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CABOTAGE AND DEREGULATORY ANOMALIES

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ABSTRACT

The strangest airline route in America is between Pago Pago and the Manu'a Islands in American Samoa. It is the only regularly scheduled service by a non-U.S.-flagged airline between two points in the United States (or its territories) due to the lack of a U.S. carrier offering service to the territory's domestic route. Under existing U.S. cabotage policies, states and U.S. territories are divested of all power to manage interstate air transportation to and from other U.S. airports as a matter of law. Specifically, federal law permits only U.S. carriers operating U.S.-registered aircraft to fly between U.S. states and territories. Consequently, governments like that of American Samoa have no authority to allow non-U.S. carriers to fly in and out of American Samoa to key connection points to the United States, such as Honolulu or Los Angeles. Standing alone, the absence of foreign carriers in any particular aviation market is unproblematic and even expected where purely "domestic" travel is involved. But, in American Samoa, the absence of foreign carriers means that competition and consumer choice are nonexistent.

Meanwhile, presently, just one U.S.-flagged carrier—Hawaiian Airlines—connects American Samoa with any other part of the United States. In this monopolistic framework, few if any incentives exist for Hawaiian Airlines to provide more than the minimum acceptable level of service. And, in fact, in 2020, the Governor of American Samoa signed an Executive Order seemingly evicting Hawaiian Airlines from the territory while calling for a permanent waiver of federal cabotage law—an action that

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the U.S. Department of Transportation (DOT) rejected as an authority not countenanced under the Airline Deregulation Act of 1978.

This Article argues for a change or exemption in the current law. In so doing, this Article features the body of national aviation law as an unexpectedly useful area in which to gain insight into the flaws of imperial rule. With respect to American Samoa specifically, federal cabotage rules and laws deregulating the commercial airline industry displace territorial efforts to achieve autonomy and self-governance over matters of local concern and constitutional dimension, including jurisdiction (i.e., navigation), commerce and trade, and travel. Worse, national laws strip territorial leaders of the ability to better the welfare of their community without also meaningfully advancing U.S. objectives. Therefore, this Article argues that Congress should exempt American Samoa permanently from application of cabotage and deregulation laws and policies, a seemingly local issue that genuinely portends wholesale changes to longstanding international aviation law.

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I. INTRODUCTION

TRAVELERS FROM THE U.S territories endure bad customer service just as other airline passengers from other parts of America.[1] What is more, even though 98% of the 3.5

[1] *E.g.*, Ben Schlappig, *Hawaiian Airlines Clarifies Why They Weighed Passengers Traveling to American Samoa*, One Mile at a Time (Oct. 5, 2016), https://onemileatatime.com/hawaiian-airlines-weighing-passengers-explanation/ [https://perma.cc/7DJK-5EWQ]; Chabeli Herrera, *Is a $786 One-Way Flight Out of Puerto Rico Price Gouging? Airlines Say No*, Mia. Herald (Sept. 27, 2017), https://www.miamiherald.com/news/business/article175537221.html [https://perma.cc/2T5E-KZFN].

million people living in the U.S. territories are minorities,[2] racial or ethnic discrimination claims brought by airline passengers from the U.S. territories are in substance and outcome generally similar to those asserted in mainland courts.[3] But, unlike other U.S. citizens,[4] airline passengers from the U.S. territories confront an exceptional challenge—federal laws that materially infringe upon the constitutional right to travel.[5]

The application of federal aviation laws is particularly problematic in American Samoa, where its self-governing territorial government is powerless to regulate either intrastate or interstate air transportation. This is of far-reaching significance and merits examination. Not only do federal aviation rules and policies provide insight into broader and enduring legal controversies that are reflective of key areas of the Law of the Territories, especially with respect to federalism, self-determination, and autonomy, but they also present an interesting case study and example that portends possible policy changes for the other noncontiguous jurisdictions of the United States, and perhaps, beyond. First, however, before evaluating the dilemmas borne of federal aviation law as applied to American Samoa and similarly situated U.S. territories, an understanding of the concept of cabotage and the details of airline deregulation law is useful.

II. CABOTAGE: FROM COASTING-TRADE TO THE CHICAGO CONVENTION

For centuries nations have asserted their sovereignty and control over their domestic sea routes by a concept known as cabo-

[2] Stacy Plaskett, *The Second-Class Treatment of U.S. Territories is Un-American*, ATLANTIC (Mar. 11, 2021), https://www.theatlantic.com/ideas/archive/2021/03/give-voting-rights-us-territories/618246/ [https://perma.cc/Z3HG-CEWW].

[3] *See, e.g.*, Abdullah v. Am. Airlines, Inc., 181 F.3d 363, 364–65 (3d Cir. 1999) (assessing claim by passenger injured on flight from the U.S. Virgin Islands and holding that federal law establishes the applicable standards of care in the field of aviation safety generally, thus preempting the entire field from state and territorial regulation, while also holding that traditional state and territorial law remedies continue to exist for violation of those standards).

[4] Unlike individuals born in any of the U.S. states or the District of Columbia, American Samoans are typically non-citizen U.S. nationals at birth. *See* Sophia Yan, *Residents of US Territory American Samoa Sue for Citizenship*, ASSOCIATED PRESS (Mar. 28, 2018), https://apnews.com/article/north-america-lawsuits-us-news-ap-top-news-international-news-f18f9d05baf74751a48a19781ada65bf [https://perma.cc/EN8Y-U56D].

[5] Kent v. Dulles, 357 U.S. 116, 125 (1958) ("The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without the due process of law under the Fifth Amendment.").

tage.[6] A nautical term of uncertain origin, cabotage originally meant navigation and trade along a coast between the ports of one nation (i.e., a state) without going out into the open sea.[7] The United States always taken a broader view of this definition, reserving for the vessels of its citizens trade between *all* of the nation's ports—whether in the Atlantic or Pacific.[8] The modern concept of cabotage, sometimes referred to as coasting trade under international law, now encompasses this view and includes sea trade between *any* two ports of the same country, whether on the same coast or different coasts, provided that the different coasts are all part of the same country as a political and geographic unit.[9]

Colonial trade did not fall within the concept of cabotage historically. In fact, "[t]he distinction between coasting-trade even in its extended meaning and Colonial trade remained unshaken throughout the nineteenth century up to 1898 and 1899."[10] At that time, the United States acquired the Philippines, the Hawaiian Islands, and the Island of Puerto Rico,[11] and declared trade between its ports and those of its possessions to be coasting trade exclusively reserved for American vessels.[12] In taking this

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[6] *See, e.g.*, Kirsten Böhmann, *The Ownership and Control Requirement in U.S. and European Union Air Law and U.S. Maritime Law—Policy; Consideration; Comparison*, 66 J. AIR L. & COM. 689, 690, 690 n.3 (2001) (noting that "[c]abotage is commonly defined as carriage of passengers or goods between two points within the territory of [the] same nation for compensation or hire").

[7] "*Cabotage* meant originally navigation and trade along the same stretch of coast between the parts thereof, such coast belonging to one and the same State." *Cabotage*, BLACK'S LAW DICTIONARY 194 (7th ed. 1999) (quoting I.F.L. OPPENHEIM, INTERNATIONAL LAW 493 (Hersch Lauter ed., 8th ed. 1955)).

[8] L. Oppenheim, *The Meaning of Coasting-Trade in Commercial Treaties*, 24 L.Q. REV. 328, 333–34 (1908).

[9] *Id.* at 328, 334.

[10] *Id.* at 333.

[11] *The Spanish–American War: Introduction*, LIBR. CONG. (June 22, 2011), https://loc.gov/rr/hispanic/1898/intro.html [https://perma.cc/9B4T-JLT3].

[12] *Id.* at 334. The U.S. position generated great controversy:

> There has always been a distinction between coasting-trade and Colonial trade. Should the requirement be dropped that the country between the ports of which trade is called coasting-trade must be a political and geographical unit, the distinction between coasting-trade and Colonial trade would become void. The latest American extension of the meaning of coasting-trade is therefore inadmissible and comprises a violation of the treaty rights of the parties which have concluded such commercial treaties with the United States as stipulate freedom of trading, coasting-trade excepted . . . And should other countries follow the American lead and apply the term coasting-trade indiscriminately for trade along their coasts

position, the United States became the only country at the time to define coasting trade and maritime cabotage as including the whole of the trade of a country with its colonial dependencies.[13]

America also made waves as its concept of cabotage was adapted to civil international aviation. The first multinational convention on aviation, the Paris Convention of 1919 (Paris Convention),[14] extended the traditional maritime concept of cabotage to aviation by authorizing a contracting nation to establish "restrictions in favor of its national aircraft in connection with the carriage of persons and goods for hire between two points on its territory."[15] In this context, "territory" included land areas and adjacent waters under a nation's sovereignty, protection, or mandate—a definition that reflected the expanded U.S. view of coastal trading.[16] The Paris Convention (to which the United States was not a signatory) thus permitted states to bar foreign air carriers carrying for remuneration passengers or goods between a home nation and its colonies or possessions overseas.[17]

In 1944, in the midst of World War II, the United States convened the Convention on International Civil Aviation (Chicago

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> and for their Colonial trade, the meaning of the word would then become trade between any two ports which are under the sovereignty of the same power, and it would then . . . be no longer synonymous with cabotage.

Id.

13 *Id.* at 333.

14 International Commission of Air Navigation, Convention Relating to the Regulation of Aerial Navigation, Oct. 13, 1919, 11 L.N.T.S 173 [hereinafter Paris Convention].

15 *Id.* art. 16.

16 *See id.* art. 1.

17 Air cabotage is much more extensive than surface cabotage conceptually, an oddity given that the justification underlying each is the same:

> Why should the State of origin and destination be given absolute control over this commerce when carried on by air but not when surface transportation is involved? Indeed, air cabotage might be expected to be subject to more international control than maritime cabotage, since changes in air rates, generally speaking, have greater international repercussions. One explanation for the different result reached is that, whereas maritime cabotage evolved for the most part during years of peace, the Paris Convention was drawn against a background of postwar tension in which nationalistic pressures predominated.

W.M. Sheehan, Comment, *Air Cabotage and the Chicago Convention*, 63 HARV. L. REV. 1157, 1158–59 (1950).

Convention) to replace the Paris Convention.[18] Like its predecessor instrument, the Chicago Convention grants states expansive rights to exclude any other state from engaging in aviation cabotage,[19] though it also arguably goes further by eliminating a contracting state's right to grant *exclusive* cabotage privileges to other states.[20] The Chicago Convention thus furthered the foundational concept of state sovereignty articulated in the Paris Convention. Indeed, Article I of the Chicago Convention confirms as sacrosanct the premise that "every State has complete and exclusive sovereignty over the airspace above its territory."[21] But, at the core of the Chicago Convention are postwar sensibilities and aspirations of a more collaborative and less territorial and protectionist global framework, which will facilitate the safe and orderly development of international air transport services "between nations and peoples upon which the peace of the world depends."[22] Among the most celebrated features of the Chicago Convention in this regard is its creation of the International Civil Aviation Organization (ICAO), a specialized agency within the United Nations created to support the diplomatic and collaborative efforts of its more than 190 signatories "in securing the highest practicable degree of uniformity in regulations, standards, procedures, and organization . . . [that] will facilitate and improve air navigation."[23]

Just as notable is what the Chicago Convention does not contain. Specifically, in the spirit of creating a near frictionless aviation regulatory environment, the Chicago Convention authors imagined several "freedoms of the air" that would encourage

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[18] Convention on International Civil Aviation art. 80, Dec. 7, 1944, 61 Stat. 1180, TIAS No. 1591 [hereinafter Chicago Convention]; *see also* Int'l Civ. Aviation Org. [ICAO], *The History of ICAO and the Chicago Convention*, https://www.icao.int/about-icao/History/Pages/default.aspx [https://perma.cc/4H8X-WZ37].

[19] Chicago Convention, *supra* note 18, art. 7.

[20] *Id.* The second sentence of Article 7 of the Chicago Convention provides that "[e]ach contracting State undertakes not to enter into any arrangements which specifically grant any such privilege on an exclusive basis to any other State or an airline of any other State, and not to obtain any such exclusive privilege from any other State." *Id. But see* Sheehan, *supra* note 17, at 1160 ("The cabotage provisions of Article 7 of the Chicago Convention are similar to those of the Paris Convention . . . It is perhaps not surprising that the cabotage provisions of the two Conventions are essentially the same. Both were drafted in periods when war-inspired nationalism prevailed over internationalism . . .").

[21] Chicago Convention, *supra* note 18, art. 1.

[22] *See id.* pmbl.

[23] *Id.* art. 37.

multilateral access to foreign aviation markets.[24] These include: (1) "[t]he right to fly over the territory of another country without landing"; (2) "[t]he right to land in another country for technical reasons" such as refueling or maintenance; (3) "[t]he right to discharge traffic from the home country in a foreign country" (e.g., New York to London); (4) "[t]he right to pick up traffic in a foreign country bound for the home country" (e.g., London to New York); and (5) beyond rights or "[t]he right to pick up traffic in a foreign country and convey them to [a different foreign] country, provided that the flight originates or terminates in the home country" (e.g., New York to London to Munich).[25] Altogether, the Chicago Convention hypothesized nine freedoms.[26] They exist in principle only, however, as only the first two freedoms were annexed to the Chicago Convention.[27] That left aviation cabotage to be negotiated separately via bilateral agreements between states.[28]

The United States has long advocated for greater liberalization in international civil aviation consistent in the fashion contemplated by the Chicago Convention.[29] In addition, the United States has promoted the concept of "open skies."[30] At the same time, however, Congress has codified national air cabotage laws of its own, and the United States has tried to leverage those rights to gain cabotage rights of its own in foreign markets.[31]

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[24] *See* Bruce Stockfish, *Opening Closed Skies: The Prospects for Further Liberalization of Trade in International Air Transport Services*, 57 J. AIR L. & COM. 599, 603 n.12, 603–04, (1992).

[25] *Id.* at 603 n.12 (citing ANDREAS F. LOWENFELD, AVIATION LAW: CASES AND MATERIALS 2–6 (1981)).

[26] *See* ICAO, *Freedoms of the Air*, https://www.icao.int/pages/freedomsair.aspx [https://perma.cc/K7HK-HQ6T].

[27] *See* Chicago Convention, *supra* note 18, art. 5.

[28] The Chicago Convention conceptualized two types of cabotage: (a) "consecutive cabotage"—or the Eighth Freedom—that would permit passenger or cargo traffic between two domestic points in a foreign country on a flight that either originated in or was destined for the carrier's home county, e.g., a British Airways flight between Boston and Chicago that originated in London; and (b) "standalone cabotage"—the Ninth Freedom—that would allow a foreign carrier to transport passengers between two domestic points in a foreign country, e.g., a British Airways flight from Boston to Chicago that neither originated in nor was destined for the United Kingdom. *See id.*; ICAO, *supra* note 26.

[29] *See* Stockfish, *supra* note 24, at 600.

[30] *Id.*

[31] *Carriers Push Increasing Foreign Ownership as Mainstay of Opening Skies*, AVIATION DAILY, June 5, 1992, at 409; *see also* Air Commerce Act of 1926, Pub. L. No. 254, ch. 344, 44 Stat. 568, 572; Civil Aeronautics Act of 1938, Pub. L. No. 706, ch. 601, § 1107(i), 52 Stat. 973, 1028 (codified as amended at 49 U.S.C. § 177).

In any case, cabotage is an exception and not the rule in America. Pursuant to the International Air Transportation Act of 1979, for example, the U.S. Department of Transportation (DOT) is vested with the power to authorize foreign carriers to carry cabotage traffic—but only if and when extremely compelling circumstances manifest.[32] First, the DOT must determine that an exemption is in the public interest because no U.S. airline can accommodate traffic in a market due to "an emergency created by unusual circumstances not arising in the normal course of business."[33] The DOT also must conclude that all possible alternative efforts were made to accommodate the traffic.[34] Third, the exemption must be "necessary to avoid unreasonable hardship for the traffic in the markets that cannot be accommodated" by U.S.-certified airlines.[35] And finally, the DOT must conclude that "granting the exemption will not result in an unreasonable advantage to any party in a labor dispute where the inability to accommodate traffic in a market is a result of the dispute."[36] In all, the burdens of proof for cabotage exemption seekers are substantial, and the DOT has demonstrated reticence to using its authority even in seemingly compelling circumstances.[37]

III. CABOTAGE IN AMERICAN SAMOA

For more than a century, the United States has asserted expansive cabotage rights over its territories and possessions such as Guam and Puerto Rico.[38] For historical reasons, however, American Samoa was initially exempted from this policy.[39] In fact, American Samoa was excepted from maritime cabotage

[32] *See* International Air Transportation Competition Act of 1979, Pub. L. No. 96-192, § 13, 94 Stat. 35, 39 (codified as amended at 49 U.S.C. § 1386).

[33] 49 U.S.C. § 40109(g)(1)(A).

[34] *Id.* § 40109(g)(1)(B).

[35] *Id.* § 40109(g)(1)(C).

[36] *Id.* § 40109(g)(1)(D).

[37] *See, e.g.*, George L. Wellington, *USDOT Decision Allowing Foreign Airlines to Assist in Hurricane Relief*, 20 AIR & SPACE LAW. 8, 10 (2006) (noting that the DOT still held carriers to stringent standards for emergency cabotage when granting an exception after Hurricane Katrina).

[38] *See* Daniel Nina, *Puerto Rico and the United States Under the Cabotage Laws: A Breach to the World Trade Organization's Member Agreement?*, 21 F. EMPRESARIAL 59 (2016), https://www.redalyc.org/jatsRepo/631/63150031003/html/index.html [perma.cc/X9PJ-67NF].

[39] *See generally* Convention Between the United States, Germany, and Great Britain to Adjust Amicably the Questions Between the Three Governments in Respect to the Samoan Group of Islands, Dec. 2, 1899, 31 Stat. 1878; *see also* U.S.

rules pursuant to the Tripartite Convention of 1899.[40] That Convention divided the Samoan Islands among the United States, the German Empire, and the United Kingdom.[41] In addition, it prohibited the three signatories from imposing maritime cabotage on Eastern Samoa (now American Samoa), Western Samoa (which became German Samoa after World War I and is currently the Republic of Samoa), and the Kingdom of Tonga.[42] But, because the Tripartite Convention was executed years before the first manned flight of an airplane, and decades before international air travel was routinized, it did not address aviation cabotage.[43]

In the absence of any treaty-based rule or statutorily based rule to the contrary, the U.S. government has asserted its view of maritime cabotage rights to commercial air travel originating from and destined to American Samoa.[44] As a result, only U.S.-flagged airlines can serve the market (absent an exemption).[45] This has created unusual hardships, not the least of which is the fact that residents of American Samoa have scant options to travel by air or transport property or mail.[46] Stated otherwise, without the ability to confer cabotage rights on foreign carriers, the American Samoan government and its populace are powerless to govern commercial air travel either intrastate (i.e., interisland transportation) or interstate (i.e., between American Samoa and other U.S. domestic destinations).

A. Intrastate Aviation Cabotage

The strangest airline route in America is between Pago Pago and the Manu‘a Islands in American Samoa.[47] It is the only regularly scheduled service by a non-U.S.-flagged airline between two

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Dep't of State, *Historical Background to Acquisition by Birth in U.S. Territories and Possessions*, *in* 8 Foreign Affs. Manual § 302.1.1 (2020).

40 Michael Hansen, *Can American Samoa Break Hawaiian Airlines Monopoly?*, Haw. Free Press (July 15, 2017, 4:29 PM), http://www.hawaiifreepress.com/Articles-Main/ID/19974/Can-American-Samoa-Break-Hawaiian-Airlines-Monopoly [perma.cc/3TYG-J223].

41 *Id.*

42 *See id.*; *see also Samoan History*, U.S. Embassy in Samoa, https://ws.usembassy.gov/our-relationship/policy-history/samoan-history/ [https://perma.cc/B6C5-KWXS].

43 *See* Hansen, *supra* note 40.

44 *Id.*

45 *Id.*

46 *Id.*

47 Madhu Unnikrishnan, *The Strangest Airline Route in America Is Between Stops in the South Pacific*, Airline Wkly. (Mar. 12, 2021), https://airlineweekly.com/2021/

points in the United States (or its territories) due to the lack of a U.S. carrier offering service to the territory's domestic route.[48] From 1973 to 1987, South Pacific Island Airways (SPIA), a U.S.-based airline, provided American Samoa with interisland air transportation, but it ceased operations in 1987.[49] Thereafter, Inter-Island Airways provided service in American Samoa, but regulators revoked its commuter authorization in 2017.[50] Since then, Polynesian Limited (doing business as Samoa Airways)—itself a citizen of Samoa that is entirely owned by the Government of Samoa—has served the route under the authority of multiple thirty-day cabotage waivers.[51]

As part of its most recent request for a cabotage exemption (until February 2022), Samoa Airways has expressed serious challenges and drawbacks inherent in an air transportation scheme that operates from exemption to exemption.[52] In particular, Samoa Airways has argued that its cabotage exemption is "essential . . . for the safety and health of Manu'a Islands residents."[53] Indeed, "Samoa Airways' flights are one of the only air links available to island residents," and consequently, "Samoa Airways is regularly called upon to transport patients seeking hospital care in Pago Pago in addition to emergency medical evacuation."[54] The airline "transports numerous passengers weekly seeking medical treatment in a Pago Pago hospital, and it has performed multiple medical evacuation flights for more seriously ill passengers."[55] Without the airline's services, the carrier contends, "many of these passengers would be forced to travel to

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03/the-strangest-airline-route-in-america-is-between-stops-in-the-south-pacific/ [perma.cc/6JXC-T7WE].

48 *Id.*

49 *South Pacific Island Airways (SPIA)*, AIRLINE HIST., https://airlinehistory.co.uk/airline/south-pacific-island-airways-spia/ [https://perma.cc/49PX-D9TY] (Aug. 14, 2018).

50 Application of Talofa Airways Limited for Renewal of Exemption Pursuant to 49 U.S.C. § 40109(g) (Pago Pago – Manu'a Islands) at 3, No. DOT-OST-2020-0177 (Nov. 2020), https://downloads.regulations.gov/DOT-OST-2020-0177-0004/attachment_1.pdf [perma.cc/7THK-BQMR].

51 In the Matter of Application of Polynesian Limited for Renewal of Exemption Pursuant to 49 U.S.C. § 40109(g) (Pago Pago – Manu'a Islands) at 1–3, 5, No. DOT-OST-2014-0144 (Jan. 2021) [hereinafter Samoa Airways Renewal Petition], https://downloads.regulations.gov/DOT-OST-2014-0144-0117/attachment_1.pdf [perma.cc/FPB9-R74H].

52 *Id.* at 1.

53 *Id.* at 2.

54 *Id.*

55 *Id.*

Pago Pago by boat, which requires a sixty-mile journey through frequently rough seas."[56] These assertions meet the statutory criteria under § 40109 for a cabotage exemption for Samoa Airways,[57] and also suggest that permanent cabotage rights for the American Samoan government may be appropriate.

B. Interstate Aviation Cabotage

The existing U.S. cabotage system also strips the American Samoan government of all power to manage *interstate* air transportation to and from other U.S. airports. Specifically, federal law permits only U.S. carriers operating U.S.-registered aircraft to fly between U.S. states and territories.[58] Consequently, by operation of law, the American Samoan government has no authority to allow non-U.S. carriers such as Fiji Airways and Air New Zealand to fly in and out of American Samoa to key connection points to the United States, for example Honolulu or Los Angeles.[59] Relatedly, the DOT has not approved any foreign carrier to serve interstate routes between American Samoan and other U.S. destinations.[60] Standing alone, the absence of foreign carriers in any particular aviation market is unproblematic and even expected where purely "domestic" travel is involved.[61] But, in America Samoa, the absence of foreign carriers means that competition and consumer choice are non-existent.

In fact, presently, just one U.S.-flagged carrier—Hawaiian Airlines—connects American Samoa with any other part of the United States.[62] What pricing discipline exists in this environment is unclear. Hawaiian Airlines has set round trip fares be-

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56 *Id.*

57 *See id.* at 5.

58 With respect to the registration of aircraft operating on fully domestic routes, aviation cabotage laws differ from U.S. maritime cabotage laws (known as the Jones Act, 46 U.S.C. § 50102) in that aviation cabotage laws permit foreign manufactured U.S.-registered aircraft to fly fully domestic routes. Hansen, *supra* note 40. In contrast, maritime cabotage laws require the use of ships built in the United States. *Id.* Consequently, a U.S. carrier can fly domestic routes using foreign manufactured aircraft, such as Airbus aircraft built in Europe.

59 *Id.*

60 *See id.*

61 *See* Kristopher Chandley & Jonathan Todd, *Cabotage Primer: The Basics and Pitfalls of Cross-Border Motor Carrriage*, JD Supra (Feb. 24, 2021), https://www.jdsupra.com/legalnews/cabotage-primer-the-basics-and-pitfalls-8519765/ [https://perma.cc/77EF-SRKL] (noting that cabotage "exists as a legal means to shield domestic carriers and their workforce from foreign competition").

62 *National Park of American Samoa*, Nat'l Park Serv., https://www.nps.gov/npsa/planyourvisit/directions.htm [https://perma.cc/D9CS-F63Y].

tween Honolulu and Pago Pago at around $1,200 per passenger.[63] In comparison, two foreign air carriers serving airports on Upolu Island—a mere 93 miles away from Pago Pago—charge $900 to $1,000 per passenger for flights to Honolulu.[64] Also, few if any incentives exist for Hawaiian Airlines to provide more than the minimum acceptable level of service. And, indeed, the quality of Hawaiian Airlines' service on routes connecting American Samoa with other points in the United States is mixed and the subject of controversy.[65]

Unsurprisingly, then, American Samoan leaders have objected to U.S. cabotage laws, emphasizing that they hamper local tourism and economic development.[66] In 2006, the Governor of American Samoa signed an Executive Order threatening to evict Hawaiian Airlines from the territory while calling for a permanent waiver of federal cabotage law.[67] And, in 2020, the Governor promised a lawsuit over the matter in the U.S. Supreme Court.[68] For its part, Hawaiian Airlines' chief executive reportedly voiced support for cabotage exemptions for interisland (i.e., intrastate) travel in American Samoa without also opining whether the airline would support interstate cabotage—an omission perhaps foreshadowing a battle between the state of Hawaii, which would have an interest in supporting its local airline, and American Samoa, which is lobbying Congress to exempt the territory from U.S. aviation cabotage.[69]

IV. AIRLINE DEREGULATION ACT OF 1978

Since 1984, Hawaiian Airlines has provided scheduled passenger air carrier service from Pago Pago International Airport in

63 Hansen, *supra* note 40.

64 *Id.*

65 *See* Office of Governor Togiola T.A. Tulafono, Exec. Order No. 005-2006 (July 26, 2006), https://www.regulations.gov/document/DOT-OST-2006-25612-0001-0001 (attached as Exhibit 1).

66 *See, e.g.*, Hansen, *supra* note 40.

67 Office of Governor Togiola T.A. Tulafono, Exec. Order No. 005-2006 (July 26, 2006), https://www.regulations.gov/document/DOT-OST-2006-25612-0001-0001 (attached as Exhibit 1).

68 *American Samoa in Legal Moves to Gain Samoa Airways Service*, CH-AVIATION (June 11, 2020, 3:41 AM), https://www.ch-aviation.com/portal/news/97103-american-samoa-in-legal-moves-to-gain-samostoa-airways-service#:~:text=the%20DOT%20previously%20granted%20a,a%20islands%20in%20American%20Samoa [perma.cc/KD2Z-D9Y7]; Tina Mata'afa-Tufele, *American Samoa to Sue Over Samoa Airways Flights*, SAMOA OBSERVER (Nov. 3, 2020, 2:00 PM), SAMOA OBSERVER, https://www.samoaobserver.ws/category/samoa/73749 [perma.cc/53KJ-U3QN].

69 Hansen, *supra* note 40.

American Samoa to Hawaii.[70] What is remarkable about this flight is that Hawaiian Airlines is the only airline providing commercial air service between American Samoa and another U.S. state or territory.[71] All other U.S.-certificated airlines have withdrawn from the market for financial reasons, and no foreign-licensed carrier is permitted to transport passengers from American Samoa without an exemption from the DOT.[72] Interestingly, too, Hawaiian Airlines' monopoly of commercial air travel in American Samoa is intentional; the DOT selected and approved Hawaiian Airlines to provide "essential air service" to American Samoa after it revoked the incumbent air carrier's operating certificate following several irregular operations.[73] Hawaiian Airlines' reputation in American Samoa is a turbulent one, however.

In 2006, the Governor of American Samoa, Togiola T.A. Tulafono, assailed the airline's services and fares. He issued an Executive Order declaring that Hawaiian Airlines was "[e]ngaged in [d]iscriminatory and [p]redatory [c]onduct [i]njurious to the [p]eople of the U.S. Territory of American Samoa."[74] The Order further asserted that Hawaiian Airlines had abused its monopoly of the route between Pago Pago, American Samoa, and Honolulu, Hawaii.[75] It alleged that Hawaiian's prices for travel between Pago Pago and Honolulu were "almost twice what it charges . . . for air transport between other United States destinations it serves of identical distances."[76] The Order added that Hawaiian Airlines was using "its monopoly power to force" American Samoans to pay reservation, baggage, and other fees

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70 Declaratory Order, Hawaiian Airlines Petition for Declaratory Order, No. OST-2006-25612, at 3 (U.S. Dep't of Transp. Apr. 2, 2007) [hereinafter Declaratory Order], https://www.regulations.gov/document/DOT-OST-2006-25612-0190 [perma.cc/VJ4F-VLBD].

71 Andrew Compart, *Samoan Governor Prohibits Hawaiian from Flying to Island*, TRAVEL WKLY. (Oct. 15, 2006), https://www.travelweekly.com/Travel-News/Government/Samoan-governor-prohibits-Hawaiian-from-flying-to-island [https://perma.cc/GAJ5-WH7Q].

72 *See* Samoa Airways Renewal Petition, *supra* note 51, at 1–2.

73 *See* Compart, *supra* note 71; *see generally Essential Air Service: Overview*, U.S. DEP'T OF TRANSP., https://www.transportation.gov/policy/aviation-policy/small-community-rural-air-service/essential-air-service [perma.cc/8CH9-6KCK] (Nov. 22, 2017).

74 Office of Governor Togiola T.A. Tulafono, Exec. Order No. 005-2006 (July 26, 2006), https://www.regulations.gov/document/DOT-OST-2006-25612-0001-0001 (attached as Exhibit 1).

75 *Id.* pmbl.

76 *Id.*

and penalties "up to 50% higher than it charges at its other United States route destinations, for the same service and circumstance."[77] The Governor also alleged that the airline had engaged in "offensive, discourteous[,] and dismissive conduct . . . perceived universally as ethnic related abuse."[78] Finally, according to the Governor's Order, despite his government's attempt to get the airline to recognize "that the people of American Samoa can no longer tolerate these abuses of [its] monopoly position," Hawaiian Airlines refused "to consider any restraint on their airfares in their service to American Samoa" or otherwise improve its service.[79]

Finding that the airline engaged in discriminatory and predatory conduct by charging excessive fares and fees, in addition to "ethnic harassment," the Governor ordered that "it is therefore in the interests of the welfare and protection of the people of American Samoa that Hawaiian Airlines, Inc. be no longer allowed to enter and clear this U.S. Territory in the conduct of its air transport activity."[80] The Governor gave notice of his intent to evict Hawaiian Airlines from American Samoa and seek another airline "to provide a replacement air service between the [U.S.] Territory of American Samoa and Honolulu, Hawaii."[81] According to the Order, moreover, once he approved a replacement airline, the Governor would issue a second executive order that would prohibit Hawaiian Airlines from flying routes from American Samoa.[82] Notably, the Governor asserted that he had authority to issue this second executive order on the basis of his customs and border control authority.[83]

In response, Hawaiian Airlines filed a petition for declaratory relief, asking the DOT to issue an order stating that U.S. law—specifically the Airline Deregulation Act of 1978—preempted and thus disallowed the Governor's actions.[84] The airline pre-

[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] *Id.* paras. 3–4.

[81] *Id.* para. 5. The Order further provided that if the governor was not successful in finding a substitute air carrier within 90 days of the Order's issuance, "then successive 30 day periods to enter the Territory of American Samoa will be granted to Hawaiian Airlines, Inc., during which a substitute carrier for replacement air service will continue to be sought." *Id.*

[82] *Id.* para. 6.

[83] *See id.*

[84] Declaratory Order, *supra* note 70, at 3–4.

vailed.[85] In 2007, the DOT confirmed its jurisdiction of the matter[86] and concluded that the explicit terms of the Airline Deregulation Act overrides the authority of the American Samoa government, "including that government's power to control its borders."[87] Specifically, the DOT reasoned that "Congress' preemption of state and territorial regulation of airline routes, rates, and services prohibits the Governor from blocking Hawaiian's service to American Samoa."[88] Additionally, the DOT determined that while Congress implicitly authorized American Samoa to control its own immigration and customs, it did not enact legislation specifically authorizing the territory to regulate interstate commerce or "to use its authority over customs and immigration matters as a vehicle for regulating transportation between American Samoa and any state."[89] As such, the DOT concluded that the Governor's Executive Order proposing to bar Hawaiian Airlines from serving America Samoa fell within the terms of the preemption clause of the Airline Deregulation Act because it sought to regulate a carrier's prices, routes, and services.[90]

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[85] *Id.* at 5.

[86] *Id.* at 6–7. The American Samoa Governor asserted that the DOT was not authorized to say whether his proposal was lawful because American Samoa was also a federal agency. *Id.* at 6–7. The DOT disagreed:

> In our view, American Samoa is an unincorporated, unorganized territory of the United States placed under the jurisdiction of the Secretary of the Interior that is allowed substantial self-government. American Samoa is not a "federal agency" and, with the exception of the Justices of the High Court of American Samoa, its employees are not federal employees. But even if American Samoa were deemed to be a federal agency, our conclusions would be the same . . . [The DOT is] the federal agency primarily responsible for administering the principal statute at issue, the preemption provision, 49 U.S.C. § 41713(b).

Id. at 7. The DOT acknowledged, however, that it "do[es] not have the responsibility for administering the federal laws concerning the government of the territories," but that it had consulted with the Department of Interior, which "has that authority." *Id.*

[87] *Id.* at 2. The DOT acknowledged that "Congress has not adopted legislation specifically concerning the American Samoa government's authority over air transportation." *Id.* at 9. Furthermore, the Customs Act of 1930 excludes American Samoa and the U.S. Customs Service regulations implementing that statue do not apply to American Samoa. *Id.* However, "American Samoa's ability to administer customs and border control is a separate matter from the regulation of interstate airline service." *Id.* at 11.

[88] *Id.* at 5.

[89] *Id.* at 12.

[90] *Id.* at 11.

The DOT's Order—issued more than fifteen years ago—seems to be the final word on the applicability of the Airline Deregulation Act to American Samoa. The Attorney General of American Samoa could have issued a contrary opinion stating that the Airline Deregulation Act did not preempt the Governor's border control authority, teeing off a controversy for judicial review under 49 U.S.C. § 46110.[91] However, the time to file a petition for review of the DOT's Order expired long ago, i.e., "60 days after the order is issued."[92] Consequently, the DOT's Order—though not a ruling of the agency responsible for the administration of American Samoa (i.e., the Department of Interior)—reflects the latest thinking on the matter. And, it is likely correct.

Federal courts around the nation routinely give broad effect to the Airline Deregulation Act's preemption provision by nullifying state laws relating to an interstate air carrier's prices, routes, and services.[93] In this regard, American Samoa is on equal footing with every state in the union. But, while the application of the Airline Deregulation Act to states and territories may be equivalent, the effect is particularly harsh for American Samoa, which, under applicable cabotage rules, also is powerless to determine interstate and intrastate commercial aviation options for its residents[94]—begging the question whether Congress should exempt American Samoa from cabotage rules, the Airline Deregulation Act, or both.

V. CONCLUSION

U.S. aviation law is an unexpectedly useful area in which to gain insight into the flaws of imperial rule. With respect to American Samoa specifically, federal cabotage rules and laws deregulating the commercial airline industry displace territorial efforts to achieve autonomy and self-governance over matters of local concern and constitutional dimension, including jurisdiction (i.e., navigation), commerce and trade, and travel.[95] Worse,

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91 *See* 49 U.S.C. § 46110(a) ("[A] person disclosing a substantial interest in an order issued by the [DOT] . . . may apply for review of the order by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business.").

92 *See id.*

93 Declaratory Order, *supra* note 70, at 10.

94 *See* discussion *supra* Parts III–IV.

95 *See* discussion *supra* Part III.

these national laws strip territorial leaders of the ability to better the welfare of their community without also meaningfully advancing U.S. objectives.[96] Therefore, Congress should exempt American Samoa permanently from application of cabotage and deregulation laws and policies.

First, cabotage restrictions (whether maritime or aeronautical) exist fundamentally to promote national sovereignty and security by disallowing foreign vessels and aircraft to navigate or trade between the nation's ports and airports.[97] How the nation's sovereignty and security are promoted either in theory or reality by impeding interstate travel in American Samoa by operation of law is unclear, however. No U.S. carrier flies or has shown any appetite to serve the American Samoan market. Thus, domestic interstate (i.e., interisland) routes in American Samoa are unique in that they are—and long have been—dependent on the operations of foreign air carriers. So, what policy objectives are materially accomplished by tasking firms able and willing to serve American Samoa with the exercise of recurringly applying for exemptions that essentially are (or should be) rubber stamped?

In fact, none of the rationales traditionally offered in opposition to cabotage apply in American Samoa, while all of the arguments in favor of cabotage appear feasible. For example, the typical argument against cabotage is that granting navigation and trade rights within the United States to foreign carriers "could destroy the ability of some U.S. airlines to compete and cause them to be replaced by foreign air carriers on both international and domestic routes . . . [rolling back cabotage] should raise serious questions of safety and security in the minds of lawmakers who are concerned with protecting the travelling public."[98] But, in fact, foreign carriers have not destroyed the ability of U.S. airlines to compete in American Samoa; U.S. airlines have demonstrated no desire to compete there,[99] presumably for economic reasons related to actual demand for air travel.

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[96] *See* discussion *supra* Part IV.

[97] *See* Thomas D. Grant, *Foreign Takeovers of United States Airlines: Free Trade Process, Problems, and Progress*, 31 HARV. J. ON LEGIS. 63, 75 (1994).

[98] *Id.* at 114 n.153 (quoting AFL-CIO Executive Council, Foreign Control of U.S. Aviation Industry, Bal Harbour, Florida (Feb. 22, 1991) (on file with the HARV. J. ON LEGIS.)).

[99] *See, e.g.*, *Hawaiian Airlines to Resume American Samoa Service*, NEWSROOM: HAW. AIRLINES, https://newsroom.hawaiianairlines.com/releases/hawaiian-airlines-to-resume-american-samoa-service-6850212 [https://perma.cc/E8ZE-4W9W].

What is more, to the extent that the operations of any airline serving the American Samoan market have generated serious questions of safety and security, it has been the U.S. carriers that have done so, not the foreign ones.[100] Finally, the go-to argument against cabotage—that it protects U.S. jobs[101]—is unpersuasive. What American jobs exist now that would be lost by having foreign carriers serve the territorial city of Pago Pago? How, if at all, would the nation's airline industry be weakened? A foreign airline operating in American Samoa would hire local ground crews and reservation agents, buy U.S. fuel, and rent U.S. gates.[102] And, ultimately, service enhancements, increased competition, lower air fares, and perhaps the injection of new capital could reach the Manu'a Islands and other destinations in the territory. In the final analysis, then, Congress should permanently waive aviation cabotage to and from American Samoa.

To be sure, serially granting exemptions is not a policy. Moreover, awarding rights on a case-by-case and temporary basis is inconsistent with a clear legislative trend toward greater liberalization of cabotage rights in American Samoa. For example, in 2018, Congresswoman Aumua Amata Radewagen proposed and obtained overwhelming bipartisan support to amend 49 U.S.C. § 40109—the rule establishing the DOT's power to grant cabotage exemptions. The legislation adjusted the customary thirty-day review and exemption period to 180 days for air transportation in American Samoa. Consequently, while foreign carriers typically must apply to renew U.S. cabotage waivers every thirty days, those serving American Samoa have six months, or six times the number of days, to do so (assuming, of course, that no U.S. carrier is available).[103]

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100 *See* Richard Halloran, *2 Charter Airlines Assailed by GAO*, N.Y. TIMES (Mar. 13, 1986), https://www.nytimes.com/1986/03/13/us/2-charter-airlines-assailed-by-gao.html [perma.cc/W7LD-MHW4].

101 *A Strong Maritime Industry Creates American Jobs and Protects America's Security*, TTD (Mar. 3, 2011), https://ttd.org/policy/policy-statements/a-strong-maritime-industry-creates-american-jobs-and-protects-americas-security/ [https://perma.cc/4L39-7JSN].

102 *See generally* Christopher Elliott, *Should Foreign Airlines Be Allowed to Fly Domestic Routes?*, USA TODAY, https://www.usatoday.com/story/travel/flights/2014/01/05/elliott-let-foreign-airlines-fly-domestic-routes/4329825/ [https://perma.cc/43T8-R6U2] (discussing the domestic economic benefits of lifting cabotage restrictions) (Jan. 6, 2014, 11:25 AM).

103 49 U.S.C. § 40109(g)(2)(C), (g)(3)(B); *see also* Press Release, Congresswoman Aumua Amata Coleman Radewagen, U.S. Senate Approves Amata's Cabotage Bill for American Samoa (Oct. 3, 2018), https://radewagen.house.gov/

So, why not make the extension of cabotage rights to carriers serving American Samoa permanent? Allowing foreign carriers to freely serve the territory achieves certain efficiencies and potentially creates incentives for competitors to enter the market. Free air navigation and trade would recognize the reality that foreign carriers reliably and safely serve American Samoan air travel needs. It would not foreclose the possibility of service by a U.S.-flagged carrier. Nor would an extension of cabotage rights prejudice the authority and ability of federal regulators to qualify and control carriers, including by revoking cabotage authority, or otherwise enforce existing laws, including rules respecting national security, commerce, and aviation broadly. Finally, international rules and standards applicable to commercial air travel provide additional assurances as to the safety and security of cabotage operations.

But, even if cabotage restrictions are eliminated, a question remains about whether the Airline Deregulation Act should reach American Samoan interstate travel (e.g., Pago Pago to Honolulu). Exempting American Samoa from the sweeping reach of the Airline Deregulation Act's is compelling, though it presents a closer question than the issue of cabotage. Unlike the issue of cabotage, which is essentially one of trade borne out of a protectionist philosophy, deregulation is an issue of federalism, designed as it is to nullify state laws that contradict a policy that seeks to promote air commerce through market forces rather than positive government. Specifically, the Airline Deregulation Act phased out federal control over airline pricing, routes, and services, and to avoid the undoing of this scheme, the Act contains a preemption provision that prohibits states (and territories) from enacting or enforcing laws related to airline prices, routes, and services. In this regard, application of the Airline Deregulation to American Samoa is both fair and textually justifiable insofar as it applies to all American states and territories equally.[104] For that matter, the DOT's April 2007 Declaratory Order that the Airline Deregulation Act prohibited the territorial Governor's attempt to block Hawaiian Airlines' service to American Samoan is likely right on the law.

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media-center/press-releases/us-senate-approves-amata-s-cabotage-bill-american-samoa [perma.cc/LL74-YJVS].

[104] *See* Michael Hansen, *Sen Ted Cruz Backs Airline Deregulation for American Samoa*, HAW. FREE PRESS (Sept. 11, 2015, 9:22 PM), http://www.hawaiifreepress.com/Articles-Main/ID/15903/Sen-Ted-Cruz-Backs-Airline-Deregulation-for-American-Samoa [perma.cc/6LLG-FK8T].

Nevertheless, the Airline Deregulation Act's impact in American Samoa is disparate and unique. This is a function of the fact that the commercial airline market in American Samoa is unhealthy and uncompetitive. True, the DOT has recognized the essential need to supply air transportation for passengers and cargo by granting limited cabotage exemptions for foreign carriers to serve American Samoa. But, no respite from the Airline Deregulation Act is likewise possible—a circumstance that only aggravates an already-difficult state of affairs. Therefore, revisiting whether and how the policy of airline deregulation applies—or should apply—in American Samoa is appropriate in this respect.

Congress deregulated the airline industry in the 1970s on the premises that an unregulated industry would increase competition and 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.'"[105] But, no "competitive market forces" exist in the American Samoan commercial aviation. They never did. Innovation and low prices also are absent. And ironically, as applied to American Samoa, the Airline Deregulation Act has aggravated, not resolved, problems Congress intended the law to undo. It makes local government impossible as to important transportation issues and neutralizes local representatives from addressing market realities and inefficiencies. Moreover, coupled with cabotage restrictions, the Airline Deregulation Act is a double whammy for American Samoan residents who must cede decision-making authority on both intrastate and interstate travel to authorities in Washington, D.C.—some 7,000 miles away.

In the final analysis, the U.S. government's adherence to cabotage restrictions, deregulation, and preemption—notwithstanding realities on the ground and in the air that mitigate against their application in American Samoa—can perhaps only be explained by the power of precedent. Indeed, what is so fascinating about aviation law issues pertaining to American Samoa is that their resolution could have global consequences. If, for example, the U.S. government affords permanent cabotage rights to a foreign airline within American Samoa, would it then as a matter of principal also have to open up other domestic markets to foreign carriers, e.g., Detroit to Dallas on Air France?

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105 Morales v. Trans World Airlines, Inc., 504 U.S. 374, 378 (1992) (quoting Airline Deregulation Act, 49 U.S.C. § 1302(a)(4), (a)(9)).

Similarly, would the federal government put its national policy of airline deregulation at risk by exempting American Samoa from the far-ranging preemption provision of the Airline Deregulation Act?

Such questions and concerns about setting a "bad" precedent, while interesting, are extraneous and potentially unduly prejudicial to the ability of lawmakers to assess and address obvious air transportation needs in American Samoa. Granting permanent cabotage rights or relaxing application of the Airline Deregulation Act in American Samoa is compelling despite slippery-slope arguments. *A fortiori*, allowing cabotage in American Samoa certainly does not obligate the United States to reverse positions it has otherwise taken with respect to the governments of its states or other nations as to aerial navigation and trade.

Alternatively, what is so wrong with having American Samoa serve as a useful case study or test case to validate and showcase the viability of foreign airline operations in domestic markets, and to make the case for expansion of cabotage rights worldwide? What is so objectionable about injecting some agility into the Airline Deregulation Act so that it takes account of exceptional local (i.e., state) air transportation needs that do not otherwise impact national economic policies? After all, a global free market exists in almost every commodity bought and sold other than aviation.[106] Whether the time is at hand to make these legal changes in all international air travel is a question for another time.[107] For now, this Article has explored a particular example of how international aviation law presents "a serious problem in international relations, affecting the way governments view one another [and] the way individual citizens view their own and foreign countries."[108] And, amid evolving scholarship addressing how U.S. mainland law impacts U.S. territories, this Article has addressed an inverse situation and possibility: how, surprisingly,

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106 *See generally Economics and Business*, *in* FUNDAMENTALS OF BUS.: CAN. EDITION, ONTARIO COLLS., https://ecampusontario.pressbooks.pub/businessfuncdn/chapter/economics-and-business/ [https://perma.cc/BF57-MVDY].

107 Timothy M. Ravich, Nationalize or Globalize (May 29, 2022) (unpublished manuscript) (on file with author); *see* Eli A. Friedman, Comment, *Airline Antitrust: Getting Past the Oligopoly Problem*, 9 U. MIAMI BUS. L. REV. 121, 143 (2001) ("The only way that a competitive, growing market can take hold with a considerable, long-term effect on price and service is if domestic and foreign airlines are able to individually establish competing hub and spoke systems on a domestic and international level, while in compliance with the antitrust laws.").

108 Andreas F. Lowenfeld, *A New Takeoff for International Air Transport*, 54 FOREIGN AFFS. 36, 36 (1975).

the practical and legal needs of the territories may—and should—spark change in territorial, mainland, and global law.