF AIR CARGO AND AIRMAIL FROM THE 18TH CENTURY (2005).

¹⁹ Air Mail (Kelly) Act, Pub. L. No. 68-359, 43 Stat. 805 (1925).

a substantial role for the federal government to promote air commerce and safety (*e.g.*, aircraft registration and licensing, and pilot medical certification).

In 1930, Congress enacted the Airmail Act of 1930 (“McNary-Watres Act”), which compensated airlines for airmail service on the basis of space instead of weight—an incentive that encouraged the use of aircraft suitable for commercial passenger purposes, not merely mail delivery.²¹ A national, market-driven, federally regulated airline transportation system—precursor principles underlying the Airline Deregulation Act of 1978—began to take shape under the McNary-Waters Act through which

[r]oute certificates were promptly issued on several routes; numerous extensions were granted; routes were consolidated; several carriers were required to carry passengers; new schedules were authorized, partly with an eye to passenger needs; and mail rates were increased to help meet the costs incurred in the transition to passenger service. An elaborate rate formula was established, providing for “variables” in rates, based primarily on amount of mail space reserved in the plane, and taking into account the flying conditions over the particular route, equipment used, and passenger capacity furnished.²²

Despite this seemingly orderly certification scheme, a congressional committee led by Hugo Black, an Alabama Senator and future Justice of the Supreme Court of the United States, suspected the new airlines were colluding in order to end-run the competitive airmail bidding process.²³ Consequently, President Roosevelt ordered cancellation of all domestic airmail contracts and directed the army to transport airmail.²⁴ The decision was disastrous as military pilots were not as experienced as early airline pilots, leading Congress to enact the Airmail Act of 1934 (“Black-McKellar Act”),²⁵ which reestablished private air carriage and a comprehensive system of federal aviation regulation. By 1936, airline

²⁰ Air Commerce Act of 1926, Pub. L. No. 69-254, 44 Stat. 568.

²¹ Air Mail Act of 1930, Pub. L. No. 71-178, 46 Stat. 259.

²² Frederick A. Ballard, *Federal Regulation of Aviation*, 60 HARV. L. REV. 1235, 1245-46 (1947).

²³ See generally Case Comment, *Merger and Monopoly in Domestic Aviation*, 62 COLUM. L. REV. 851, 854-55 (1962).

²⁴ See Exec. Order No. 6591, Feb. 9, 1934.

²⁵ Airmail Act of 1934, Pub. L. No. 73-308, 48 Stat. 933.

revenue from passenger traffic exceeded airmail income. Congress then enacted the Civil Aeronautics Act of 1936 (“McCarran-Lea Act”), which consolidated diffuse regulatory responsibility in the Civil Aeronautics Authority,²⁶ which was later split into the Civil Aeronautics Administration (“CAA”) and Civil Aeronautics Board (“CAB”).²⁷

2. Federal Aviation Act of 1958

The CAA remained in force until the late 1950s, when jurisdictional issues arose between military and civilian airspace and a series of mid-air collisions exposed the need for uniform air space management across the nation.²⁸ Specifically, in 1956, a Kansas City-bound Trans World Airlines Constellation collided with a Chicago-bound United Airlines DC-7, and fell into the Grand Canyon.²⁹ In 1957, a Douglas Aircraft Company DC-7 and a United States Air Force F-89 collided near Sunland, California; the fighter plane crashed into nearby mountains while the DC-7 crashed into a junior high school playground, killing three students and injuring seventy others.³⁰ As a consequence, Congress enacted the Federal Aviation Act of 1958 to replace the Civil Aeronautics Act effective at that time.³¹

The Federal Aviation Act of 1958 was nearly identical to its predecessor law except for its coverage of air safety. It established a “new Federal agency with powers adequate to enable it to provide for the safe and efficient use of the navigable airspace by both civil and military operations.”³² While the Federal Aviation Act of 1958 shifted the CAA’s powers to the Federal Aviation Agency (predecessor of today’s FAA), the CAB continued to have regulatory authority over interstate air fares and jurisdiction over airline trade practices.³³

²⁶ Civil Aeronautics Act, Pub. L. No. 75-706, 52 Stat. 973 (1936).

²⁷ NAT’L ARCHIVES, RECORDS OF THE CIVIL AERONAUTICS BOARD (CAB), available at <http://www.archives.gov/research/guide-fed-records/groups/197.html> (on file with U.S. Nat’l Archives labeled “197.2.2 Records of the Civil Aeronautics Authority (CAA)” in College Park, Md.).

²⁸ See generally Justin T. Barkowski, Comment, *Managing Air Traffic Congestion through the Next Generation Air Transportation System: Satellite-Based Technology, Trajectories, and—Privatization?*, 37 PEPP. L. REV. 247, 259 (2010).

²⁹ See, e.g., David E. Rigney, *Death or Injury to Occupant of Airplane from Collision or Near-Collision with Another Aircraft*, 64 A.L.R. 5th 235 § 9(a) (1998).

³⁰ *Id.*; see also Paul Stephen Dempsey, *Compliance and Enforcement in International Law: Achieving Global Uniformity in Aviation Safety*, 30 N.C. J. INT’L L. & COM. REG. 1, 44, n.213 (2004).

³¹ Federal Aviation Act of 1958, Pub. L. No. 85-726, 72 Stat. 731; see Barkowski, *supra* note 28, at 259.

³² H.R. Rep. No. 85-2360, pt. 1, at 1 (1958), reprinted in 1958 U.S.C.C.A.N. 3741.

³³ See § 201, 72 Stat. at 741 (codified as amended at 49 U.S.C. § 1506 (1988)).

The CAB regime continued until the late 1970s, when Congress overhauled the entire commercial aviation marketplace by empowering the carriers themselves to determine and manage core aspects of their business and operation, including air fare, routes, and services. Significantly, the Federal Aviation Act of 1958 did not expressly preempt state regulation of commercial airlines. Like the CAA, the new law contained an express “savings clause” providing that “[n]othing . . . in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.”³⁴ As a result, states were not disallowed from enforcing their own laws, including the regulation of intrastate airfares³⁵ and the enforcement of laws barring deceptive trade practices.³⁶ In 1978, however, Congress determined that efficiency, low prices, innovation, variety, and quality would best be promoted by loosening and dismantling federal economic regulation of the nation’s air carriers and preventing the states from frustrating these goals by creating economic regulations of their own with respect to the airline industry.³⁷

3. Airline Deregulation Act of 1978

Airline deregulation occurred more than thirty years ago when Congress made a policy determination that “maximum reliance on competitive market forces” would best further “efficiency, innovation, and low prices” as well as “variety [and] quality . . . of air transportation services.”³⁸ This represented an about-face for an industry that effectively had operated as a sort of cartel between 1938 and 1978. Prior to deregulation, the federal government controlled core aspects of airline economics, including the rates, routes, and service airlines could offer for public consumption.³⁹ It did so through the CAB, whose jurisdiction and powers over the business affairs of all commercial airlines were exclusive, including with respect to the grant of operating permits and

³⁴ 49 U.S.C. § 1506 (1958) (recodified at 49 U.S.C. § 40120(c)).

³⁵ *See, e.g.,* *California v. Civil Aeronautics Bd.*, 581 F.2d 954 (D.C. Cir. 1978).

³⁶ *See* *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290 (1976).

³⁷ Airline Deregulation Act of 1978, H.R. Rep. 95-211, 95th Cong. 2d Sess. (1978).

³⁸ 49 U.S.C. app. §§ 1302(a)(4), 1302(a)(9); *see also* *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259, 1261 (9th Cir. 1999) (citing H.R. Conf. Rep. No. 95-1779, 95th Cong., 2d Sess. 53 (1978)).

³⁹ The Federal Aviation Administration (“FAA”) is the successor authority to the Civil Aviation Authority (by which the Civil Aeronautics Board was referred) pursuant to the Civil Aeronautics Board Sunset Act of 1984, Pub. L. No. 98-443, 98 Stat. 1703 (1984).

market entry and anti-competitive practices.⁴⁰ In this regulatory climate, airlines were essentially immunized from the type of competition that has occurred in the last two decades, resulting in sweeping mergers and consolidation and the survival of but three major carriers in the United States to date (*e.g.*, American (USAir), United (Continental), Delta (Northwest)).⁴¹

Interestingly, customer satisfaction was a distinguishing feature of the CAB-regulated commercial airline marketplace. During the years of CAB regulation, consumers ranked airlines at the top of consumer satisfaction and confidence surveys.⁴² Nevertheless, deregulatory impulses in the 1970s took hold and ushered in the modern era of airline travel. President Jimmy Carter urged Congress “to enact, without delay, regulatory reform of domestic commercial aviation.”⁴³ The airline industry did not share this call for regulatory overhaul. As one industry observer put it, “[i]t was, after all, the airlines themselves who invited the government to impose regulation in order to save them from competition, and only United among the then trunk carriers supported deregulation in 1978.”⁴⁴ In any event, Congress enacted the Airline Deregulation Act of 1978, one year after deregulating cargo aviation.⁴⁵ Without question, the economic deregulation of the commercial airline industry has democratized air travel and assured consumers generally low fares. Indeed, average prices for domestic routes today are competitive with and even lower than fares (in constant dollars) twenty years ago, according to the Bureau of Transportation Statistics.⁴⁶

⁴⁰ See, *e.g.*, Domestic Passenger-Fare Level Policies, Domestic Passenger-Fare Structure Policies and Discount Fare Policy, 43 Fed. Reg. 39,522 (Sept. 5, 1978) (codified at 14 C.F.R. pt. 399).

⁴¹ The “major” or “legacy” carriers are often distinguished from “low cost carriers” such as Southwest, JetBlue, Allegiant, Frontier, and “ultra low cost carrier” Spirit. Historically, American, Eastern, Transcontinental & Western Air (later TWA), and United Air Lines comprised the “Big Four” or the so-called major or trunk carriers. Two of these carriers are extinct, as are historic airlines such as Pan Am, Braniff, National, Northeast, Piedmont, and Eastern.

⁴² See, *e.g.*, James W. Callison, *Airline Deregulation—Only Partially a Hoax: The Current Status of the Airline Deregulation Movement*, 45 J. AIR L. & COM. 961, 964 n.4 (1980).

⁴³ See Reduced Federal Regulation of the Domestic Commercial Airline Industry, 13 WEEKLY COMP. PRES. DOCS. 285 (March 4, 1977).

⁴⁴ Michele McDonald, *Trouble on the Hill; Congress Considers Possible Airline Regulations*, AIR TRANSP. WORLD, June 1, 2001, at 95.

⁴⁵ Air Cargo Deregulation Act, Pub. L. No. 95-163, 91 Stat. 1278-89 (1977) (codified as amended at 49 U.S.C. §§ 1301-1552 (1982)).

⁴⁶ DEP’T OF TRANSP., BUREAU OF TRANSP. STATISTICS, ANNUAL U.S. DOMESTIC AVERAGE ITINERARY FARE IN CURRENT AND CONSTANT DOLLARS, *available at*

But, the core legal and economic assumptions and promises of deregulation have failed by most accounts. Competition has given way to industry consolidation. Actually high barriers to entry have supplanted theories of freely contestable markets. Nonstop service to many markets has been replaced with the hub-and-spoke model of operations while some small communities have lost major airline service altogether. In all, neither airline passengers nor airlines themselves are satisfied with the state of commercial airline policy.⁴⁷

Today, more than thirty years after the enactment of federal airline deregulation, the domestic airline industry has shrunk. Every major airline has sought bankruptcy protection (at least once), bringing into question the central assumption of the 1970s deregulation era, *i.e.*, free competition in a market space with few barriers to entry. The persistence of low air fares is regularly cited as proof of the success of airline deregulation, but where base air fares have remained affordable, the overall expense of commercial flying is higher for travelers at particular origins and destinations.⁴⁸ This is true despite—or in some cases because of—the emergence of “low-cost” or “ultra-low-cost” alternatives to “legacy” carriers. The “innovation” of ancillary fees for carry-on baggage, seat selection, and in-flight amenities, to say nothing of the inefficiency of congestion and delays caused by an old aviation infrastructure, has impaired some of the most important promises of airline deregulation for airline passengers. Indeed, by the mid-1980s, consumer dissatisfaction with the airline industry had reached crises proportions and the need for executive, legislative, and judicial intervention in the arena of aviation consumer practices presented.

http://www.rita.dot.gov/bts/airfares/programs/economics_and_finance/air_travel_price_index/html/AnnualFares.html.

⁴⁷ *But see* Press Release, J.D. Power, Passengers Tolerate Higher Costs and Fees of Traveling as Airline Satisfaction Continues to Improve, but Still Trails Other Industries (May 14, 2014), *available at* <http://www.jdpower.com/press-releases/2014-north-america-airline-satisfaction-study>.

⁴⁸ Steven A. Morrison & Clifford Winston, *The Remaining Role for Government Policy in the Deregulated Airline Industry*, in *DEREGULATION OF NETWORK INDUSTRIES: WHAT’S NEXT?* 1, 5 (Sam Peltzman et al., eds., 2000).

B. *Decisional Law*

1. Airline Consumer Protection under State Tort Law

a. *Morales v. Trans World Airlines*

In June 1987, the National Association of Attorneys General (“NAAG”) commissioned a Task Force of states to study the advertising and marketing practices of the U.S. airline industry in the United States and to evaluate the scope of existing unfair and deceptive airline advertising practices.⁴⁹ In terms of airline customer service, the conclusion they reached was a condemnation of the then-nine-year old deregulation policy:

Consumer dissatisfaction with the airline industry has reached crisis proportions. Federal agencies have focused their attention on airline scheduling problems, on-time performance, safety, and other related issues, but have not addressed airline advertising and frequent flyer programs. Unchecked, the airlines have engaged in practices in these areas that are unfair and deceptive under state law. The individual states through NAAG can play an important role in eliminating such practices⁵⁰

Consequently, the NAAG adopted Air Travel Industry Enforcement Guidelines containing standards governing the content and format of airline advertising, the awarding of premiums to regular customers (“frequent flyers”), and the payment of compensation to passengers who voluntarily yield their seats on overbooked flights.⁵¹

The NAAG Guidelines did not create any new laws or regulations regarding the advertising practices or other business practices of the airline industry, but merely explained in detail how existing state laws would apply to airfare advertising and frequent flyer programs.⁵² For example Section 2 of the Guidelines governed print advertisements of fares, requiring “clear and conspicuous disclosure [defined as the lesser of one-third the size of the largest typeface in the ad or ten-point type] of restrictions such as” limited time availability, limitations on refund or exchange rights, time-of-day or day-of-week restrictions, length-of-stay

⁴⁹ *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 379 (1992).

⁵⁰ *Id.* at 418-19.

⁵¹ *Id.* at 379, Appendix.

⁵² *See id.* at 407.

requirements, advance-purchase and round-trip-purchase requirements, variations in fares from or to different airports in the same metropolitan area, limitations on breaks or changes in itinerary, limits on fare availability, and “[a]ny other material restriction on the fare.”⁵³ Section 2.2 imposed similar restrictions on broadcast advertisements of fares; and section 2.3 required billboard fare ads to state clearly and conspicuously “substantial restrictions apply” if there were any material restrictions on the fares’ availability.⁵⁴ The Guidelines further mandated that an advertised fare be available in sufficient quantities to “meet reasonably foreseeable demand” on every flight on every day in every market in which the fare is advertised; if the fare was not available on this basis, the ad would have to contain a “clear and conspicuous statement of the extent of unavailability.”⁵⁵ Section 2.5 required that the advertised fare include all taxes and surcharges; round-trip fares, under Section 2.6, would disclose at least as prominently as the one-way fare when the fare was only available on round trips; and Section 2.7 prohibited use of the words “sale,” “discount,” [or] “reduced” unless the advertised fare was available only for a limited time and was “substantially below the usual price for the same fare with the same restrictions.”⁵⁶

The U.S. Department of Transportation (“DOT”) and the Federal Trade Commission challenged the Guidelines on preemption and policy grounds; nevertheless, the attorneys general of seven states sent a memorandum to the major airlines announcing that they intended to sue, asserting that “it has come to our attention that although most airlines are making a concerted effort to bring their advertisements into compliance with the standards delineated in the . . . Guidelines for fare advertising, many carriers are still [not disclosing all surcharges].”⁵⁷

In response, the airlines themselves filed suit in federal district court seeking a declaration that state regulation of fare advertisements was preempted under the Airline Deregulation Act and requesting an injunction restraining any state action in conjunction with the Guidelines that would regulate airline rates, routes, or services, or airline advertising and marketing.⁵⁸ Given the likelihood of success on preemption grounds, the federal district court ruled in favor of the airlines and issued a preliminary injunction.⁵⁹ The Fifth Circuit Court of Appeals affirmed,

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 380.

⁵⁹ *Id.*

after which the district court enjoined the states from taking “any enforcement action” which would restrict “any aspect” of respondents’ fare advertising or operations relating to rates, routes, or services.⁶⁰ The Court of Appeals once again affirmed and the Supreme Court of the United States granted *certiorari*.⁶¹

Justice Scalia, writing for the majority, addressed the issue of whether the Airline Deregulation Act preempted the states from prohibiting allegedly deceptive airline fare advertisements through enforcement of their general consumer protection statutes.⁶² Beginning with the language of the deregulation statute, the Court recognized that Congress had intended to expressly preempt states from “enact[ing] or enforc[ing] any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier.”⁶³

Focusing on the phrase “relating to,” the Court concluded that the guidelines impermissibly established binding requirements as to how tickets could be marketed if they were to be sold at given prices.⁶⁴ In doing so, the Court reasoned that “state restrictions on fare advertising have the forbidden significant effect upon fares.”⁶⁵ Moreover, the Court offered a defense of the very marketing practices that state attorneys general regarded as deceptive:

Although the State insists that [the Guideline is] not compelling or restricting advertising, but is instead merely preventing the market distortion caused by “false” advertising, in fact the dynamics of the air transportation industry cause the guidelines to curtail the airlines’ ability to communicate fares to their customers. The expenses involved in operating an airline flight are almost entirely fixed costs; they increase very little with each additional passenger. The market for these flights is divided between consumers whose volume of purchases is relatively insensitive to price (primarily business travelers) and consumers whose demand is very price sensitive indeed (primarily pleasure travelers).

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at 383.

⁶³ *Id.* at 384.

⁶⁴ *Id.*

⁶⁵ *Id.* at 388.

Accordingly, airlines try to sell as many seats per flight as possible at higher prices to the first group, and then to fill up the flight by selling seats at much lower prices to the second group (since almost all the costs are fixed, even a passenger paying far below average cost is preferable to an empty seat). In order for this marketing process to work, and for it ultimately to redound to the benefit of price-conscious travelers, the airlines must be able to place substantial restrictions on the availability of the lower priced seats (so as to sell as many seats as possible at the higher rate), and must be able to advertise the lower fares.

The Guidelines severely burden their ability to do both at the same time: The sections requiring “clear and conspicuous disclosure” of each restriction make it impossible to take out small or short ads, as does (to a lesser extent) the provision requiring itemization of both the one-way and round-trip fares.

Since taxes and surcharges vary from State to State, the requirement that advertised fares include those charges forces the airlines to create different ads in each market. The section restricting the use of “sale,” “discount,” or “reduced” effectively prevents the airlines from using those terms to call attention to the fares normally offered to price-conscious travelers.⁶⁶

Finally, although it broadly interpreted the Airline Deregulation Act with respect to state regulation of airline economics, the Court explained that not all state actions that “relate to” rates, routes, or services were preempted:

In concluding that the NAAG fare advertising guidelines are pre-empted, we do not, as Texas contends, set out on a road that leads to pre-emption of state laws against gambling and prostitution as applied to airlines. Nor need we address whether state regulation of the nonprice aspects of fare advertising (for example, state laws preventing obscene depictions) would similarly “relat[e] to” rates; the connection would obviously be far more

⁶⁶ *Id.* at 389-90.

tenuous . . . “[s]ome state actions may affect [airline fares] in too tenuous, remote, or peripheral a manner” to have pre-emptive effect. In this case . . . “[t]he present litigation plainly does not present a borderline question, and we express no views about where it would be appropriate to draw the line.”⁶⁷

Significantly, the Court concluded that its “decision does not give the airlines *carte blanche* to lie to and deceive consumers; the DOT retains the power to prohibit advertisements which in its opinion do not further competitive pricing.”⁶⁸

b. Spirit Airlines, Inc. v. Dep’t of Transp.

In 2009, federal aviation lawmakers codified a rule entitled “Enhancing Airline Passenger Protections.”⁶⁹ Effective April 29, 2010, air carriers were required to adopt contingency plans for hours-long tarmac delays, develop and publish customer service plans, and respond to consumer problems.⁷⁰ Through the new rule, DOT would consider continued delays on flights that are chronically late to be unfair and deceptive in violation of federal law. The rule was designed to “mitigate hardships for airline passengers during lengthy tarmac delays and otherwise to bolster air carriers’ accountability to consumers.”⁷¹

Importantly, despite its creation of rights for passengers—in substance the same or similar rights demanded a decade earlier in the call for an airline passengers’ bill of rights—the rule made clear that no enforcement mechanism by passengers themselves existed. Indeed, the rule contains a particular provision entitled “Unfair and Deceptive Practice,” stating “[a]n air carrier’s failure to comply with the assurances required by this rule and as contained in its Contingency Plan for

⁶⁷ *Id.* at 390.

⁶⁸ *Id.*

⁶⁹ See Enhancing Airline Passenger Protections, 14 C.F.R. § 259 (2009).

⁷⁰ *Id.*

⁷¹ For domestic flights, each “Contingency Plan for Lengthy Tarmac Delays” must provide an assurance that an air carrier will not permit an aircraft to remain on the tarmac for more than three hours unless the pilot-in-command determines there is a safety-related or security-related reason (*e.g.*, weather, a directive from an appropriate government agency) why the aircraft cannot leave its position on the tarmac to deplane passengers; or air traffic control advises the pilot-in-command that returning to the gate or another disembarkation point elsewhere in order to deplane passengers would significantly disrupt airport operations. There are similar requirements for international flights. Additionally, for all domestic or international flights, air carriers are required under the rule to provide adequate food and potable water, operable lavatory facilities, and medical attention, if needed. See 14 C.F.R. § 259.4.

Lengthy Tarmac Delays will be considered an unfair and deceptive practice within the meaning of 49 U.S.C. 41712.”⁷² The provision concludes by stating that violations are “subject to enforcement action by the Department.”⁷³ Thus, there was (and is) no private right of action for airline passengers for any violation of the “enhanced” passenger protection rules.⁷⁴ Airline passengers can complain to the government about their negative flight experience, but no direct judicial right or remedy against the airline exists. Despite this virtual immunity from direct passenger consumer action by operation of law, certain airlines persisted in attacking the government itself as a bad actor when it came to airfares and pricing.

Spirit Airlines led an effort by several airlines to challenge three of the DOT’s passenger protection rules—the Airfare Advertising Rule, the Refund Rule, and the Post-Purchase Price Rule.⁷⁵ First, under the Airfare Advertising Rule, the DOT had regulated airfare advertising since 1984 by requiring airlines to disclose the “entire price to be paid by the customer to the air carrier.”⁷⁶ Airlines may advertise the pre-tax price of tickets provided that the advertisement clearly discloses the amount of the tax.⁷⁷ For example, an airfare advertisement of “\$167 base fare + \$39 taxes and fees” is permissible even though consumers are left to compute the final price themselves—\$206.⁷⁸ Citing consumer confusion, the DOT revised this policy to require airlines to state the total final price (*e.g.*, \$206).⁷⁹ While airlines could still itemize their air fare (*e.g.*, the amount of the base fare, taxes, and other charges), the Airfare Advertising Rule disallowed airlines from displaying these price components

⁷² 14 C.F.R. § 259.4(f).

⁷³ *Id.* (emphasis added).

⁷⁴ *But see* 14 C.F.R. § 259.7 (requiring airlines to “make available the mailing address and e-mail or web address of the designated department in the airline with which to file a complaint about its scheduled service [and . . . to] acknowledge in writing receipt of each complaint regarding its scheduled service to the complainant within 30 days of receiving it and shall send a substantive written response to each complainant within 60 days of receiving the complaint. A complaint is a specific written expression of dissatisfaction concerning a difficulty or problem which the person experienced when using or attempting to use an airline’s services.”).

⁷⁵ *See* Spirit Airlines, Inc. v. Dep’t of Transp., 687 F.3d 403 (D.D.C. 2012).

⁷⁶ *See* Statements of General Policy, 49 Fed. Reg. 49,440 (Dec. 20, 1984) (codified as amended at 14 C.F.R. § 399.84(a)).

⁷⁷ *See* Enhancing Airline Passenger Protections, 75 Fed. Reg. 32,318, 32,327 (June 8, 2010) (explaining DOT enforcement policy regarding the 1984 rule).

⁷⁸ *Spirit Airlines, Inc.*, *supra* note 75, at 408-09.

⁷⁹ *See* Enhancing Airline Passenger Protections, 76 Fed. Reg. 23,110, 23,166 (Apr. 25, 2011) (amending 14 C.F.R. § 399.84(a)).

“prominently” or “in the same or larger size as the total price.”⁸⁰ The airlines argued that “DOT provides no explanation [for] why the prominent disclosure of taxes and fees would be confusing to consumers,” and that DOT acted arbitrarily and capriciously by “requir[ing] airlines to prominently and conspicuously disclose airline-imposed fees but . . . bury[ing] in fine print the taxes and fees that the government itself imposes on air transportation.”⁸¹

The DOT responded that it “reasonably declined to allow the airlines to state, with equal prominence, the breakdown of that figure as between base fare, airline-imposed fees, and government taxes and fees” and clarified that its prohibition on prominently stating taxes “‘means that the break-out of per-person charges cannot be in a more prominent place on a web page or in a print advertisement than the total advertised fare.’”⁸² The United States Court of Appeals for the District of Columbia agreed, reasoning that

nothing in the Airfare Advertising Rule requires airlines to hide the taxes—or, as Spirit’s website puts it, the ‘Government’s Cut.’ It just requires that the total, final price be the most prominently listed figure, relying on the reasonable theory that this prevents airlines from confusing consumers about the total cost of their travel. This limited imposition hardly amounts to an arbitrary exercise of DOT’s statutory authority to prevent ‘unfair or deceptive practice[s],’ under 49 U.S.C. § 41712(a).⁸³

The court also refused a First Amendment challenge of the Airfare Advertising Rule, concluding that without “doubt that DOT’s final rule, which requires the total, final price to be the most prominently listed figure is ‘reasonably related to the [government’s] interest in preventing deception of consumers.’”⁸⁴ According to the court, the Airfare Advertising Rule did not “prohibit airlines from saying anything; it just requires them to disclose the total, final price and to make it the most prominent figure in their advertisements.”⁸⁵ To make its point, the district court produced a screenshot of a sample flight advertised by Spirit’s website and evaluated it as follows:

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Spirit Airlines, Inc.*, *supra* note 75, at 411.

⁸³ *Id.*

⁸⁴ *Id.* at 414-15.

⁸⁵ *Id.* at 414.

Spirit’s website prominently displays “Our Price”—broken down into “Base Fare + Fuel”—and then adds, with a plus sign, “Government’s Cut,” which is displayed clearly and separately, and then finally provides, in slightly larger font, the “Total Price.” The website also separately states, underlined and in bold, the “government tax rate” for each flight price quote, so that consumers know the tax burden in both absolute and relative terms.

TUESDAY, JULY 10 Washington DC – Reagan National - Atlanta							
Depart ▼	Arrive	Stops	Type	Our Price Base Fare + Fuel		+ Government's Cut	= Total Price
10:05 AM	6:00 PM	1 Stop	Standard	\$124.90	FREE	\$29.69	\$154.59
4:45 PM	11:28 PM	1 Stop	Standard	\$124.90	FREE	\$29.69	\$154.59
i Your government tax rate for this selection is 24%.							

Moreover, a bright orange link (in the form of a question mark) appears next to each of those price components—*i.e.*, “Base Fare,” “Fuel,” and “Government’s Cut”—and if one clicks that link, the site provides a further breakdown of what makes up the cost of airfare. For example, the base fare on domestic flights generally includes the cost of “Flight,” a “Passenger Usage Fee,” and what Spirit labels a fee for the “Unintended Consequences of DOT Regulations.”⁸⁶

TUESDAY, JULY 10 Washington DC – Reagan National - Atlanta							
Depart ▼	Arrive	Stops	Type	Our Price Base Fare + Fuel		+ Government's Cut	= Total Price
10:05 AM	6:00 PM	1 Stop	Standard	\$124.90	FREE	\$29.69	\$154.59
4:45 PM	11:28 PM	1 Stop	Standard	\$124.90	FREE	\$29.69	\$154.59
i Your government tax rate for this selection is 24%.							

Flight \$106.05
 Unintended Consequences of DOT Regulations \$1.86
 Passenger Usage Fee \$16.99
Base Fare Total \$124.90

⁸⁶ *Id.*

Given this, the district court resolved that:

All of this demonstrates what the rule's text already tells us: the rule is aimed at providing accurate information, not restricting it. Nothing in the rule prohibits the airlines from separately alerting the public to the taxes imposed on air transportation . . .

The airlines can even call attention to taxes and fees in their advertisements; what they cannot do is call attention to them by making them more prominent than the total, final price the customer must pay.⁸⁷

The district court also rejected Spirit's challenge to the Refund Rule.⁸⁸ Under that rule, airline passengers may cancel reservations made a week in advance of the flight without penalty for twenty-four hours.⁸⁹ Spirit argued that the rule violated the Airline Deregulation Act and its prohibition on the regulation of airfares.⁹⁰ The district court disagreed, reasoning that "the rule has nothing to do with airfares. Instead, it regulates cancellation policies on the basis of a finding that existing practices were deceptive and unfair under 49 U.S.C. § 41712."⁹¹ As such, the Refund Rule—developed as part of a systematic effort aimed at preventing unfair and deceptive practices—was not arbitrary or capricious as the airline contended.⁹²

Finally, Spirit challenged the so-called Price Rule as arbitrary and capricious.⁹³ The rule itself prohibits airlines from increasing the price of travel post-purchase. The district court considered "whether DOT appropriately prohibited airlines from raising the price of airline tickets, carry-on luggage, or the first two checked bags after customers buy their tickets."⁹⁴ The airline contended that the basis for the rule—a concern that "some air tour operators were burying consumer notices about the possibility of price increases in their conditions of carriage"—had no relationship to raising the price of an optional service before a consumer purchases it—especially given that "under the status quo, airlines are prohibited from increasing prices without first giving consumers notice

⁸⁷ *Id.*

⁸⁸ *Id.* at 416.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* at 410.

⁹⁴ *Id.*

prices could go up.”⁹⁵ In addition, Spirit argued that “a passenger can protect himself against future price increases by purchasing optional services at the same time as (or as soon as possible after) he purchases his ticket.”⁹⁶ But, the district court noted, it was reasonable and evidence-based that “the DOT saw this as a classic bait and switch.”⁹⁷ It found that when consumers purchase airline tickets, they assume that the price they pay for extra bags at the airport will be the price advertised when they bought their ticket.⁹⁸ Thus, DOT concluded, increasing the price of these very commonly purchased and practically necessary services (like the ability to carry bags onto the flight) amounts to an unfair practice.”⁹⁹

2. Contract Principles Applied to Airline Consumer Protection

a. American Airlines, Inc. v. Wolens

Soon after *Morales*, the Supreme Court again considered the preemptive effect of the Airline Deregulation Act in *American Airlines, Inc. v. Wolens*.¹⁰⁰ There, the Court evaluated the applicability of the Airline Deregulation Act within a tort as well as a contract context. Litigation in *Wolens* arose from a complaint that modifications made to American Airlines’ AAdvantage program devalued credits that frequent flyer program members had earned.¹⁰¹ Program changes included the imposition of capacity controls (limits on seats available to passengers obtaining tickets with AAdvantage credits) and blackout dates (restrictions on dates credits could be used).¹⁰² While the passenger plaintiffs conceded that American Airlines had reserved the right to change AAdvantage terms and conditions, they sued for injunctive relief by challenging the retroactive application of such modifications as violative of the Illinois Consumer Fraud and Deceptive Business Practices Act.¹⁰³

The Illinois Supreme Court rejected the claim, reasoning injunctive relief would involve the regulation of an airline’s current rendition of services, a matter preempted by the Airline Deregulation Act.¹⁰⁴

⁹⁵ *Id.* at 417.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *See* *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995).

¹⁰¹ *Id.* at 225.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *See* *Wolens v. Am. Airlines, Inc.*, 589 N.E.2d 533, 536 (Ill. 1992).

However, the state's high court did not dismiss the passengers' actions for monetary damages arising from allegations of breach of contract and violation of the Illinois consumer fraud act because federal airline deregulation policy disallowed "only those State laws and regulations that specifically relate to and have more than a tangential connection with an airline's rates, routes or services."¹⁰⁵ Given *Morales*, American Airlines petitioned for *certiorari*, asserting that the Illinois court had ruled inconsistently with Supreme Court precedence by narrowly construing the preemptive effect of the Airline Deregulation Act.¹⁰⁶

Writing for the majority, Justice Ginsburg considered the scope of the Airline Deregulation Act, and specifically its application to the state-court suit brought by the airline's frequent flyer program participants, challenging the airline's retroactive changes in terms and conditions of the program.¹⁰⁷ The Court compared the Illinois consumer fraud act to the NAAG guidelines in *Morales* in that it "serves as a means to guide and police the marketing practices of the airlines [and] does not simply give effect to bargains offered by the airlines and accepted by airline customers."¹⁰⁸ The Court concluded that the deregulation act preempted the claims under the Consumer Fraud Act given the text of the preemption clause and "the congressional purpose of deregulation policy to leave largely to the airlines themselves, and not at all to states, the selection and design of marketing mechanisms appropriate to the furnishing of air transportation services."¹⁰⁹

Next, American argued, and the Supreme Court agreed, that "Congress could hardly have intended to allow the States to hobble [competition for airline passengers] through the application of restrictive state laws."¹¹⁰ Consequently, Justice Ginsberg concluded that,

[w]e do not read the ADA's preemption clause . . . to shelter airlines from suits alleging no violation of state-imposed obligations, but seeking recovery solely for the airline's alleged breach of its own, self-imposed undertakings A remedy confined to a contract's terms simply holds parties to their agreements—in this

¹⁰⁵ *Wolens*, *supra* note 100, at 225-26.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 228.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 220.

¹¹⁰ *Id.* at 228 (citing Brief for Petitioner at 27, *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995) (No. 93-1286), 1994 WL 242545).

instance, to business judgments an airline made public about its rates and services.¹¹¹

The airline resisted this, not by arguing that its contracts lack legal force, but by identifying the DOT as the exclusively competent monitor of the airline's undertakings.¹¹² The United States maintained that the DOT had neither the authority nor the apparatus required to superintend a contract dispute resolution regime.¹¹³

The Court acknowledged that after Congress dismantled the regime by which the CAB set rates, routes, and services, lawmakers indicated no intention to establish a new administrative process for DOT adjudication of private contract disputes.¹¹⁴ The Supreme Court agreed that it was not “plausible that Congress meant to channel into federal courts the business of resolving, pursuant to judicially fashioned federal common law, the range of contract claims relating to airline rates, routes, or services. The [Airline Deregulation Act] contains no hint of such a role for the federal courts.”¹¹⁵ In this respect, the Airline Deregulation Act differs from other federal statutes that employ almost identical verbiage (*i.e.*, ERISA), but that channel civil actions into federal courts, under a comprehensive scheme, detailed in the legislation, designed to promote “prompt and fair claims settlement.”¹¹⁶ Ultimately, the *Wolens* Court ruled that the Airline Deregulation Act permits state-law-based court adjudication of routine breach-of-contract claims—a conclusion supported by Congress’ retention of the FAA’s saving clause:

The ADA’s preemption clause, § 1305(a)(1), read together with the FAA’s saving clause, stops States from imposing their own substantive standards with respect to rates, routes, or services, but not from affording relief to a party who claims and proves that an airline dishonored a term the airline itself stipulated. This distinction between what the State dictates and what the airline itself undertakes confines courts, in breach-of-contract actions, to the parties’ bargain, with no enlargement or enhancement based on state laws or policies external to the agreement.

¹¹¹ *Id.* at 228.

¹¹² *Id.* at 231.

¹¹³ *Id.*

¹¹⁴ *Id.* at 232.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 232 (quoting *Pilot Life Ins. Co. v. Dedeau*, 481 U.S. 41, 54 (1987)).

American suggests that plaintiffs' breach-of-contract and Consumer Fraud Act claims differ only in their labels, so that if Fraud Act claims are preempted, contract claims must be preempted as well. But a breach of contract, without more, "does not amount to a cause of action cognizable under the [Consumer Fraud] Act and the Act should not apply to simple breach of contract claims." The basis for a contract action is the parties' agreement; to succeed under the consumer protection law, one must show not necessarily an agreement, but in all cases, an unfair or deceptive practice.

In closing, this case presents two issues that run all through the law. First, who decides (here, courts or the DOT, the latter lacking contract dispute resolution resources for the task)? On this question, all agree to this extent: None of the opinions in this case would foist on the DOT work Congress has neither instructed nor funded the Department to do.

Second, where is it proper to draw the line (here, between what the ADA preempts, and what it leaves to private ordering, backed by judicial enforcement)?

Justice Stevens reads our *Morales* decision to demand only minimal preemption; in contrast, Justice O'Connor reads the same case to mandate total preemption. The middle course we adopt seems to us best calculated to carry out the congressional design; it also bears the approval of the statute's experienced administrator, the DOT. And while we adhere to our holding in *Morales*, we do not overlook that in our system of adjudication, principles seldom can be settled "on the basis of one or two cases, but require a closer working out."¹¹⁷

The precedence of *Wolens* found application in 2007, after hundreds of airline passengers were stranded aboard nine JetBlue Airways airplanes on the snow-covered tarmac of New York's JFK International Airport for almost 10 hours.¹¹⁸ To stave off Congressional action and repair its public image, JetBlue subsequently announced its own

¹¹⁷ *Id.* at 234-35.

¹¹⁸ See, e.g., Timothy M. Ravich, *Re-Regulation and Airline Passengers' Rights*, 67 J. AIR L. & COM. 935 (2002).

“Customer Bill of Rights,” setting out self-imposed penalties and “major” rewards for passengers inconvenienced beyond a “reasonable” amount of time.¹¹⁹ Subject to its own Contract of Carriage, JetBlue’s “Customer Bill of Rights” undertook several contractually binding requirements:

JetBlue Airways is dedicated to bringing humanity back to air travel. We strive to make every part of your experience as simple and as pleasant as possible. Unfortunately, there are times when things do not go as planned. If you’re inconvenienced as a result, we think it is important that you know exactly what you can expect from us. That’s why we created our Customer Bill of Rights. These Rights will always be subject to the highest level of safety and security for our customers and crewmembers.

GENERAL INFORMATION

JetBlue will notify customers of delays, cancellations and diversions. Notification may be given in any of the following forms: via jetblue.com, telephone, flight information display system, airport announcement, onboard announcement, email or text message. ***

CANCELLATIONS

All customers whose flight is cancelled by JetBlue will, at the customer’s option: Receive a full refund OR Reaccommodation on the next available JetBlue flight at no additional charge or fare. If JetBlue cancels a flight within 4 hours of scheduled departure and the cancellation is due to a *Controllable Irregularity*, JetBlue will also issue the customer a \$50 Credit good for future travel on JetBlue. ***

ACCOMMODATION DURING ONBOARD GROUND DELAYS

JetBlue will provide customers experiencing an onboard ground delay with 36 channels of DIRECTV®, food

¹¹⁹ See, e.g., Jeff Bailey, *Chief “Mortified” by JetBlue Crisis*, N.Y. TIMES, Feb. 19, 2007, at A1.

and drink, access to clean restrooms and, as necessary, medical treatment. JetBlue will not permit the aircraft to remain on the tarmac for more than three hours unless the pilot-in-command determines there is a safety or security-related reason for remaining on the tarmac or Air Traffic Control advises the pilot-in-command that returning to the gate or another disembarkation point elsewhere in order to deplane would significantly disrupt airport operations. JetBlue will provide free movies on flights that are greater than two hours in duration for customers whose flight is delayed more than 3 hours after scheduled departure. ***

OVERBOOKINGS

(As defined in JetBlue's Contract of Carriage)

Customers who are involuntarily denied boarding shall receive \$1,300.¹²⁰

This and other customer-friendly initiatives were undermined in late 2014, when JetBlue's Board of Directors reportedly decided not to renew the contract of its CEO Dave Barger. The reason was cheered by Wall Street because

Barger kept the focus on the customer, preferring not to add baggage fees or seats to aircraft even when most other U.S. carriers adopted both practices . . . In arguing this summer for a CEO change, Cowen & Co. analyst Helane Becker wrote, "JetBlue is an overly brand-conscious and customer-focused airline, which has resulted in lagging fundamentals."¹²¹

The cold message was not lost in an editorial that remarked, "Sadly, being loved by your customers is not enough for JetBlue's board of directors."¹²² Indeed, such corporate decisions further disconnect the pro-passenger narrative of national airline policy advocates from actual boardroom decisions.

¹²⁰ See JETBLUE AIRWAYS BILL OF RIGHTS (Aug. 2012), <http://www.jetblue.com/about/ourcompany/promise/index.html>.

¹²¹ Brian Sumers, *Profit vs. Brand*, AVIATION WK. & SPACE TECH., Sept. 29, 2014, at 24.

¹²² Editorial, *Raw Deal for JetBlue's CEO*, AVIATION WK. & SPACE TECH., Oct. 13, 2014, at 58.

b. Northwest, Inc. v. Ginsberg

Almost contemporaneously with efforts by the legislature to amplify the range of airline passenger rights and by the executive to discipline the airline industry from an anti-trust perspective, Justice Alito reinforced the preemptive power of the Airline Deregulation Act in the realm of airline economics in *Northwest, Inc. v. Ginsberg*.¹²³ In that case, Northwest Airlines terminated Rabbi S. Binyomin Ginsberg's membership in its WorkPerks Airline Partners Program. Members of the program accumulated and redeemed "miles" for tickets and service upgrades with Northwest Airlines and its partner carriers.¹²⁴

Ginsberg became a member of the frequent flyer program in 1999, achieving the highest level of membership—"Platinum Elite"—in 2005.¹²⁵ In 2008, however, the airline terminated Ginsberg's membership on the basis of a provision in the WorldPerks agreement that provided that "[a]buse of the . . . program (including improper conduct as determined by [the airline] in its sole judgment) may result in cancellation of the member's account."¹²⁶ The airline informed Ginsberg his "Platinum Elite" status was being revoked by telephone and confirmed in a letter:

[Y]ou have contacted our office 24 times since December 3, 2007 regarding travel problems, including 9 incidents of your bag arriving late at the luggage carousel . . .

Since December 3, 2007, you have continually asked for compensation over and above our guidelines. We have awarded you \$1,925.00 in travel credit vouchers, 78,500 WorldPerks bonus miles, a voucher extension for your son, and \$491 in cash reimbursements

Due to our past generosity, we must respectfully advise you that we will no longer be awarding you compensation each time you contact us.¹²⁷

In response to a request by Ginsberg to clarify his status, an airline representative stated by e-mail that, "[a]fter numerous conversations with not only the Legal Department, but with members of the WorldPerks

¹²³ *Northwest, Inc. v. Ginsberg*, 134 S.Ct. 1426 (2014).

¹²⁴ *Id.* at 1426.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.* at 1427.

department, I believe your status with the program should be very clear.”¹²⁸ Ultimately, Ginsberg brought a class action suit in the United States District Court for the Southern District of California, claiming that the airline had ended his membership as a cost-cutting measure related to the airline’s merger with Delta Air Lines.¹²⁹ In addition to suing for negligent and intentional misrepresentation, Ginsberg averred that Northwest breached the terms of its loyalty program by revoking his “Platinum Elite” status without valid cause and further violated the duty of good faith and fair dealing.¹³⁰ Ginsberg sought \$5 million, together with a demand for injunctive relief restoring his WorldPerks status and prohibiting Northwest from future revocations of membership.¹³¹

The federal district court rejected Ginsberg’s tort claims, as well as his allegations of breach of the covenant of good faith and fair dealing, as preempted by the Airline Deregulation Act.¹³² The district court reasoned that all of Ginsberg’s claims “related to” Northwest’s rates and services, falling squarely within the ambit of the deregulation statute.¹³³ The remaining claim—for breach of contract—also was dismissed because Ginsberg had failed to identify any material breach given that the frequent flyer agreement gave the airline sole discretion to determine whether a participant had abused the program.¹³⁴ Ginsberg appealed and the Ninth Circuit Court of Appeals reversed.

On appeal, in a unanimous opinion, the Supreme Court considered whether the Airline Deregulation Act preempted a state law claim for breach of the implied covenant of good faith and fair dealing. As a preliminary matter, the Court rejected the argument that the preemptive language in the Airline Deregulation Act applied only to legislation enacted by a state legislature and regulations issued by a state administrative agency and not to a common-law rule like the implied covenant of good faith and fair dealing.¹³⁵ Finding that “[i]t is routine to call common-law rules ‘provisions,’” the Court found that state common law rules “comfortably fall within the language” of the preemption provision of the Airline Deregulation Act, *i.e.*, “law[s], regulation[s], or other provision[s] having the force and effect of law.”¹³⁶ The Court further determined that exempting common-law claims would also

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.* at 1429.

¹³⁶ *Id.* (citing 49 U.S.C. § 41713(b)(1)).

disserve the central purpose of airline deregulation policy (*e.g.*, eliminate federal regulation of rates, routes and services) by supporting state laws that would effectively undo policies designed to have airline rates, routes, and services set by market forces.¹³⁷ Indeed, “[i]f all state common-law rules fell outside the ambit of the ADA’s pre-emption provision, [there would be no] need in *Wolens* to single out a subcategory of common-law claims, *i.e.*, those based on the parties’ voluntary undertaking, as falling outside that provision’s coverage.”¹³⁸

In focusing on Ginsberg’s contract specifically, the Court applied *Wolens* to hold that his claims were and would be pre-empted insofar as they sought to enlarge the contractual obligations voluntarily undertaken by the contracting parties.¹³⁹ Under Minnesota law (which controlled Ginsberg’s dispute), the implied covenant of good faith applied to every contract and was a state-imposed obligation—a covenant around which parties could not contract or otherwise disclaim.¹⁴⁰ Ginsberg lost, therefore. While the Court ultimately rejected Ginsberg’s claim, the airline pressed the court to go further, asking for a finding that all claims relating to an implied covenant of good faith and fair dealing, no matter the content of the law of the relevant jurisdiction, are pre-empted.”¹⁴¹ The airline claimed that, “[i]f pre-emption depends on state law . . . airlines will be faced with a baffling patchwork of rules, and the deregulatory aim of the ADA will be frustrated.”¹⁴² The Court rejected the argument, finding that

the airlines have means to avoid such a result. A State’s implied covenant rules will escape pre-emption only if the law of the relevant State permits an airline to contract around those rules in its frequent flyer program agreement, and if an airline’s agreement is governed by the law of such a State, the airline can specify that the agreement does not incorporate the covenant. While the inclusion of such a provision may impose transaction costs and presumably would not enhance the attractiveness of the program, an airline can decide

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.* at 1426.

¹⁴⁰ *Id.* at 1432.

¹⁴¹ *Id.* at 1433.

¹⁴² *Id.*

whether the benefits of such a provision are worth the potential costs.¹⁴³

Meanwhile, Justice Alito reasoned that the Court's ruling was helpful to airline passengers:

Our holding also does not leave participants in frequent flyer programs without protection. The ADA is based on the view that the best interests of airline passengers are most effectively promoted, in the main, by allowing the free market to operate. If an airline acquires a reputation for mistreating the participants in its frequent flyer program (who are generally the airline's most loyal and valuable customers), customers can avoid that program and may be able to enroll in a more favorable rival program.

Federal law also provides protection for frequent flyer program participants. Congress has given the Department of Transportation the general authority to prohibit and punish unfair and deceptive practices in air transportation and in the sale of air transportation, 49 U.S.C. § 41712(a), and Congress has specifically authorized the DOT to investigate complaints relating to frequent flyer programs. Pursuant to these provisions, the DOT regularly entertains and acts on such complaints.¹⁴⁴

Thus, *Ginsberg*, like *Morales*, would appear to presume (in spite of contrary evidence) market choice, equate the value of different airlines' frequent flier programs and networks, and gloss over the fact that the DOT—but not airline passengers themselves—are afforded authority to pursue a remedy for provable wrongs.

C. *RICO to the Rescue?*

Ironically, Spirit Airlines—the unsuccessful plaintiff in an action attacking DOT rules forbidding it from prominently disclosing government taxes and fees added to airfare¹⁴⁵—is now a so-far-

¹⁴³ *Id.*

¹⁴⁴ *Id.*; see also U.S. DEP'T OF TRANSP., FILE A CONSUMER COMPLAINT <http://www.dot.gov/airconsumer/file-consumer-complaint> (last updated Nov. 13, 2013).

¹⁴⁵ See *infra* Part II.B.1.b.

unsuccessful defendant accused of hiding fees from its passengers. In *Ray v. Spirit Airlines, Inc.*,¹⁴⁶ a class of airline passengers has brought a putative federal class action lawsuit against the airline on the basis of the Racketeer Influenced and Corrupt Organizations Act (“RICO”),¹⁴⁷ alleging that Spirit Airlines conducted an enterprise by means of racketeering activity, *e.g.*, mail and wire fraud involving the concealment and misrepresentation of airfares and user fees. While the United States District Court for the Southern District of Florida dismissed the action on the basis of preemption, the Eleventh Circuit Court of Appeals vacated that decision:

Because federal laws do not preempt other federal laws, subsequent legislation could preclude Plaintiffs’ claims only if Congress had repealed the provisions of RICO, at least insofar as they authorized Plaintiffs’ actions. Congress did not do so expressly through the Airline Deregulation Act of 1978 (ADA) . . . [a]nd we find no ‘repeal by implication’ because Congress has not exhibited the requisite clear and manifest intent. The ADA explicitly preempted state laws but, notably, said nothing about any federal cause of action. Moreover, a saving clause found in the ADA did not disturb any other remedies provided by law. Quite simply, the two laws are not irreconcilably in conflict, nor was the ADA clearly intended as a substitute for RICO. Applying the strong presumption against implied repeals, we are constrained to conclude that RICO supplements, rather than subverts, federal regulation of air carriers.¹⁴⁸

In reaching this conclusion, the court recognized at least one other circumstance in which a federal court found that a RICO action was not precluded by airline deregulation policy. Cancellation fees charged for flights in the months following September 11, 2001 was the issue in *All World Prof’l Travel Servs., Inc. v. Am. Airlines, Inc.* where a federal district court in California recognized that a travel agency could have complained to the DOT about an airline’s conduct, but was not required to submit a RICO-type mail and wire fraud claim to the DOT.¹⁴⁹ On this

¹⁴⁶ *Ray v. Spirit Airlines, Inc.*, --- F.3d ---- (2014), 2014 WL 4699445, at *1 (11th Cir. 2014).

¹⁴⁷ Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-68 (2013).

¹⁴⁸ *Ray*, 2014 WL 4699445, at *1.

¹⁴⁹ *All World Prof’l Travel Servs., Inc. v. Am. Airlines, Inc.*, 282 F. Supp. 2d 1161 (C.D. Cal. 2003).

basis, the Eleventh Circuit Court of Appeals wrote that, “we agree with the *All World* court that civil RICO claims predicated on mail and wire fraud are not precluded by the ADA simply because they involve fraud arising out of pricing, fees, and advertising in the airline industry.”¹⁵⁰

The *Ray* case is remarkable in that civil lawsuits arising under RICO are seldom used to address consumer complaints against the airline industry. As the Eleventh Circuit’s opinion indicates, only one case relates RICO and the Airline Deregulation Act of 1978. The theory being tested in *Ray* appears to be a novel one as applied to airline airfare advertising specifically, and an infrequently litigated theory as applied to the Airline Deregulation Act generally. As a practical matter, traveling under RICO to vindicate alleged violations of airline passengers’ rights is not surprising considering that few private rights of action exist for the direct use of airline passengers under the Airline Deregulation Act. While consumers might complain to the DOT for issues relating to airline fares or services, it is usually up to the DOT to enforce penalties. Thus, though still at the pleading stage, *Ray* (taking the lead of *All World Prof'l Travel, Inc.*) might establish RICO as a viable strategy for travelers to end-run decades-long frustration with federal passengers’ rights laws that expressly limit or extinguish private causes of action arising from airline prices, routes, and services.¹⁵¹

The fact that courts currently have to step in as customer dispute resolution centers is troubling, and *Ray* may be a case of be careful what you wish for. A victory in that case (however probable or improbable) might compensate a certain class of airline passengers and reward their counsel. But, the commercial airline market will react, possibly in the form of higher fares and ancillary fees. Moreover, the case highlights inconsistencies between talking points broadcast under the banner of a national airline policy and actual airline customer service and conduct. For that matter, where lawmakers are passing specious laws that protect airline passengers without also affording passengers any direct rights, the plaintiff bar will continue to think creatively about getting their clients their day in court; for their part, airlines and defense counsel would be well-served to understand that legal victories may be public relations nightmares.¹⁵²

¹⁵⁰ *Ray*, *supra* note 145, at *8.

¹⁵¹ *Civil RICO Action Over Spirit Fees Ready to Take Off*, DAILY BUS. REV., Oct. 6, 2014, available at <http://www.dailybusinessreview.com/id=1202672444302?>.

¹⁵² *Id.*

III. ANALYSIS

The call for a national airline policy is a marketing campaign that minimizes airline-centric business goals in customer-friendly talking points. Who is for reducing taxes? Or reforming regulatory burdens? Who isn't? What consumer or airline is adverse to a modernized air traffic system and stabilized energy prices? Nobody. The concept of a globally competitive U.S. airline industry is a consensus issue in America, too. Thus, in a significant way, the hallmarks of a proposed national airline policy do little to build value or trust between carrier and customer. Indeed, the call for a national airline policy smacks of a tired industry tactic of looking to the government to get out of the way when it comes to how airlines treat their customers (good and bad), but inviting the government to get involved (under the heading of customer service) when it comes to how regulators treat the industry itself.

For example, in September 2014, A4A issued a press release applauding bi-partisan legislation introduced “to protect airline customers from higher passenger security taxes, which are unlawfully being collected by the federal government.”¹⁵³ In announcing its support, the A4A framed the government's actions in the least favorable way, casting the airline as the champion of its passengers without identifying whom (if anybody) would protect customers from airline practices:

Since its inception, the passenger security tax was assessed on a per-enplanement basis, and capped at a maximum of \$5 for a one-way trip (maximum two enplanements) or \$10 for a round-trip itinerary. Last year, as part of the bipartisan budget deal to reduce the deficit, Congress simplified the fee structure by creating a flat \$5.60 fee per one-way trip, regardless of the number of enplanements. Congress made this change against the backdrop of the existing round-trip cap and expected it to remain in place.

The Hudson/Richmond bill addresses the Administration's misinterpretation of congressional intent and restores the cap. This bill also is in line with the intent of the Chairs of the Senate and House Budget Committees, Sen. Patty Murray (D-WA) and Rep. Paul

¹⁵³ Press Release, Airlines for America, A4A Commends Introduction of Hudson/Richmond Bill to Protect Travelers from Unjust Passenger Tax Hike (Sept. 5, 2014), *available at* <http://www.canadianshipper.com/press-releases/story.aspx?id=1003254132>.

Ryan (R-WI), and Speaker John Boehner, who affirmed that Congress did not intend to change the definition of a round-trip cap. The federal government is collecting more than \$1 billion in additional passenger security taxes from airline customers – and the revenue is not even being used for security.¹⁵⁴

Importantly, claims of government overreach or inefficiency should not deflect attention away from the manner in which the airlines themselves are nickel-and-diming their customers. The airline industry's call to optimize customer service as the basis for a national airline policy is specious. This is particularly so given the adverse consumer positions airlines regularly take in the courtroom—from small claims courts all the way up to the Supreme Court of the United States.

The precedents detailed above—from *Morales* and *Spirit Airlines, Inc.*, on the tort side, to *Wolens* and *Ginsberg*, on the contract side—promote deregulation policy, but at the expense of overall industry health. Aggregately, the cases are losers for both airlines and their customers in the United States. Net, customers lost in *Morales* and *Ginsberg*, and the airlines lost in *Spirit Airlines, Inc.* and *Wolens*. While *Morales* and *Wolens* insulate carriers from federal and state economic regulation, they also reveal a dysfunctional marketplace in which core customer rights are irremediable because Congress has not given passengers any private right of action while DOT regulators micromanage basic business practices respecting the publication of government taxes and fees on airfares.¹⁵⁵ “[I]mprovements in efficiency, innovation, and low prices” are hard to come by in this environment.

The cases featured in this Article also cast doubt on the efficacy of a national airline policy by evidencing a deep distrust among carriers, passengers, and state and federal aviation officials. *Morales* and *Spirit Airlines, Inc.*, taken together, are remarkable in this regard. In one case (*Morales*), the state of the marketplace worsened to such a degree that state officials felt compelled to require the airline industry to publish basic information for the benefit of their customers. In another case (*Spirit Airlines, Inc.*), it was the industry that fought (and lost in its efforts) to spotlight the amount of government taxes and fees on airfares

¹⁵⁴ *Id.*

¹⁵⁵ See Real Transparency in Airfares Act of 2014, S. 2290, 113th Cong. (May 5, 2014) (increasing the maximum financial penalty (to be imposed by the federal government) for unfair and deceptive practices relating to advertising of the costs of air transportation); see also A4A Applauds House Action to Increase Airfare Transparency, AIRLINES FOR AMERICA (July 28, 2014), <http://www.airlines.org/news/a4a-applauds-house-action-to-increase-airfare-transparency/>.

to the detriment of airlines and their passengers. Meanwhile, *Wolens and Ginsberg* illustrate the degree to which the airline industry will go to restrict the contractual terms and leverage of their customers. In all of these cases, the consumer's market power, choice, and rights are minimized and restricted while the airline industry's economic liberties are impeded—the exact opposite of what airline deregulators envisioned.

The negative relationships between business-and-customer and business-and-regulator in *Morales*, *Wolens*, *Spirit Airlines, Inc.*, and *Ginsberg* also is striking, casting doubt on any efforts to cooperatively arrive at a national airline policy that enhances the interests of all stakeholders in commercial aviation. Indeed, the tone of A4A's campaign for a national airline policy seems to perpetuate an unhealthy policy of blame shifting.

In all, deregulation principles applicable to the airline industry—borne out of the very same deregulatory impulse that perhaps contributed to energy deregulation and corporate frauds like Enron, banking deregulation, and the Great Recession of 2008—invite serious reconsideration. As aviator and United States Bankruptcy Judge (Southern District of Florida) A.J. Cristol has observed:

Yes, we have lower fares on certain routes [but it is] because the airline industry, like the United States Congress, is unable to understand that if you sell your product for less than it costs you, you have a deficit. At the same time, we have astronomical airfares on other routes.

Robert Crandall, the former president and CEO of American Airlines, used to make a speech where he opened up by asking his audience “How much did a Hershey Bar cost in 1945?” Members of the audience would volunteer, “a quarter,” “a dime.” Crandall would then point out that in 1945 you could buy a Hershey Bar for a nickel. A new Chevrolet could be purchased for \$900. Roundtrip airfare from New York to Paris was \$700.

Today a Hershey bar is as much as a buck. A new Chevy Camaro is listed out as Chevy \$33,600, and roundtrip airfare? New York to Paris can be \$500 to \$600, sometime less.

Crandall's point is simple . . . Most airfares are too low. Airlines charge too much for first and business class and far too little for coach or economy . . . Each year they continue to lose more and more money and they try to make it up with charges for your suitcase or your seat assignment

In the irrational airline industry of today, the doctrine is sell your seats at a loss and make it up on volume. A few quarters ago, Delta announced a huge loss. Their solution: Reduce fares . . . and Pricing: It goes from the sublime to the ridiculous.¹⁵⁶

IV. CONCLUSION

Seemingly and substantively lost in the call for a national airline policy is the customer. The A4A's proposal for government support of the industry is large on general themes, but small on details, including specifics about any direct benefits to airline passengers themselves. True, a reduction in federal taxes and a loosened regulatory environment for airlines might result in lower fares for airline passengers. So too might a modernized air traffic system and stabilized energy prices translate into airline consumer savings. And, a regulatory structure that "will enable our country's airline industry to reclaim its mantle as the global pacesetter" may produce yet-imagined benefits.¹⁵⁷ Unclear is whether or how any revamped commercial airline legal regime will treat the airline passenger as anything more than a third party beneficiary or bystander who is literally along for the ride, however. The operative statutory law effecting airline deregulation policies, including recent court opinions over the last two decades (*e.g.*, *Morales*, *Wolens*, *Spirit Airlines, Inc.*, and *Ginsberg*)—and the recent, almost desperate effort to secure passengers rights under RICO (*Ray*)—provide scant optimism that a new national framework for commercial airline operations will put the customer in a prominent position. To this point, the law gives few if any

¹⁵⁶ Hon. A.J. Cristol, United States Bankruptcy Judge, Southern District of Florida, Guest Lecture at the University of Miami School of Law (Sept. 12, 2013) (recording available at [http://www.law.miami.edu/webcast/video.php?location=Departments&stream=Aviation_Economics_\(Judge_Cristol_Guest_Lecture\)_September_12_2013.mp4&width=480&height=270&page=](http://www.law.miami.edu/webcast/video.php?location=Departments&stream=Aviation_Economics_(Judge_Cristol_Guest_Lecture)_September_12_2013.mp4&width=480&height=270&page=)).

¹⁵⁷ Gary Kelly, *America Needs a National Airline Policy*, CENTERFORAVIATION.COM (Sept. 8, 2014), <http://centreforaviation.com/members/direct-news/america-needs-a-national-airline-policy-185910>.

rights to airline passengers directly; and, where passenger protections and rights do exist, Congress has not provided for a private right of action, but only empowered passengers with the right to complain to a federal agency empowered to effect a discretionary penalty.¹⁵⁸ Going forward, and in the absence of a serious and voluntary effort by the airline industry as a whole to differentiate and improve their customer service offerings beyond an artificially low price laden by ancillary fees, a national airline policy should delineate direct and not merely derivative customer service upgrades—otherwise, re-regulation may be in the offing.¹⁵⁹

¹⁵⁸ For a discussion of pending federal rulemaking on passenger protections from a variety of perspectives (*e.g.*, distribution, consumer, industry, and regulatory) see Volume 27, Number 3 of *AIR AND SPACE LAWYER* (November 2014).

¹⁵⁹ See, Ravich, *supra* note 118; see also Anita Mosner, *DOT's Rulemaking is a Step Toward Reregulation*, 27 *AIR & SPACE LAW*. (2014).